COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JESUS CABRALES.		§	No. 08-19-00199-CR
	Appellant,	§	Appeal from the
v.		§	346th District Court
THE STATE OF TEXAS,		§	of El Paso County, Texas
	Appellee.	§	(TC# 20160D04939)

O P I N I O N

On April 15, 2019, a jury convicted Jesus Cabrales ("Appellant") of assault family violence with a previous conviction. TEX.PENAL CODE ANN. § 22.01(b)(2)(A). In accordance with the jury's findings, the trial court sentenced him to five years, but suspended the sentence with community service. On appeal, Appellant complains that the trial court erred in denying his motion for new trial. Finding that the trial court acted within its discretion, we affirm the court's denial of the motion for new trial below.

I. BACKGROUND

A. Factual Background

The State indicted Appellant for the offense of assault family violence with a previous conviction. A unanimous jury found him guilty. Appellant, however, claims that the verdict arose

from jury misconduct and an outside influence.

The claim of jury misconduct arises from the following facts. One of the jurors, Edward Lapuma, testified that he was leaning toward a not-guilty verdict and was committed to reaching such a verdict. Therefore, the jury foreperson contacted the bailiff and asked what they should do if they could not reach a verdict or a unanimous verdict. The bailiff advised the foreperson to write down any questions the jury had for the judge. The bailiff denied making any further statements to the foreperson. Lapuma did not hear the discussion between the bailiff and the foreperson. Lapuma, spoke only with the foreperson. According to Lapuma, the foreperson reported that the jury had to reach a unanimous verdict. Lapuma cannot recall exactly what the foreperson told him, but it was to the effect that the verdict had to be unanimous.

Lapuma testified that because of the information he got from the foreperson, he changed his vote. He later admitted, however, that he knew that the jury did not have to reach a unanimous decision (that is, the trial could end with a mistrial because the jury was deadlocked).

Post-verdict, Lapuma became concerned because he believed the bailiff told the foreperson that the jury had to reach a unanimous verdict. He was troubled, believing that it was an incorrect statement of the law. He spoke to his lawyer, who contacted Appellant's counsel about the deliberations and the verdict.

B. Procedural History

Appellant filed his motion for new trial on May 20, 2019 and his amended motion one day later. The trial court conducted a hearing and thereafter denied the motion for new trial. This appeal arises from that ruling.

II. STANDARD OF REVIEW

The decision whether to grant or deny a new trial rests within the sound discretion of the

trial court. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex.Crim.App. 1995) (en banc); *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex.Crim.App. 1993) (en banc); *Thompson v. State*, 445 S.W.3d 408, 410 (Tex.App.--Houston [1st Dist.] 2013 pet. ref'd). As an appellate court, we cannot substitute our decision for the trial court, and will reverse that decision only when it was arbitrary or unreasonable. *McQuarrie v. State*, 380 S.W.3d 145, 150 (Tex.Crim.App. 2012). That standard is met only when the decision was "so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Gonzalez*, 855 S.W.2d at 695 n.4, *quoting Cantu v. State*, 842 S.W.2d 667, 682 (Tex.Crim.App. 1992) (en banc).

III. DISCUSSION

Appellant bore a heavy burden in challenging this verdict because no witness can testify to the jury's deliberative process or the factors influencing a juror's decision. TEX.R.EVID. 606(b); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 368 (Tex. 2000). An exception to that rule, however, permits a juror to testify as to whether an outside influence was "improperly brought to bear on any juror." TEX.R.EVID. 606(b)(2)(A); *Tinker v. State*, 148 S.W.3d 666, 673 (Tex.App.--Houston [14th Dist.] no pet.), *habeas corpus dismissed sub nom. Tinker v. Quarterman*, No. A-06-CA-945-LY, 2007 WL 1257129 (W.D. Tex. April 30, 2007). Further, our rules require a new trial when the jury's verdict "has been decided by lot or in any manner other than a fair expression of the jurors' opinion." TEX.R.APP.P. 21.3(c).

To a large extent then, the question here turns on whether the hearsay statement attributed to the bailiff and purportedly repeated by the foreperson constitutes an "outside influence." The courts have defined an "outside influence" as "something originating from a source outside of the jury room and other than from the jurors themselves." *McQuarrie v. State*, 380 S.W.3d at 154 (finding outside influence where juror conducted internet research which she conveyed to other

jurors). The court then determines the impact that influence would have on a "hypothetical average juror." *Id*. at 154-55.

This record contains conflicting evidence as to whether any outside influence confronted this jury. As noted above, Lapuma testified that he *believes* the bailiff told the foreperson that the jury was required to reach a unanimous verdict. On the other hand, the bailiff denies he made such a statement. The trial court clearly had the discretion to reach this credibility determination. *Salazar v. State*, 38 S.W.3d 141, 148 (Tex.Crim.App. 2001); *Fairley v. State*, 90 S.W.3d 903, 906 (Tex.App.--San Antonio 2002, no pet.). Confronting conflicting evidence on fact issues regarding jury misconduct, "the trial judge determines the issue and there is no abuse of discretion in overruling the motion for new trial." *Salazar*, 38 S.W.3d at 148; *see also Lewis*, 911 S.W.2d at 7; *Fairley*, 90 S.W.3d at 906.

Even if we found evidence of an "outside influence" in this record (and we do not), that does not end the inquiry. The outside influence must improperly be brought to bear with the intent to influence the juror. *Colyer v. State*, 428 S.W.3d 117, 128-29 (Tex.Crim.App. 2014). In light of the lack of specificity of the report of the bailiff's purported conversation with the foreperson, this record does not reach this level of an improper outside influence.[1] That analysis would essentially call for an examination of the harm brought about by the outside influence. *See Martinez v. State,* 471, S.W.2d 399, 400 (Tex.Crim.App. 1971) (allegation that bailiff instructed jury that verdict must be unanimous, even if true, did not warrant new trial based on jury misconduct); *Escarcega v. State*, 711 S.W.2d 400, 402 (Tex.Civ.App.--El Paso 1986, *pet. dism'd, improvidently granted*, 767 S.W.2d 806 (Tex.Crim.App. 1989) (en banc); *Baldonado v. State*, 745 S.W.2d 491, 493-94 (Tex.App.--Corpus Christi 1988, pet. ref'd).

[1] If it occurred, his purported conversation with the bailiff merely restated a portion of the court's charge (not objected to), which read: "in order to return a verdict, each juror must agree thereto[.]"

We do not reach the question of harm to the Appellant or the impropriety of the alleged outside influence. Nor do we reach the question of the applicability of *Sneed v. State*, 670 S.W.2d 262 (Tex.Crim.App. 1984) (en banc) (setting out test for whether jury's discussion of parole law constitutes reversible error). We do not reach those issues because the testimony concerning the purported "outside influence" was disputed. If the trial court accepted the testimony of the bailiff, which it could well do within its discretion, no such outside influence took place. Clearly, the bailiff disputed the testimony of the juror, and resolving that credibility question lay within the trial court's authority. *Colyer*, 428 S.W.3d at 122. Such a view of this record would support the trial court's ruling, and thus the trial court acted within its discretion. *McQuarrie*, 380 S.W.3d at 150.

IV. CONCLUSION

Finding no abuse of the trial court's discretion, we affirm the judgment below.

JEFF ALLEY, Chief Justice

June 30, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

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