Affirmed and Opinion filed April 5, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-00413-CR

———————————

HANS KEITH BRODERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 185th District Court
Harris County, Texas
Trial Court Cause No. 798,351

O P I N I O N

Hans Keith Broderson appeals a conviction for injury to a child[1] on the grounds that the trial court: (1) lacked subject matter jurisdiction; (2) erred in overruling appellant's objection to the testimony of an assistant district attorney; and (3) improperly commented on a question posed by the jury during its deliberations. We affirm.

---

[1] Appellant was charged by indictment with intentionally and knowingly causing serious bodily injury to a child, found guilty by a jury of recklessly causing serious bodily injury to a child, and sentenced by the trial court to twelve years confinement.

Jurisdiction

Appellant's first issue contends that the trial court did not have subject matter jurisdiction over the case because appellant was indicted beyond the applicable statute of limitations. Although a limitations defect was formerly a jurisdictional issue that could be raised at any time, it is no longer. *State v. Turner*, 898 S.W.2d 303, 307 (Tex. Crim. App. 1995), *overruled on other grounds by Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998). Therefore, an indictment which charges an offense that is barred by limitations still confers jurisdiction upon the trial court;[2] and limitations is a defense which is waived if not asserted at or before the guilt/innocence stage of trial. *Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998). Before trial, a defendant may assert the statute of limitations defense by filing a motion to dismiss under Article 27.08(2) of the Texas Code of Criminal Procedure. *Id*.[3] However, such a defect in substance in an indictment must be raised "before the date trial on the merits commences."[4]

In this case, because appellant filed his motion to set aside the indictment *on* the day voir dire was conducted and the jury was impaneled and sworn,[5] his challenge to the indictment on that basis was untimely and thus waived.[6] Accordingly, appellant's first issue is overruled.

---

2 *Turner*, 898 S.W.2d at 307.

3 At trial, the defendant may assert the limitations defense by requesting a jury instruction on it if there is some evidence before the jury, from any source, that the prosecution is limitations-barred. *Proctor*, 967 S.W.2d at 844.

4 *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2000) ("If the defendant does not object to a defect . . . of . . . substance in an indictment . . . before the date on which the trial on the merits commences, . . . he may not raise the objection on appeal . . . .").

5 *See Westfall v. State*, 970 S.W.2d 590, 592 (Tex. App.—Waco 1998, pet. ref'd) (holding that a jury trial commences at the point that jeopardy attaches, when the jury is impaneled and sworn); *Hinojosa v. Sate*, 875 S.W.2d 339, 342 (Tex. App.—Corpus Christi 1994, no pet.) (same).

6 *See Turner*, 898 S.W.2d at 306 (holding that an indictment that is beyond the statute of limitations is a defect of substance and must be objected to prior to the date the trial on the merits commences, not on the date of trial).

Testimony of Other Assistant District Attorney

Appellant's second issue contends that the trial court erred by overruling his objection to the testimony of Kris Moore, an assistant district attorney, because it was in violation of Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct and his due process rights. Appellant claims that the State's prosecutorial misconduct, in calling Moore to testify in the State's case-in-chief, deprived appellant of a fair trial because there was no way to overcome the indicia of credibility and reliability of an additional prosecutor speaking from the witness stand. Appellant contends that the testimony of Moore unfairly invoked the prestige of the Harris County District Attorney's office, which enhanced her credibility as a witness and influenced the jury to convict.

Rule 3.08 provides that a lawyer generally shall not accept or continue employment in an adjudicatory proceeding if he believes that he may be a necessary witness to establish an essential fact on behalf of his client. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08(a) (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9). However, an alleged disciplinary rule violation by an opposing party does not require reversal of a conviction unless the defendant can show that the alleged violation affected his substantial rights or deprived him of a fair trial.[7] *House v. State*, 947 S.W.2d 251, 252 (Tex. Crim. App. 1997). Therefore, we need not determine whether the State's conduct violated a disciplinary rule, but only whether appellant has shown actual prejudice therefrom. *Id*.

