Affirmed and Opinion filed January 31, 2002.

In The

Fourteenth Court of Appeals

NOS. 14-00-00588-CR & 14-00-00589-CR & 14-00-00590-CR

JONATHAN CHRISTOPHER SEALS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause Nos. 822,648 & 823,020 & 824,292

O P I N I O N

Appellant Jonathan Christopher Seals pleaded guilty before the jury to three indictments charging him with aggravated robbery with a deadly weapon on July 13, 1999, July 10, 1999, and July 8, 1999. The trial court accepted appellant's plea, and proceeded to the punishment phase of the trial. At the conclusion of the trial, the court instructed the jury to find appellant guilty and to assess punishment within the applicable range of five to ninety-nine years, or life. The jury found appellant guilty of the charges and assessed punishment at twenty-two years confinement for the robbery of July 13, 1999, twenty years confinement for the robbery of July 10, 1999, and fifteen years confinement for the July 8,

1999, robbery. No fines were assessed, and all three sentences were ordered to run concurrently, but consecutive to a five year sentence appellant was serving for another aggravated robbery.

Appellant asserts four points of error on appeal. Appellant argues (1) the trial court erred in overruling his motion for a mistrial; (2) the trial court erred in limiting his cross examination of a State's witness; (3) the trial court erred by failing to get appellant's express waiver and consent to proceed with only eleven jurors; and (4) appellant received ineffective assistance of counsel. We affirm.

FACTUAL BACKGROUND

On July 8, 1999, appellant and an accomplice entered a Pizza Inn restaurant. Appellant was armed with a firearm resembling a machine gun. Appellant approached the manager of the restaurant, who was standing by a cash register, and demanded money. When the manager appeared to be stalling, appellant declared he would blow the manager's head off if he didn't surrender the money. The manager opened the cash register, but appellant was dissatisfied with the amount of money in the register, and demanded to be taken to the safe. The manager took appellant to the back of the restaurant. Finally the two robbers left the restaurant with about $500-600 from the restaurant and a wallet stolen from one of the restaurant's customers.

On July 10, 1999, appellant and two accomplices entered a Hartz Chicken restaurant. One of the accomplices was armed with a 9-millimeter firearm. Appellant was armed with what looked like a black sawed-off shotgun. Shakendra Michelle Cook, present in the restaurant, knew appellant from an apartment complex near her home. Appellant recognized her. One of the accomplices urged appellant to kill Cook because she could identify them. Instead, appellant jumped over the counter and ordered an employee to open the cash register. Appellant threatened to shoot the employee in order to expedite the employee's compliance. Appellant took the money from the register. Appellant then took the employee

to the back of the restaurant and demanded that the vault be opened. The vault, however, could not be opened. The three robbers fled with approximately $400 from the cash register and additional money taken from the restaurant's manager and Cook.

On July 13, 1999, appellant and two accomplices entered the back door of another Hartz Chicken restaurant. Appellant was armed with a handgun. One of the accomplices was also armed. Appellant approached Evelyn McCowan, a Hartz employee, and held his gun to her head. He demanded the key to the register. In her fright, Ms. McCowan forgot where the key was. Appellant "clicked" his gun in her face; McCowan believed appellant was going to shoot her for her failure to cooperate, so she put her head down on the counter. Ms. McCowan finally got the register open. The robbers took the money from the register and left through the back door of the restaurant.

Motion for Mistrial

In his first point of error, appellant contends the trial court erred by refusing to grant defense counsel's request for a mistrial after the State, during its cross examination of appellant, questioned appellant about a statement of an unavailable co-defendant. In particular, the State questioned appellant regarding his level of intoxication, during the Pizza Inn robbery, and the following exchange occurred:

> A [by Appellant] I was intoxicated.
>
> Q [by State] You were messed up on what?
>
> A Alcohol.
>
> Q And?
>
> A Alcohol. I don't smoke.
>
> Q Well, would it surprise you if one of your codefendants told Officer Anderson something different?
>
> [Defense Counsel]: Objection.
>
> A [by Appellant]: It would surprise me.
>
> . . .

> [Defense Counsel]: Assuming facts not in evidence, calls for hearsay, and we object.
>
> [Court]: Sustained, sustained.
>
> [State]: Had you done any form of drugs on the night of any of—
>
> [Defense Counsel]: Excuse me, sorry to interrupt you, but I'd ask for a jury instruction on that previous question.
>
> [Court]: Concerning the previous question, not the one she just now started, but the one before, you should not consider that for any purpose whatsoever. You should disregard it, please.
>
> [Defense Counsel]: We would move for on [sic] a mistrial, Your Honor.
>
> [Court]: That's denied.

