Reversed and Remanded; Majority and Dissenting Opinions filed October 26, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01233-CR

———————————

PATRICK VERNESS TILLMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 787,363

MAJORITY OPINION

Appellant was charged by indictment with the offense of aggravated robbery. A jury convicted appellant of the charged offense and assessed punishment at twenty years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises ten points of error. We reverse and remand.

I. Preservation of Error

Prior to trial, appellant filed a motion to have the jury assess punishment. He also filed a motion for community supervision. The charge at the guilt phase permitted the jury to convict appellant as either a principal or a party to the charged offense. At the punishment phase, appellant proved his eligibility for

community supervision. And the punishment charge authorized the jury to recommend that the imposition of sentence be suspended and that appellant be placed on community supervision.

Each point of error makes the same allegation, namely that the trial court erred in overruling appellant's challenges to cause to veniremembers who could not consider community supervision for a person convicted as a principal actor in an aggravated robbery. Specifically, the points of error relate to appellant's challenges for cause to veniremembers 5, 6, 10, 17, 18, 19, 21, 22, 23 and 24.[1]

Our law is clear that the following steps must be taken to preserve error following the erroneous denial of a challenge for cause:

1. The voir dire of the challenged veniremember(s) must be recorded and transcribed;
2. The challenge(s) must be clear and specific;
3. Following the denial of the challenge(s) for cause, the defendant must peremptorily strike the veniremember(s);
4. All peremptory strikes must be exhausted;
5. After the peremptory strikes are exhausted, the defendant must request additional peremptory strikes sufficient to offset the erroneously denied challenge(s) for cause;
6. The request for sufficient additional peremptory strikes to cure the error from the erroneous denial of the challenge(s) for cause must be denied; and
7. Finally, the defendant must identify at least one member who was selected to serve on the jury as objectionable. The significance being that the objectionable juror(s) would have been peremptorily struck had the trial court not erred in denying the challenge(s) for cause.

See Jacobs v. State, 787 S.W.2d 397, 405 (Tex. Crim. App. 1990) (citing *Harris v. State*, 790 S.W.2d 568 (Tex. Crim. App. 1989). We find that appellant undertook each of these steps.

The State's only contrary argument is that appellant's request for additional peremptory challenges was untimely. The State contends the request should have been made before the veniremembers were seated in the jury box. The record reflects that after each side exercised its peremptory strikes, the clerk called the names of the first twelve veniremembers who had not been struck. Then, prior to those veniremembers being sworn as jurors, appellant requested ten additional peremptory strikes. The trial

[1] On the same legal basis, appellant also challenged for cause the following veniremembers: 26, 27, 29, 30, 31, 38, 39, 41, 42, 43, 44, 45, 46, 48, 49 and 50.

court denied the request.

The State cites no authority nor can we find any that supports the State's position. The law simply requires the defendant to make the request after the normal allotment of strikes has been exhausted. *See Jacobs*, 787 S.W.2d at 405.[2] Appellant, therefore, complied with the seven prong test of *Jacobs*, *supra*. We do believe, however, that it is important to note that the additional peremptory strikes were requested prior to the remaining veniremembers being excused. Therefore, had the trial court opted to grant the additional strikes and cure the error, he would have been in a position to do so as the remaining veniremembers could have been utilized to constitute the jury. This is consistent with the most fundamental requirement of error preservation, namely that it be done at such a time and in such a way that the trial court is provided an opportunity to attempt to cure the error. *See generally Zillender v. State*, 557 S.W.2d 515, 517 n.1 (Tex. Crim. App. 1977); *Coleman v. State*, 481 S.W.2d 872, 874 (Tex. Crim. App. 1972). To that end, the Court of Criminal Appeals has held: "[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him *at a time when the trial court is in a proper position to do something about it.*" *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) (emphasis added). And, of course, this Court has followed this line of cases. *See Mosley v. State*, 931 S.W.2d 670, 674 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).[3] Accordingly, we

---

[2] We pause here to note the State did not object to the timeliness of the appellant's request for additional peremptory strikes. *See McCarter v. State*, 837 S.W.2d 117, 121 (Tex. Crim. App. 1992) (State failed to lodge objection to defense voir dire as being repetitious or dilatory.)