In this case, Moore testified generally that a parent or guardian has a duty under the Family Code to provide medical care to their child.[8] *See* TEX. FAM. CODE ANN. § 151.003

---

[7] The principal concern in this context is the possible confusion for the trier of fact as to whether statements by an advocate-witness should be taken as evidence or argument. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 4. However, Rule 3.08 is an ethical standard, and is not well suited as a standard for procedural disqualification. *Id*. cmt. 9. In addition, it should not be used as a tactical weapon. *Id*. cmt. 10. Moreover, Rule 3.08 operates to disqualify lawyers from acting as counsel, not as a witness. *House v. State*, 909 S.W.2d 214, 217 (Tex. App.—Houston [14th Dist.] 1995), *aff'd*, 947 S.W.2d 251 (Tex. Crim. App. 1997).

[8] Appellant did not object, and has not assigned error, to the *content* of Moore's testimony.

(Vernon 1996). Moore did not testify that appellant failed to provide medical care to his child or otherwise comment about the facts of this case. Her testimony was of little, if any, significance to the issues in this case and was not of a type for which the credibility of the witness mattered. Nor did appellant's counsel cross-examine Moore. Under these circumstances, we are not persuaded that the alleged disciplinary rule violation affected appellant's substantial rights or deprived him of a fair trial. Accordingly, appellant's second issue is overruled.

Comment on Question Posed by Jury

Appellant's third issue claims that the trial court improperly commented on a question raised by the jury during deliberations in violation of Texas Code of Criminal Procedure articles 38.05[9] and 36.27.[10] During deliberations, the jury sent the judge the following note:

> Clarification is needed with regard to the multi-level charges.
>
> If we cannot all agree to the most serious charge, do we then have to move to the second charge[?]
>
> If we do, then will we who felt otherwise - that is, that he was guilty of the more serious charge - have the opportunity to say so when we are asked if we found him guilty of the lesser charge[?] In the event that we are polled individually.

The trial court replied: "If you all cannot agree to the more serious charge you must then move to the lesser. Your verdict must be unanimous." Appellant argues that the trial court's response implicitly informed the jury that it thought the defendant was guilty of at least one of the lesser included offenses. Additionally, appellant claims the trial court invaded the thought process of the jury by telling it that the verdict must be unanimous.

To preserve error by the trial court in making a comment which allegedly conveys to

---

9 *See* TEX. CODE CRIM. PROC. ANN. art. 38.05 (Vernon 1979) (prohibiting a judge from discussing or commenting upon the weight of the evidence when ruling upon its admissibility, or making any remark calculated to convey to the jury his opinion of the case).

10 *See* TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 1981) (specifying the procedure to be followed when the jury wishes to communicate with the trial court).

the jury its opinion of the case, the appellant must object to the trial court's comment.[11] Because appellant failed to object to the comment of which he complains, he has waived any error as to article 38.05.

Appellant further contends that the trial court did not follow the mandatory terms of article 36.27 because it failed to have the court reporter record the trial court's response to the jury note and whether appellant and his counsel were present when the trial court responded. In the absence of a showing in the record to the contrary, we presume the trial court's response was made in open court, in appellant's presence, and that he had an opportunity to object. *See Green v. State*, 912 S.W.2d 189, 192 (Tex. Crim. App. 1995); TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 1981). In this case, appellant failed to object, file a bill of exception, file a motion for new trial, or otherwise develop a record to show that the trial court's communication with the jury was not in compliance with article 36.27. *See Verret v. State*, 470 S.W.2d 883, 887 (Tex. Crim. App. 1971); *Harris v. State*, 736 S.W.2d 166, 166-67 (Tex. App.—Houston [14th Dist.] 1987, no pet.). Because appellant did not, therefore, preserve his article 36.27 complaint on the trial court's response, his third issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed April 5, 2001.
Panel consists of Acting Chief Justice Fowler and Justices Anderson and Edelman.
Do not publish — TEX. R. APP. P. 47.3(b).

---

[11] *See Green v. State*, 912 S.W.2d 189, 192 (Tex. Crim. App. 1995) (holding that failure to object resulted in waiver of complaint); *Woods v. State*, 569 S.W.2d 901, 904 (Tex. Crim. App. 1978) (same); *Minor v. State*, 469 S.W.2d 579, 580 (Tex. Crim. App. 1971) (same).