Affirmed and Memorandum Opinion filed July 23, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00620-CR

JACOBO OCHOA-AVALOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 33rd District Court
Burnet County, Texas
Trial Court Cause No. 47174

MEMORANDUM OPINION

Appellant Jacobo Ochoa-Avalos was charged by indictment with one count of indecency with a child by sexual contact. Tex. Penal Code §21.11(a)(1).[1] After a plea of not guilty, a jury trial commenced on June 4, 2018. The jury found appellant guilty of indecency with a child by sexual contact as alleged in the indictment. The jury assessed appellant's punishment at confinement for a term of twelve years in

[1] Appellant was originally charged with a second offense of aggravated sexual assault of a child, but the state abandoned this charge at trial.

the Texas Department of Criminal Justice. Appellant timely filed a notice of appeal.

In his appeal, appellant raises three issues. First, appellant argues that the trial court failed to recognize and prevent contamination of the jury panel in violation of the due process clause of the Constitution. Second, he argues that the trial court erred in denying his challenge for cause of venireperson No. 33 because she had previously been a victim of sexual abuse. Finally, appellant argues that his right to a fair and impartial court was violated due to the trial court participating in the plea agreement process and pressuring appellant to plead guilty. Finding no error or that appellant failed to preserve the alleged error, we affirm the judgment of the trial court.[2]

I. BACKGROUND

Appellant was invited to a birthday dinner for his cousin Eliseo on April 16, 2016, at the home of Eliseo's sister, Maria, located in Burnet County, Texas. Also present at the dinner were Maria's four children, the oldest of which was her eleven-year-old daughter. After dinner, the adults had a few drinks and Maria went to sleep in the early hours of the morning. Eliseo fell asleep on the couch, and appellant remained awake. Maria's oldest daughter woke to find appellant's hand beneath her underwear touching her genitals. Appellant told Maria's daughter that he was trying to wake her up for school, and apologized after the daughter informed him that it was the weekend and there was no school. Appellant then left the room and told Eliseo he wanted to leave. Maria's daughter informed her mother of the incident that morning, and Maria confronted appellant the next day. Maria did not immediately contact the police. Fourteen months after the incident, Maria's daughter disclosed the incident to a counselor she was seeing as a result of her parent's divorce and

[2] The Texas Supreme Court ordered the Third Court of Appeals to transfer this appeal to the Fourteenth Court of Appeals. We must therefore decide the case in accordance with the precedent of the Third Court of Appeals if our decisions otherwise would have been inconsistent with that court's precedent. *See* Tex. R. App. P. 41.3.

Maria reported the incident to the local police department.

On September 6, 2017, appellant was indicted for one count of aggravated sexual assault and one count of indecency with a child by contact. The State dropped the aggravated sexual assault charge at trial. Appellant pleaded not guilty to the charges. On April 30, 2018, the trial court held a pre-trial hearing with counsel for appellant present, at which time counsel for appellant confirmed that appellant had rejected the plea agreement offered by the State. On May 29, 2018, the court held a second hearing on a plea deadline docket. During the hearing, the court asked appellant if he received a new offer from the State since the last hearing, and asked appellant to confirm whether or not he accepted the plea. The State offered no new plea agreement, and appellant stated that he wished to go to trial. On June 4, 2018, a jury trial commenced. On June 5, 2018, the jury found appellant guilty, and assessed punishment at twelve years confinement with no fine.

The issues raised by appellant in this appeal pertain exclusively to the pre-trial proceedings and the voir dire examination of venirepersons.

II. ANALYSIS

A. Appellant failed to preserve his complaint that the venire panel was biased and was not a representative cross section of the community.

Appellant argues that the "jury could not be a representative cross section of the jury [sic] that would offer an impartial determination of the facts" because allegedly, twenty venirepersons noted in front of the rest of the venire panel that they themselves, or someone they knew had been sexually abused. Appellant argues that he was denied a fair trial due to "the absence of an untainted unbiased jury panel." However, appellant does not cite any part of the record showing that he presented these arguments to the trial court through objection or requested the trial court to dismiss the venire panel.

For a complaint to be presented on appeal, a timely request, objection, or motion must have been made to the trial court, which "states the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004) (quoting Tex. R. App. P. 33.1(a)(1)(A)). An appellant must request the trial court dismiss the venire panel to preserve any complaint regarding the trial court's failure to do so. *See Degar v. State*, 482 S.W.3d 588, 591 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

At trial, appellant made no objection on the basis that the venire panel did not represent a cross-section of the community and was biased or that the responses given to his questions caused the panel to be prejudiced, contaminated, or otherwise unrepresentative of the broader community. Nor did appellant ask the trial court to take any action, such as moving to dismiss the venire panel. Accordingly, we conclude that appellant failed to preserve his complaints for appeal and overrule his first issue.

B. The trial court did not err by denying appellant's challenge for cause to venireperson No. 33.

Appellant argues that the trial court erred by denying his challenge for cause to venireperson No. 33 because the venireperson stated that she had previously been a victim of sexual abuse.