[3] The dissent would abandon this line of cases and impose an additional burden on appellant. But the requirements of *Jacobs* are sufficiently strenuous and accomplish all that is necessary to preserve error stemming from the erroneous denial of a challenge for cause. The Court of Criminal Appeals has noted that the "slavish and unforgiving approach" in the preservation of error context has "dwindled in importance." *Lankston* 827 S.W.2d 908. Consequently, we shall not require more than present law requires.

Furthermore, the dissent's distaste for the parties being able to see the selected veniremembers prior to requesting additional peremptory strikes ignores those situations where the parties are required to wait until the veniremembers are selected before either objecting or requesting a curative remedy. For example, a *Batson* objection is not timely until the veniremembers have been selected. Following that objection, the movant is required to make a *prima facie* case, the respondent is required to produce a race or gender neutral explanation, and the movant is required to show the explanation was a pretext for the discriminatory use of (continued...)

hold the issue raised in points of error one through ten has been preserved for appellate review. Therefore, we will address the merits of these points of error.

II. *Johnson* Error

During voir dire, appellant questioned the venire on the range of punishment and their ability to consider community supervision for one convicted of the offense of aggravated robbery. During this portion of voir dire, appellant's counsel approached the bench and, outside the hearing of the venire, informed the trial court that he wished to ask if the veniremembers could consider community supervision for a person convicted as a principal to aggravated robbery. The trial court informed counsel that he would permit the question but that the answer would not be a basis for a challenge for cause. Defense counsel proceeded to ask the question to the entire venire. The veniremembers who are the subjects of these ten points of error stated they could not consider community supervision for one convicted as a principal of the offense of aggravated robbery.[4]

The identical issue was raised in *Johnson v. State*, 982 S.W.2d 403 (Tex. Crim. App. 1998), where the defendant attempted to challenge two veniremembers for cause. The Court of Criminal Appeals held that veniremembers "must be able to keep an open mind with respect to punishment regardless of whether the defendant might be found guilty as a principal or as a party, because the statutory range of punishment for any offense is the same whether the defendant is found guilty as a principal or as a party." *Id*. at 406. Therefore, a prospective juror who does not believe in the full range of punishment for either a defendant found guilty as a principal or a defendant found guilty as a party, is biased against the law as

---

[3] (...continued)
the peremptory strike. *See generally Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 1719 (1986). If the movant carries his burden, the trial court is in a position of curing the error by replacing a previously selected veniremember with the one who was improperly struck. *See State ex rel. Curry v. Bowman*, 885 S.W.2d 421, 425 (Tex. Crim. App. 1993). This is a timely process but one that serves us well. Similarly, the requirements of *Jacobs* serve us well and we should not now tamper with them to make them more burdensome. To do so would return to the "slavish and unforgiving approach" to error preservation that has been specifically rejected by the Court of Criminal Appeals. *See Lankston*, 827 S.W.2d 908.

[4] Additionally, the following veniremembers stated they could not consider community supervision for one convicted as a principal of the offense of aggravated robbery and were not successfully challenged for cause on a non-related ground or excused by agreement of the parties: 27, 29, 30, 31, 38, 39, 41, 42, 43, 44, 45, 46, 48, 49, and 50.

established by the legislature. *Ibid*. Consequently, the trial court erred in denying the challenges for cause. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (defense may challenge for cause veniremembers who have bias or prejudice against law applicable to punishment.). *See also, Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992) ("[J]urors must be willing to consider the full range of punishment applicable to the offense submitted for their consideration.").

Based on the holding in *Johnson*, we similarly hold the trial court erred in denying appellant's challenges for cause to veniremembers: 5, 6, 10, 17, 18, 19, 21, 22, 23 and 24.

III. Harm Analysis

Following its determination that the trial court erred in denying the defendant's challenge for cause, the *Johnson* Court summarily remanded the case to this court for a harm analysis under TEX. R. APP. P. 44.2(b). On remand, this court declared the error harmless. *See Johnson v. State*, 996 S.W.2d 288, 290 (Tex. App.—Houston [14th Dist.] 1999, pet. grt'd). However, for the following reasons, we do not believe the instant case present error controlled by Rule 44.2(b).

