



NUMBER 13-19-00141-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

CHARLES KURTZ HARMON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the County Court at Law No. 3
of Cameron County, Texas.**

MEMORANDUM OPINION

**Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Benavides**

By his sole issue, appellant Charles Kurtz Harmon challenges his conviction for assault. See TEX. PENAL CODE ANN. § 22.01(a)(1). He argues the trial court abused its discretion by not declaring a mistrial based on a prospective juror's statement. We affirm.

I. BACKGROUND

Harmon was charged with assault following an altercation with the complaining

witness at the Isla Grande Resort at South Padre Island, Texas. See *id.* During jury selection, the trial court asked the venire panel if anyone knew the prosecutors, defense counsel, or Harmon. The following occurred:

Trial Court: Does anybody know defense counsel of the defendant?
Please raise your hand if you do.

. . . .

Juror 7: His name sound familiar. I'm not sure if I've arrested him in the past.

Trial Court: Are you talking about the defendant or defense attorney?

Juror 7: The defendant.

Trial Court: Okay. Does the fact that it creates some sort of familiarity with the defendant, do you think that that familiarity would create a bias either for or against the defendant?

Juror 7: Well, I feel it could be considered a conflict of interest.

Trial Court: Okay. So you do think that it could perhaps create a bias?

Juror 7: Yes.

Following the exchange, defense counsel asked to approach the trial court for a "motion." The discussion was conducted off the record. When the proceeding came back on the record, the parties completed the voir dire examination before defense counsel asked to make a motion to the trial court.

Defense: Yes, Your Honor. I'm concerned that [Juror 7] may have ruined the jury pool for us by saying that he thinks that he may have arrested my client in the past. I think that's harm that I don't think can be overcome at this point, and I'm asking that the Court give us another jury panel or declare a mistrial and give us another panel.

Trial Court: Are you opposed to that motion?

State: Your Honor, at this moment, we will leave it at the Court's discretion.

Trial Court: Okay. I'm going to deny the motion for mistrial at this time. Anything else?

Following the denial of the motion, Juror 7 was struck for cause. Harmon was convicted, sentenced to one year in Cameron County jail, probated for eighteen months and assessed an \$800 fine. This appeal followed.

II. MISTRIAL

By his sole issue, Harmon argues he was denied a fair trial when the trial court denied his motion for mistrial and in the alternative, the trial court abused its discretion by the denial.

A. Standard of Review and Applicable Law

We review the trial court's denial of a motion for mistrial under an abuse of discretion standard. *Archie v. State*, 340 S.W.3d 734, 738–39 (Tex. Crim. App. 2011); *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). Under this standard, we view the evidence in the light most favorable to the trial court's ruling and uphold the ruling if it falls within the zone of reasonable disagreement. *Archie*, 340 S.W.3d at 738–39. A reviewing court cannot substitute its judgment for that of the trial court but instead determines whether the trial court's decision was arbitrary or unreasonable. *Id.* A trial court abuses its discretion when no reasonable view of the record could support the trial court's ruling. See *id.* When a party requesting a mistrial does not first seek a lesser remedy, a reviewing court cannot reverse the trial court's judgment if the alleged error could have been cured by a less drastic alternative. *Ocon v. State*, 284 S.W.3d 880, 884–

87 (Tex. Crim. App. 2009).

B. Discussion

A motion for mistrial is timely only if it is made as soon as the grounds for it become apparent. *Veras v. State*, 410 S.W.3d 354, 358 (Tex. App.—Houston [14th Dist.] 2013, no pet.); see *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). Harmon states that his complaint was preserved because his counsel obtained an adverse ruling on his motion for mistrial. However, Harmon asked to approach the bench following Juror 7’s comment and engaged in an off-record colloquy with the State and trial court. See *Veras*, 410 S.W.3d at 357 (stating that defense counsel did not preserve error by having an off-the-record conference regarding a juror’s comments). The record reflects that Harmon did not object, request an instruction to disregard, or move for a mistrial as soon as the grounds for the motion became apparent following Juror 7’s remarks. His failure to move for a mistrial earlier could have permitted further objectionable comments or a greater accumulation of harm. See *id.* Instead, the record reflects that Harmon first moved for a mistrial after voir dire proceedings were completed. Thus, we cannot conclude that Harmon “preserved error based upon speculation or supposition as to what may have occurred during a bench conference at which no record was made.” *Id.* at 357–58. Harmon’s “request to approach the bench and the off-record bench conference that followed did not preserve error as to any complaint or show that appellant moved for a mistrial during this bench conference.” *Id.*; see TEX. R. APP. P. 33.1(a)(1); *Cockrum v. State*, 758 S.W.2d 577, 585 n.7 (Tex. Crim. App. 1988).

If a party delays in moving for a mistrial and, by failing to object, could allow for the introduction of further objectionable testimony or comments and a greater accumulation of harm, the motion for mistrial is untimely and preserves nothing for appellate review. See *Griggs*, 213 S.W.3d at 927. Harmon has not shown any legitimate reason for waiting from the beginning of voir dire when Juror 7's statement was made until the conclusion of voir dire to assert his complaint. See *Veras*, 401 S.W.3d at 358. The record reflects that Harmon did not move for a mistrial as soon as the grounds for the motion became apparent. See *id.* Harmon's motion for mistrial was untimely and did not preserve error. See *Griggs*, 213 S.W.3d at 925–27. We overrule Harmon's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

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TEX. R. APP. P. 47.2 (b).

Delivered and filed the
21st day of May, 2020.