We review a trial court's denial of a mistrial under an abuse of discretion standard. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). A mistrial is required for an improper question only when the question is clearly prejudicial to the defendant and is of such a character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. *Id.*[1] An improper question will seldom justify declaration of a mistrial because, in most cases, any harm can be cured by an instruction to disregard. *See id.* [2]

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[1] *See, e.g., Crawford v. State*, 603 S.W.2d 874, 876 (Tex. Crim. App. [Panel Op.] 1980) (holding that, after prosecutor asked question which assumed appellant actually attempted to poison deceased and witness answered affirmatively, instruction given to jury did not cure error because jury was left with clear impression such poisoning attempt had occurred); *Cavender v. State*, 547 S.W.2d 601, 603 (Tex. Crim. App. 1977) (noting prosecutor's question about whether appellant told his mother he stabbed and raped his aunt, coupled with prosecutor's statement he had all the evidence in the file, was calculated to inflame minds of jury and was so prejudicial its impact could not be withdrawn by trial court's instruction); *Edmiston v. State*, 520 S.W.2d 386, 387-88 (Tex. Crim. App. 1975) (commenting trial court's instruction was not sufficient to remove harmful effect of appellant's testimony deliberately elicited by prosecutor that appellant's attorney had financial interest in theater where undercover agent purchased obscene magazine).

[2] *See, e.g., Franklin v. State*, 693 S.W.2d 420, 428 (Tex. Crim. App. 1985) (upholding denial of mistrial after prosecutor inquired into appellant's failure to answer questions while in custody because trial court's instruction could withdraw any adverse impression made upon jury); *Kelley v. State*, 677 S.W.2d 34, 36 (Tex. Crim. App. 1984) (concluding instruction to disregard testimony concerning needle marks on appellant's arm cured any error); *Woods v. State*, 653 S.W.2d 1, 5 (Tex. Crim. App. [Panel Op.] 1982)

In this case, the prosecutor's question coupled with appellant's answer did not affirmatively establish that appellant was intoxicated on any drug, other than alcohol, at the time of the robbery. Instead, the State's question asked appellant only whether he would be surprised if his co-defendant told Officer Anderson something to the contrary. Appellant's point of error fails to demonstrate that such a question and answer were so inflammatory that the trial court's instruction to disregard did not cure the error. Therefore, appellant's first point of error is overruled.

Limitations on Cross-Examination

In appellant's second point of error, he contends the trial court erred in limiting his cross-examination of the State's eyewitness, Roger Schooler, about Schooler's pending felony deferred-adjudication probation.[3] Appellant asserts this limitation denied him the ability to show Schooler's alleged bias and motivation to testify against appellant and denied appellant his federal and state confrontation rights.[4]

The confrontation clause of the United States Constitution guarantees a defendant the right to cross-examine witnesses. *See* U.S. CONST. Amend. VI; *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 1434-35 (1986); *Carroll v. State*, 916 S.W.2d 494, 496- 97 (Tex. Crim. App. 1996). A defendant may cross-examine a witness on any subject

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(noting witness's statement tool kit found in appellant's trunk was type used by people who steal automobiles was not so prejudicial as to have introduced incurable error into trial).

[3] Schooler was a witness to only the July 8, 1999 Pizza Inn robbery, the subject of this court's cause number 14-00-00590-CR and trial court cause number 824292.

[4] The Texas Constitution may provide a greater right of confrontation than does the Sixth Amendment. *See Gonzales v. State*, 818 S.W.2d 756, 762-63 (Tex. Crim. App. 1991) (noting Article I, Section 10, of Texas Constitution may afford greater right of confrontation than does Sixth Amendment to United States Constitution). Appellant, however, does not point this court to any place in the record where he apprized the trial court of an argument under the federal, much less the Texas, constitution. Even if the federal constitutional ground for appellant's position was apparent from the context, arguably the same cannot be said for a separate state constitutional claim. *See* TEX. R. APP. P. 33.1(a) (allowing for preservation of error if specific grounds apparent from context). Nevertheless, because we conclude there was error under the federal constitution, we need not decide the state constitutional issue.

reasonably calculated to expose a motive, bias, or interest for the witness to testify. *See Carroll*, 916 S.W.2d at 497.