The standard of review on appeal for this issue is whether the trial court abused its discretion. *Smith v. State*, 297 S.W.3d 260, 268 (Tex. Crim. App. 2009). The Court of Criminal Appeals has adopted a five step process for establishing harm from an erroneous challenge for cause ruling. The defendant must show on the record that "(1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venireperson; (3) his peremptory

challenges were exhausted; (4) his request for additional strikes was denied; and (5) an objectionable juror sat on the jury." *Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014) (quoting *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010)). The purpose of the five steps is to demonstrate that the defendant suffered a detriment from the loss of a peremptory strike, and this error actually harmed the defendant. *Comeaux*, 445 S.W.3d at 749. The steps to preserve error and establish harm are intended to allow the trial judge every opportunity to correct error and to allow the defendant to demonstrate that he did not have the benefit of using his peremptory challenges in the way that he desired. *Johnson v. State*, 43 S.W.3d 1, 6 (Tex. Crim. App. 2001).

In reviewing the decision of the trial court, we examine the *voir dire* of the prospective juror as a whole and determine whether the record shows that the prospective juror's convictions would interfere with her ability to serve as a juror and to abide by the oath. *Curry v. State*, 910 S.W.2d 490, 493 (Tex. Crim. App. 1989); *see also Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002). We afford great deference to the trial judge's decision because the judge is present to observe the demeanor of prospective jurors and to listen to tones of voice. *See Morgan v. Illinois*, 504 U.S. 719, 734–39 (1992); *Davis*, 329 S.W.3d at 807. Here, venireperson No. 33 admitted that she had been a victim of sexual abuse, though stated that she could set her past aside:

> THE COURT: You mentioned at the end when Mr. Shell asked if yourself or someone close to you is a victim.
>
> VENIREPERSON NO. 33: I myself was a victim when I was five. I'm older now, I'm 33. I do have two girls, but someone's life is at stake, you know, prison time, so I could [set] my past aside for this case. So I don't have a bias.
>
> THE COURT: So you think you can judge this case?
>
> VENIREPERSON NO. 33: Oh, yeah, perfectly. Yes. I work sometimes with my uncle who's an attorney and I know how it all works. And, you

know, this is a serious case. So I know that my past has nothing to do with this case. It's completely separate.

A prospective juror is challengeable for cause if he or she has a bias or prejudice against the defendant or against the law upon which either the State or the defense is entitled to rely. Tex. Code Crim. Proc. art. 35.16(a)(9) & (c)(2); *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009). The test is whether the prospective juror's bias or prejudice would substantially impair his ability to carry out his duties in accordance with his instructions and his oath. *Buntion v. State*, 482 S.W.3d 58, 84 (Tex. Crim. App. 2016).

The record reflects no statements made by venireperson No. 33 indicating that she could not set aside her past and follow the law. In fact, she specifically testified that she could put aside her past and that she didn't have a bias. Appellant has not shown that venireperson No. 33 could not be impartial. We defer to the decision of the trial judge, who questioned her, observed her demeanor and listened to the tone of her voice, and who therefore was in the best position to ascertain whether venireperson No. 33 had a bias that would interfere with her ability to serve as a juror.

Additionally, although appellant used a peremptory strike on venireperson No. 33 and requested an additional strike, which was denied, appellant never identified another objectionable juror who did sit on the jury because appellant was forced to use a peremptory strike on venireperson No. 33. Therefore, appellant has not shown that harm resulted from the trial court's refusal to strike venireperson No. 33. *See Comeaux*, 445 S.W.3d at 749.

For these reasons, we overrule appellant's second issue.

C. Appellant failed to preserve his complaint that the trial court improperly participated in the plea agreement process.

In his third issue, appellant alleges that the trial court violated his rights to a

fair and impartial court guaranteed by the due process clause by improperly participating in the plea agreement process and attempting to pressure appellant to plead guilty. Appellant argues that the trial court "should not be engaged in the plea bargain proceedings, especially when counsel engages the court regarding the decision of the defendant [and] when the judge inquires of the existence of a plea bargain." Appellant further argues that the trial court implied that a plea would be preferred and that the court twice specifically stated that severe sentencing would result if appellant rejected the plea deal.

Regardless of their merit, appellant's complaints regarding the trial court's participation in the plea process and statements regarding appellant's plea have not been preserved for appellate review because appellant did not object to any of the trial court's allegedly improper statements or otherwise present his complaints to the trial court. *See* Tex. R. App. P. 33.1(a)(1). A defendant may not complain on appeal about a trial judge's improper participation in plea negotiations if he did not object at the time he entered his plea. *See Hallmark v. State*, 541 S.W.3d 167, 170 (Tex. Crim. App. 2017) (citing *Moore v. State*, 295 S.W.3d 329, 333 (Tex. Crim. App. 2009)). Therefore, we overrule appellant's third issue.

III. CONCLUSION

We affirm the judgment of the trial court.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Jewell, and Poissant.
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