A. U. S. v. Martinez-Salazar

In January of this year, the United States Supreme Court considered whether requiring the defendant to exercise a peremptory strike to cure the erroneous denial of a challenge for cause violated the Due Process Clause of the Fifth Amendment. *See United States v. Martinez-Salazar*, ___ U.S. ___, 120 S.Ct. 774 (2000). In that case, the defendant challenged for cause a veniremember who had a bias in favor of the prosecution. However, the trial judge erroneously denied the challenge. Thereafter, the defendant peremptorily struck the veniremember. The defendant did not request an additional peremptory strike nor did he object to the composition of the jury ultimately seated. Following the defendant's conviction, the Ninth Circuit Court of Appeals reversed holding the error in denying the challenge forced the defendant to use a peremptory strike curatively, thereby impairing the defendant's right to the full complement of peremptory strikes, which violated the defendant's Fifth Amendment due process rights. 146 F.3d 653 (9th Cir. 1998). The Ninth Circuit held the error required automatic reversal. *Id*. at 659.

The Supreme Court granted certiorari to resolve the issue upon which the courts of appeals were divided. *Id*., ___ U.S. at ___, 120 S.Ct. at 779. The Court began by recognizing that peremptory strikes

are not of constitutional dimension but are rather one means to achieve the constitutionally required end of an impartial jury. *Id*. at 777 (citing *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273 (1988). *See also Georgia v. McCollum*, 505 U.S. 42, 57, 112 S.Ct. 2348, 2358 (1992) (peremptory challenges are "one state-created means to constitutional end of an impartial jury and a fair trial."). The Supreme Court reversed the Ninth Circuit, holding there is no Fifth Amendment violation of due process where the defendant elects to exercise a peremptory strike to cure the trial judge's erroneous denial of a challenge for cause, so long as no biased juror sat on the jury. The Court made it clear, however, that had a biased juror served on the jury, a Sixth Amendment violation would have occurred. *See Martinez-Salizar*, ___ U.S. at ___, 120 S.Ct. at 782. The Court further recognized that such a violation would require reversal. *Id*.

This latter pronouncement was derived from *Ross v. Oklahoma*, where the defendant exercised a peremptory strike after the trial judge erroneously denied a challenge for cause. 487 U.S. 83, 84, 108 S.Ct. 2273, 2276 (1988). However, none of the jurors who actually sat on the jury were challenged for cause by the defendant. Although the defendant objected to the composition of the jury because no African-Americans were selected to serve on the jury, he did not object to any of the individual jurors.[5] *Id*. at 86, 2277. Following his conviction, the defendant contended his Sixth Amendment right to an impartial jury was violated because he was forced to exercise a peremptory challenge to prevent an unqualified veniremember from serving on the jury.

The *Ross* Court noted that any claim that the jury was not impartial must focus *not* on the veniremembers who were excluded but rather on those who ultimately sat on the jury. *Id*. at 86, 2277. While the Court agreed that the jury actually empaneled was different than the jury that would have been empaneled had the trial court not erroneously denied the challenge for cause, the Court could not agree that the result was a biased jury. *Id*. at 87, 2278. The Sixth Amendment claim failed because the defendant failed to show any of the jurors were biased. *Ibid*.

In the instant case, appellant used his ten allotted peremptory strikes to cure the erroneous denial

[5] In *Ross*, the defendant was African-American and the complainant was white. 487 U.S. at 84, 108 at 2276.

of his challenges for cause. The trial court denied appellant's request for additional peremptory strikes. Appellant then objected to several of the veniremembers who ultimately sat on the jury. Among the objectionable jurors were veniremembers 27 and 29, both of whom had been challenged for cause and those challenges were erroneously denied.[6] *See Johnson*, 982 S.W.2d at 403. However, those veniremembers were beyond the effective reach of appellant's peremptory strikes, which were exhausted to prevent preceding veniremembers whom the trial court erroneously denied appellant's challenges for cause from serving on the jury.[7] Therefore, unlike the jury in *Ross*, appellant's jury was comprised of jurors who could not consider the full range of punishment applicable to appellant's case. Accordingly, they were biased against the law upon which appellant was entitled to rely. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2); *Fuller*, 829 S.W.2d at 191; *Johnson*, 982 S.W.2d at 407 (Keller, J., concurring) ("The inability [of prospective jurors to consider the full range of punishment] constitutes a bias or prejudice against the law.") Consequently we are presented with the situation predicted by *Martinez-Salizar*: because biased jurors actually served, a Sixth Amendment violation occurred. ___ U.S. at ___; 120 S.Ct. at 782. Therefore, a harm analysis under Rule 44.2(a) rather than (b) is appropriate.