The issue of the limitation on cross-examination arose initially when the prosecutor presented an "Oral motion in Limine" arguing Schooler's being on deferred adjudication for a felony offense was not relevant. The prosecutor then requested the trial court to instruct the defense not to discuss Schooler's probation or incarceration. Defense counsel responded, "I don't have an objection to the Motion in Limine. I won't go into it without notifying the Court first, but I think I'm entitled to maybe outside the presence of the jury question th[is] witness to find out if there is some additional motive or bias or some deal made for [his] testimony." After Schooler's cross-examination, defense counsel questioned Schooler out of the presence of the jury:

> Q [by Defense Counsel] Now, are you on probation right now?
>
> A [by Schooler] Yes, sir.
>
> Q What is your probation for?
>
> A Unauthorized vehicle.
>
> Q Is that a felony probation?
>
> A Yes.
>
> Q And how long have you been on probation?
>
> A For a year, and I think about two, two months, a year and two months.
>
> Q And how long have you been in jail?
>
> A Just for two months.
>
> Q Okay. Now, any other convictions?
>
> A No, sir.
>
> Q Nothing?
>
> A No, sir.
>
> Q Okay. In your discussions with anybody with regard to your testimony in this case, whoever you talked to, [the prosecutor]or whomever it would be, was anything discussed about the fact that you're on probation?

A No, sir.

Q The State didn't even know you were on probation or it just never came up?

A I don't know. Probably just didn't never come up.

Q So then, if I'm understanding you, you never discussed the fact that you are on probation with the State at all?

A No, sir. No. sir.

Q So, there is no deal, no special consideration to you for testifying in this case?

A No, sir, no deal.

Q Is your probation fixing to be revoked?

A No, sir.

Q Are you just serving some jail therapy or whatever they call it?

A Yes, sir.

Q Whatever they call that.

The prosecutor further questioned Schooler to clarify that his probation/community supervision was deferred-adjudication probation, not regular probation. Defense counsel argued Schooler had "an inborn motive or prejudice to satisfy the State and testify in a certain way that's beneficial to their case so that the probation wouldn't get revoked." The prosecutor countered there would be no basis to revoke and there was no development of any prejudice or bias or any basis for that to be developed before the jury. The trial court denied defense counsel's request to cross examine Schooler about the fact he was on probation.

In *Maxwell v. State*, the court of criminal appeals rejected an argument similar to that made by the prosecutor in the present case:

> The court of appeals in this case interpreted *Jones* [*v. State*, 843 S.W.2d 487 (Tex. Crim. App. 1992)] to require a defendant to "show something beyond the witness's deferred adjudication status." *Maxwell*, slip op. at 5. This interpretation is inconsistent with case law from this Court and the Supreme Court. Both prior and later opinions from this Court and the

> Supreme Court have indicated that a witness's deferred adjudication probation status is sufficient to show a bias or interest in helping the State. *See Moreno* [*v. State*, 22 S.W.3d 482, 486 (Tex. Crim. App. 1999)]; *Carroll* [*v. State*, 916 S.W.2d 494, 500 (Tex. Crim. App. 1996)]; *Evans* [*v. State*, 519 S.W.2d 868, 873 (Tex. Crim. App. 1975)]. Therefore, we hold that a defendant is permitted to cross-examine a State's witness on the status of his deferred adjudication probation in order to show a potential motive, bias or interest to testify for the State, and we disavow any language in *Jones* holding otherwise.

48 S.W.3d 196, 199-200 (Tex. Crim. App. 2001).

Under *Maxwell*, the trial court erred in precluding appellant from cross-examining Schooler on his deferred-adjudication probation. To determine whether the error requires reversal, we start with the assumption "the damaging potential of the cross-examination were fully realized." *Shelby v. State*, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991) (citing *Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986)). We then consider the following factors: (1) the importance of the witness's testimony in the State's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the State's case. *Shelby*, 891 S.W.2d at 547 (citing *Van Arsdall*, 475 U.S. at 684, 106 S. Ct. at 1438).

Applying these factors, we conclude the error was harmless. In addition to Schooler, Bradley Taylor, a customer at Pizza Inn, testified about the robbery. Taylor identified appellant as the person carrying what looked like a small machine gun, a gun that required two hands to hold. Taylor also testified appellant was the person who demanded the money. Although Taylor did not actually see appellant take the cash, Taylor did see appellant bend down to get the money from the register. The only aspects of Schooler's testimony not paralleled by Taylor's were Schooler's testimony appellant was threatening to shoot if the manager did not hurry in opening the cash register and Schooler's testimony the robbers took a customer's wallet. Other than not being able to inquire about Schooler's deferred-adjudication probation, defense counsel was not restricted in his cross-examination of

Schooler. Despite Schooler's testimony about the threat and the wallet, the jury assessed the least punishment for this charge. We conclude beyond a reasonable doubt the error did not contribute to appellant's conviction or punishment.[5] *See* TEX. R. APP. P. 44.2(a).

