

AFFIRM; and Opinion Filed March 29, 2017.



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00084-CR

RICHARD RICHARD, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1320795-V

MEMORANDUM OPINION

Before Justices Lang-Miers, Evans, and Boatright
Opinion by Justice Boatright

Appellant was charged with aggravated assault for seriously injuring a family member with a firearm. He pleaded not guilty and was tried by a jury, which found him guilty, sentenced him to 30 years in prison, and fined him \$10,000. Appellant contends that one of the jurors in his trial withheld material information during voir dire, denying his constitutional rights to effective assistance of counsel and trial by an impartial jury. He also contends the trial court abused its discretion by failing to remove the juror who withheld information. We affirm.

BACKGROUND

Before appellant's trial, the judge read the indictment to the prospective jurors and explained that the charged offense had a punishment range from probation to life in prison. The prosecution and defense asked prospective jurors whether they could consider the full range of punishment. Several said they were unable to consider the minimum or maximum punishment,

but prospective juror Debra Clarke did not say anything at all. After voir dire, the trial court and counsel discussed peremptory strikes and challenges for cause. Twelve jurors, including Clarke, were selected, along with two alternates. Court recessed for the day.

Clarke sent an email to the trial court at 7:29 the next morning, the second day of trial. She explained that she could not sentence the defendant to probation or life in prison, but that she was prepared to follow through with the case, and did not want to be biased in any way. Later that day, the jury heard opening statements, and testimony from eight witnesses. When the jury left the room at the end of the day, the judge asked counsel to think "about what you would like to do with the juror. I gave you all an email." He also said "the record should reflect that a juror e-mailed me with some concerns. I've given the email to the - both sides, and we're going to discuss how to proceed with that issue, I guess, tomorrow morning." Finally, the judge asked counsel whether either side needed to put anything else on the record. Both told him no.

On the third day, prior to resuming the prosecution's case, and outside the presence of the jury, the trial judge asked the attorneys what they wanted to do about Clarke. The judge told them he did not think he could lawfully remove her from the jury, but that he would entertain any motions from either side. The prosecution deferred to the judge. The defense said Clarke could not consider the full range of punishment, and that she was "automatically disqualified." The judge said Clarke would remain a juror. The defense responded by asking, "just for the record, you're overruling our objection?" The judge said yes. Clarke remained on the jury.

Appellant raises three issues on appeal. We will discuss his first and second issues together, then we will address his third.

DISCUSSION

In his first issue, appellant contends that by withholding the information that she could not consider the full range of punishment, Clarke deprived him of his constitutional right to

counsel. Appellant explains that this right includes a voir dire that allows counsel to identify unqualified jurors and intelligently exercise challenges. He complains that his attorney's efforts to provide effective assistance were thwarted because Clarke withheld the information that would have substantiated a challenge for cause. In his second issue, appellant contends that by withholding the information that she could not consider the full range of punishment, Clarke deprived him of his constitutional right to an impartial jury. He claims that Clarke's inability to consider probation in his case constituted bias sufficient to destroy the impartiality of the jury. The State argues that appellant did not preserve the arguments in his first two issues.

"Whether a party's particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial." *Peña v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). At trial, appellant simply objected that Clarke was "automatically disqualified." He did not say anything about a violation of constitutional rights in general, or effective assistance of counsel and an impartial jury in particular. Because appellant did not make an objection at trial on the basis of his constitutional rights to effective assistance of counsel and an impartial jury, he failed to preserve errors predicated on those grounds. *See Gillum v. State*, 888 S.W.2d 281, 286 (Tex. App.—El Paso 1994, writ ref'd) (refusing to consider whether presence of juror, who withheld material information during voir dire, violated appellant's constitutional rights to effective assistance of counsel and an impartial jury, because appellant did not object to the presence of the juror on any of those grounds, and therefore failed to preserve them for appeal). Even constitutional error may be waived by failure to raise the issue at trial. *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990); *see also Delrio v. State*, 840 S.W.2d 443, 445 (Tex. Crim. App. 1992) (holding that the right to an impartial jury is a "right of the accused, which must be pressed in some fashion at trial before reversal of his conviction may be predicated upon its breach"). Accordingly, we overrule his first two issues.