This conclusion does not conflict with either the Court of Criminal Appeals' or our subsequent holding in *Johnson* because there is no indication in either opinion that the objectionable jurors held a bias against the law upon which the defendant was entitled to rely.[8] Therefore, a constitutional violation was not presented in *Johnson* and Rule 44.2(b) prescribed the correct analysis.

B. Harm Analysis

Since the landmark decision in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), where the Supreme Court adopted the general rule that errors of constitutional magnitude do not automatically require reversal, the Court has noted that most errors of constitutional magnitude are

---

[6] Additionally, veniremember 31 who served on the jury and had been challenged for cause under *Johnson*; that challenge was erroneously denied.

[7] Appellant's peremptory strikes were exhausted when appellant struck the 24th venireperson.

[8] The only reference was made in *Johnson* on remand: "Appellant subsequently used all of his peremptory challenges, requested additional challenges, and when his request was denied, *he identified two jurors against whom he had an objection who were ultimately seated on the jury*." 996 S.W.2d at 289. (emphasis added)

subject to a harm analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 306-7, 111 S.Ct. 1246, 1263 113 L.Ed.2d 302 (1991) (and cases cited therein). However, the common thread in the cited cases "is that each involved trial error -- error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.*, at 307-8, 1264 (internal quotations omitted).

However, the *Fulminante* Court was quick to acknowledge that certain errors defy analysis by harmless error standards. *Id.*, at 309-10, 1265. Such errors are known as "structural defects" because they affect the framework within which the trial proceeds, rather than simply an error in the trial process itself. *See Rey v. State*, 897 S.W.2d 333, 345 (Tex. Crim. App. 1995) (structural errors impact the structural underpinnings of the entire trial, defy subjugation to a harm analysis and call for automatic reversal.). In this context, the Supreme Court noted errors stemming from the denial of counsel or the right to self representation, the right to a public trial, and the exclusion of jurors on the basis of race.[9] *Fulminante*, at 309-10, 1265. The Court of Criminal Appeals has similarly recognized that certain errors are not subject to a harm analysis. *See Rey*, 897 S.W.2d at 345 (violations of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), not subject to harm analysis.). As the Supreme Court stated in *Rose v. Clark*, 478 U.S. 570, 577-578, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986), "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

In demonstrating structural errors, the Supreme Court specifically recognized its decision in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), where the defendant was tried by a judge who was not impartial. Similarly, a structural defect would follow from the trial before a jury who was not impartial. Indeed, it is difficult to imagine a more fundamental flaw within our criminal justice system.[10]

---

[9] We can now add to this list the exclusion of jurors on the basis of gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Fritz v. State*, 946 S.W.2d 844 (Tex. Crim. App. 1997).

[10] As the Supreme Court stated in *Parker v. Gladden*, 385 U.S. 363, 366, 87 S.Ct. 468, 471 (1966), a criminal defendant is be tried by a full complement of the requisite number of jurors. The fact that a (continued...)

Therefore, we hold that when the erroneous denial of a challenge for cause results in the defendant being tried in violation of the Sixth Amendment's guarantee to an impartial jury, the error is not subject to a harm analysis and reversal is required. *See U.S. v. Martinez-Salazar*, ___ U.S. at ___, 120 S.Ct. at 782.

In the instant case, veniremembers 27 and 29 had been challenged for cause and those challenges were erroneously denied. Those veniremembers ultimately sat on appellant's jury. *See also* n.5, *supra*. As they were biased and prejudiced against the law upon which appellant was entitled to rely, they were not impartial. Therefore, points of error one through ten are sustained.

The judgment of the trial court is reversed and the case is remanded to that court for further proceedings. *See* TEX. CODE CRIM. PROC. ANN. art. 44.29(a); *Carson v. State*, 6 S.W.3d 536, 539 (Tex. Crim. App. 1999).

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Amidei, Wittig and Baird.[11]

Publish — TEX. R. APP. P. 47.3(b).

---

[10] (...continued)
majority of the jurors were impartial or unprejudiced is of no moment.

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

Reversed and Remanded; Majority and Dissenting Opinions filed October 26, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01233-CR

———————————

PATRICK VERNESS TILLMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 787,363

D I S S E N T I N G O P I N I O N

When I seriously consider the course set by the majority, I must take a different tack. It strikes me as both fundamentally unfair and untimely to allow trial counsel to view all twelve jurors selected before requesting additional peremptory strikes. My view is supported by three distinct reasons discussed below. I would affirm the conviction below and accordingly dissent.