Waiver of a Juror

In his third point of error, appellant contends that the trial court erred in failing to get appellant's express waiver and consent before proceeding with a jury of fewer than twelve. The record reflects that after appellant's trial began, the State and appellant agreed to proceed with eleven jurors after it was learned that Juror McCann, following a medical examination, was diagnosed with influenza:

> [Court]: I have . . . received a fax from Dr. Harold Wilson . . . and . . . I talked to him this morning. [He] explained that Ms. McCann is very ill. She has the flu and a cold and her temperature is more than 100 degrees. He says she is very ill . . . .
>
> He said she cannot come to Court today. If I work tomorrow, which is Satruday, she probably . . . will not be here. He said it was very unlikely she would be well enough for tomorrow, but that she probably could come on Monday. . . .
>
> [Defense Counsel]: Judge, I have discussed the matter with my client. We're proposed [sic] to go forward with the remaining 11 jurors.
>
> [Court]: All right. You waive your right to have a trial by 12 jurors then?
>
> [Defense Counsel]: Yes.
>
> [Court]: Is that agreeable with the State?
>
> [Prosecutor]: That is agreeable with the State. The State agrees to proceed with 11 jurors.

At the time of appellant's trial, Texas Code of Criminal Procedure Article 36.29(a) provided in relevant part:

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[5] This constitutional error could not have contributed to appellant's conviction because he pleaded guilty to all charges. And the error did not contribute to his punishment because the fifteen year sentence assessed for the Pizza Inn robbery did not exceed the twenty-two year sentence assessed for the July 13 robbery. Inasmuch as all the sentences were ordered to run concurrently, punishment for the Pizza Inn robbery had no effect on the total length of appellant's incarceration.

> Not less than twelve jurors can render and return a verdict in a felony case. . . . Except as provided in Subsection (b) of this section [referring to a capital case], however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.

Act of May 31, 1981, 67th Leg., R.S., ch. 545, § 2, 1981 Tex. Gen. Laws 2264, 2264 (since amended) (current version at TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (Vernon Supp. 2002)).

A felony verdict may not be returned by fewer than twelve jurors unless one of the jurors dies or becomes disabled from sitting at any time before the court's charge is read to the jury. *Id*. However, the Texas Government Code section 62.201 expressly provides: "The jury in a district court is composed of 12 persons, except that the parties may agree to try a particular case with fewer than 12 jurors." TEX. GOV'T CODE ANN. § 62.201 (Vernon 1998). The Texas Court of Criminal Appeals has held there is nothing inconsistent or conflicting between these two provisions and that section 62.201 applies to criminal as well as civil cases. *Hatch v. State,* 958 S.W.2d 813, 816 (Tex. Crim. App. 1997). A defendant who agrees to be tried by fewer than twelve jurors is still exercising his right to trial by jury. *Id*. The *Hatch* court relied on Government Code section 62.201 which allows a juror to be dismissed upon an agreement between the parties. *Roberts v. State,* 987 S.W.2d 160, 162 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). The *Hatch* court explicitly held "a defendant may waive Article 36.29(a)'s requirement that not less than twelve jurors can return a verdict in a non-capital felony case." *Hatch,* 958 S.W.2d at 816. Accordingly, based on the express waiver of a jury of twelve persons by appellant's trial counsel, in the context of an agreement with the State, we hold the trial court did not err in proceeding to trial with eleven jurors.

However, appellant does not address *Hatch* or *Roberts,* but rather clings to the contention that for waiver of a jury of fewer than twelve persons to be proper, it must be made by appellant, in person, through an express waiver and consent.

We rejected a substantially similar argument in *Roberts.* At trial, Roberts requested a mistrial after learning a juror had talked with a potential State's witness. *Id.* at 161. The State decided not to call the witness, and the trial court denied Roberts' mistrial motion. *Id.* Roberts then requested the trial court to disqualify the juror, and the trial court did so. *Id.*

On appeal, Roberts argued the trial court erred when it did not follow the procedures for waiver of an entire jury. "Specifically [Roberts asserted] a proper waiver of a jury of less than twelve persons must be made in open court, in person, in writing, and with the State's consent." *Id.* at 162. *See* TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (Vernon Supp. 2002) (setting out procedures in a criminal prosecution for an offense other than a capital felony for the defendant to waive the right of trial by jury). This court explained the error of that contention as follows:

> In Justice Baird's dissenting opinion in *Hatch,* he argued that a waiver under section 62.201 must be harmonized with article 1.13 by requiring its additional procedural safeguards--in open court, in person, and in writing. *Hatch*, 958 S.W.2d at 818 (Baird, J., dissenting). The majority, however, held that a proper waiver of a jury of less than twelve only required *an agreement by the parties* to try the case with fewer than twelve jurors. *See Hatch*, 958 S.W.2d at 815-816. Therefore, based on *Hatch,* we hold that a waiver of a juror under section 62.201 resulting in a jury of less than twelve jurors requires an affirmative record establishing that the parties agreed to try their case with fewer than twelve jurors. Accordingly, the trial court did not err by dismissing [the juror] pursuant to the parties' agreement.