Appellant presents his third issue two different ways. In the Table of Contents, the list of Issues Presented, and at the beginning of the Argument section of his appellate brief, he says his third issue is that the trial court abused its discretion when it overruled appellant's objection to keeping a juror who notified the trial court that she could not consider probation in appellant's case. In the Analysis section, appellant says his third issue is that the trial court abused its discretion when it failed to remove and replace a juror who became disqualified during trial.

Appellant's objection at trial was that Clarke was "automatically disqualified" because she could not consider the minimum and maximum ends of the range of punishment for the charged offense. On appeal, for the first time, appellant argues that Clarke was biased against him, and that she may be challenged for cause under article 35.16 of the Texas Code of Criminal Procedure. The prosecution contends that appellant never argued that Clarke was biased against him, and that appellant never sought sworn testimony from Clarke about whether she would be able to follow the law on the full range of punishment.

Actual bias is not grounds for the automatic removal of a seated juror once a jury is empaneled. *State v. Hernandez*, 363 S.W.3d 745, 751 (Tex. App.—Austin 2011, pet. ref'd) (citing *Quinn v. State*, 958 S.W.2d 395, 402 (Tex. Crim. App. 1997)). Article 35.16 applies only to prospective jurors, not those who are already seated. *In re J.G.C.G.*, 283 S.W.3d 927, 931 (Tex. App.—Fort Worth 2009, pet. denied). Appellant had the responsibility of clearly stating what he wanted and why he was entitled to it. *Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex. Crim. App. 2006). If he wanted to make an objection that was viable, on grounds that were applicable to the circumstances of the case, he needed to have done so. "To avoid forfeiting a complaint on appeal, the party must 'let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.'" *Pena*, 285 S.W.3d at 464 (quoting

Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)). Appellant's objection was his only attempt to challenge Clarke's presence on the jury.

Appellant did not ask the trial court to remove and replace Clarke. He did not ask the trial court to conduct an inquiry into Clarke's beliefs and intentions, so there is no testimony showing whether Clarke understood and could follow the law regarding the range of punishment. *See Granados v. State*, 85 S.W.3d 217, 236 (Tex. Crim. App. 2002) (inquiry is appropriate to determine juror's intent when juror's statements raise question as to bias). And appellant never moved for a mistrial about Clarke's presence on the jury, which was his only available remedy once the jury had been sworn in. *Franklin v. State*, 138 S.W.3d 351, 353–54 (Tex. Crim. App. 2004).

We review a trial court's decision of whether to remove a juror under an abuse of discretion standard. *Scales v. State*, 380 S.W.3d 780, 784 (Tex. Crim. App. 2012). We view the evidence in the light most favorable to the decision and assess whether it was arbitrary or unreasonable. *Id.* A decision within the "zone of reasonable disagreement" must be upheld. *Id.* Because appellant's objection was not viable, it was reasonable for the judge to overrule it. Because appellant failed to ask the trial court to remove Clarke from the jury and replace her with an alternate, failed to have her questioned under oath, and failed to move for a mistrial, it was reasonable for the judge to allow the trial to proceed with Clarke on the jury. Viewing the evidence in the light most favorable to the trial court's ruling, we conclude the trial court did not abuse its discretion by overruling appellant's objection, and allowing Clarke to remain on the jury panel.

CONCLUSION

Appellant's objection did not preserve his arguments for our review. The trial court did not abuse its discretion by overruling appellant's objection and retaining the juror.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

RICHARD RICHARD, Appellant

No. 05-16-00084-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District
Court, Dallas County, Texas

Trial Court Cause No. F-1320795-V.

Opinion delivered by Justice Boatright.

Justices Lang-Miers and Evans participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 29th day of March, 2017.