The majority begins correctly by delineating the law for the proper preservation of error when a challenge for cause is erroneously denied. *See Jacobs v. State*, 787 S.W.2d 397 (Tex. Crim. App.

1990). Then it veers from *Jacobs*, TEX. CODE CRIM. PROC. ANN. art. 35.26 (Vernon 1989), and customary courtroom practice.

Jacobs tells us, *inter alia*, "When the peremptory strikes are exhausted, the defendant must request additional peremptory strikes sufficient to offset erroneously denied challenge(s) for cause." *See Jacobs*, 787 S.W.2d at 405. Somehow this rather clear requirement is stretched to allow defense counsel (or the state) to sneak a peek at the actual jury before requesting additional strikes. While perhaps not anticipating this exact scenario, I see no reason to scuttle or expand either the *Jacobs* or *Harris* requirement that counsel request additional peremptory strikes *when the peremptory strikes are exhausted*. I am not suggesting a hard, fast, hyper-technical rule requirement that the split second counsel foresees the need of additional strikes that the request must be made. Rather, the request must be timely in the context of jury selection rules and fairness.

Jury selection rules in both civil and criminal cases mandatorily require the parties deliver their strike lists to the clerk. *See* TEX. CODE CRIM. PROC. ANN. art. 35.26; *cf*. TEX. R. CIV. P. 234. Thereafter, in non-capital cases, the clerk is likewise mandated to "call off the first twelve names of the lists that have not been stricken." *Id*. The rules facially do not allow for the majority's proposition that a party may seek additional peremptory strikes after the jury has been selected. Applying Article 35.26, I would hold that jury selection rules require the request for additional strikes be made before the clerk calls the names of the jurors selected.

The untimeliness of allowing a party to see the actual jury before requesting or obtaining additional strikes has been reviewed in an analogous setting. A party may not glean biographical information or obtain voir dire information and then request a jury shuffle. *See Davis v. State*, 782 S.W.2d 211, 214 (Tex. Crim. App.1989). If a motion to shuffle is untimely it will be denied if the motion is made after voir dire starts. *See Garza v. State*, 7 S.W.3d 164, 165 (Tex. Crim. App. 1999). I would hold a motion for additional strikes is untimely and will be denied if the motion is made after the jury has been selected and called by the clerk.

In applying rules of criminal procedure we are enjoined "To insure a trial with as little delay as is consistent with the ends of justice." TEX. CODE CRIM. PROC. ANN. art. 1.03(3) (Vernon 1977). The rule suggested by the majority would result in a quagmire. First, it would propose many of the twelve jurors already selected to again be struck by the defense. Then what of the state? Could the trial court equalize these new peremptory strikes (as in civil cases) or does one side get to remove jurors previously chosen by both sides? Does the defense have the opportunity to view the state's strikes then get a second bite of the apple? How can either side intelligently use their peremptory strikes when our case law would allow for the possibility of more strikes even after jury selection and a "free look" at the actual jury?[1] I suspect the unintended consequences of the majority's expansive conclusion are far greater than are here charted.[2] The ends of justice require the state (or defendant) not be disadvantaged by the last minute and untimely request for more strikes.

---

[1] The majority, in footnote 3, argues to extend some *Batson* practices into the general arena of peremptory strikes. Unlike *Batson*, as the majority accurately notes elsewhere in their opinion, peremptory strikes are not ordinarily of constitutional dimension. *See U.S. v Martinez-Salazar, supra*, at 777. Still I agree with the sentiment that the law should not impose a "slavish and unforgiving approach" to error preservation, particularly when a trial court seems reluctant to grant timely and proper challenges for cause. I observe that *Jacobs* is elaborated upon but not extended by my insistence that requests for additional peremptory strikes be timely made before a party turns in their strikes to the clerk.

[2] Though not material to this reasoning, we need hear the weary supplications of jurors, shuffled around, often made to wait for last minute negotiations of the parties, trial courts taking pleas, and seemingly endless delays. It is no wonder, jury attendance has dropped significantly in recent years with the attendant greater burden on those jurors who take seriously the responsibilities of citizenship and actually answer their jury summons.

I would, accordingly, affirm the judgment of the trial court.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Amidei, Wittig, and Baird.[3]

Publish — TEX. R. APP. P. 47.3(b).

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