Id. at 163 (emphasis in original).

Under *Roberts,* appellant's waiver of a jury of twelve was valid, and the procedures under article 1.13 are not applicable unless the entire jury is waived. We overrule appellant's third point of error.

Ineffective Assistance of Counsel

Finally, appellant complains that his attorney rendered ineffective assistance as a result of his failure to object to the trial court's jury charge, which omitted a limiting instruction on extraneous offenses and a definition on reasonable doubt.

In order to support his complaint about the ineffective assistance of his trial counsel, appellant is required to show: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness based upon prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The *Strickland* standard, however, should not be interpreted as a guarantee of perfect or errorless counsel. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992). Thus, isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective. *Id*. Rather, we must look, with a highly deferential eye, at the totality of counsel's representation to determine whether the *Strickland* standard has been met. *Id*.

Under *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000), trial counsel is not required to make an objection or request under Code of Criminal Procedure article 37.07 § 3(a) in order for the trial court to instruct the jury on the reasonable-doubt standard of proof concerning extraneous offenses and bad acts. Failure of the trial court to submit an instruction at the punishment phase on the reasonable-doubt standard of proof concerning extraneous offense evidence is error. *Id*. However, appellant's fourth point of error does not challenge trial court action, but rather is directed at counsel's conduct during trial.

Failure to request an instruction on the burden of proof required for consideration of extraneous offenses during the punishment phase of trial is not necessarily ineffective assistance of counsel. *Gholson v. State*, 5 S.W.3d 266, 273 (Tex. App.—Houston [14th Dist.] 1999, pet ref'd). When reviewing a claim of ineffective assistance, a court must

indulge a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Thus, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id*. We hold counsel's action in waiving inclusion in the charge of the State's burden of proof concerning extraneous offenses was sound trial strategy.

Here, the record affirmatively demonstrates that the omissions of which appellant complains were counsel's reasoned trial strategy. The reasoned trial strategy is evident in the following exchange:

> [Court]: There is nothing in here about you may consider an extraneous offense only if it's proven beyond a reasonable doubt. Does that need to be in there?
>
> [Defense Counsel]: I just as soon it not be in there. I just as soon it not be commented on. I'm not objecting or requesting it.
>
> . . .
>
> [Defense Counsel]: Well, we're on the record, and I'm specifically not requesting a charge.
>
> [Court]: Sorry?
>
> [Defense Counsel]: I realize we're on the record right now . . . and I'm specifically not requesting a charge on extraneousness [sic].
>
> [Court]: You waive it?
>
> [Defense Counsel]: And my reason is that—less said about it the better I like it.
>
> [Court]: You specifically waive any right you have to such a charge?
>
> [Defense Counsel]: Yes.
>
> [Court]: Bases [sic] on strategy?
>
> [Defense Counsel]: Yes.

Hence, the record reveals appellant's attorney declined to object to omission of a limiting instruction on extraneous offenses as a strategic choice to avoid calling further attention to them. *See Hardin v. State*, 951 S.W.2d 208, 212 (Tex. App.—Houston [14th

Dist.] 1997, no pet.) (holding failure to object to objectionable reading of enhancement paragraphs in indictment during guilt/innocence phase may be reasonable strategy to attempt to avoid calling further attention to appellant's prior convictions); *Oliva v. State*, 942 S.W.2d 727, 733 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (noting counsel's failure to object to prosecutor's alleged misstatement regarding appellant's prior conviction may have been trial strategy to avoid overemphasizing prior conviction). An appellate court will not second guess through hindsight the strategy of counsel at trial. *See Johnston v. State*, 959 S.W.2d 230, 236-37 (Tex. App.—Dallas 1997, no pet.) (citing *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979)). Moreover, appellant has failed to rebut the presumption that counsel's actions constituted sound trial strategy.

We overrule appellant's fourth point of error.

Accordingly, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed January 31, 2002.
Panel consists of Justices Anderson, Hudson, and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).