

Affirmed and Opinion filed August 16, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00441-CR

WILLIAM BICKFORD MUTZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Court at Law No. 3
Brazoria County, Texas
Trial Court Cause No. 97,071B**

OPINION

Following a jury trial, appellant was convicted of driving under the influence. The trial court assessed punishment at twenty-four months community supervision. On appeal, appellant contends the trial court erred in refusing to grant appellant an additional peremptory strike. We affirm.

In December of 1997, appellant was involved in a one-car accident in Brazoria County. After taking a breathalyzer test, appellant was charged with the offense of driving under the influence. Appellant pled not guilty and requested a jury trial.

During voir dire, appellant challenged five jurors for cause. The trial court granted two of the challenges, but denied three. After appellant exercised his three strikes, his

counsel requested two additional peremptory challenges stating:

At this time, Judge, we would ask for an enlargement of strikes for the defense since the denial of Jurors No. 3 and No. 7 force us to waste strikes on Jurors Robinson and Ruiz and we feel that Jurors Campbell who also we made a motion for cause on and Juror Whitlow would be people that we would want to strike from this jury at this time.

The trial court agreed to give appellant one additional peremptory, but refused appellant's request for a second additional peremptory. According to appellant, without the second additional peremptory, he was unable to strike Juror Whitlow, who was seated on the jury.

When the trial court erroneously overrules a challenge against a venireperson, the defendant is harmed only if he uses a peremptory strike to remove the venireperson and thereafter suffers a detriment from the loss of the strike. *Rosales v. State*, 4 S.W.3d 228, 232 (Tex. Crim. App. 1999); *Chambers v. State*, 866 S.W.2d 9, 23 (Tex. Crim. App. 1993). Error is preserved for review only if the appellant: (1) used all of his peremptory strikes; (2) asked for and was refused additional peremptory strikes; and (3) was then forced to accept an identified objectionable juror whom appellant would not otherwise have accepted had the trial court granted his challenge for cause or granted him additional strikes so that he might strike the identified juror.

The record establishes that appellant exhausted his three peremptory challenges, then requested two additional challenges. The trial court granted appellant one additional challenge, but denied his request for a second. Appellant identified Juror Whitlow as objectionable. Juror Whitlow was seated on the jury. However, because appellant *was* granted an additional strike, to demonstrate harm, i.e., reversible error, he must show that his challenges for cause to at least two venirepersons were erroneously denied. *See Chambers*, 866 S.W.2d at 23.

In this case, appellant has failed to bring forward a record establishing his challenges for cause to at least two of the venirepersons were erroneously denied. After

both the State and appellant completed their examination of the venire, the trial court allowed the venirepersons to leave the courtroom. At that point, the attorneys apparently participated in a bench conference in which they stated the bases for their challenges for cause. That conference, however, was not recorded by the court reporter. An appellant must properly preserve any issue for which he desires appellate review. *See* TEX. R. APP. P. 33.1. In addition to the preservation requirements stated above, appellant was required to make clear and specific challenges on the record to the venirepersons he wished to remove for cause. *See Tanguma v. State*, 47 S.W.3d 663,678 (Tex. App.—Corpus Christi April 12, 2001, pet. filed June 12, 2001). The burden is on the appellant, independent of the burden on the court reporter established by rule 13.1, to ensure that any challenges for cause he makes are recorded and transcribed. *Id.* This burden comports with the requirement of rule 33.1 that an appellant must properly preserve issues for which he wishes appellate review. *Id.* In this case, appellant failed to ensure that his challenges for cause were recorded and transcribed. It was incumbent upon appellant to request the court reporter to record the conference and preserve his complaints for appellate review. Because appellant failed to carry this burden, we are unable to determine whether the trial court erred in denying appellant’s challenges for cause. Accordingly, we cannot say the trial court erred in denying appellant’s challenges for cause or in refusing to award appellant a second additional peremptory challenge.

We overrule appellant’s sole point of error and affirm the trial court’s judgment.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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