Affirmed and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01012-CR

RAY STEVEN NUNEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 772,710

O P I N I O N

Appellant, Ray Steven Nunez, was found guilty of aggravated robbery and sentenced to twenty years' confinement. He presents one point of error, alleging error by the trial court in giving the jury an "Allen" or dynamite charge after receiving a note from the jury that it was deadlocked 9 to 3. We affirm.

A discussion of the underlying facts of the offense is unnecessary. The record shows that after approximately five hours of deliberation, the jury sent the following note to the trial court:

> The jury regrets to inform the court that we have a hung jury. There are 9 jurors finding the defendant guilty and 3 jurors finding the defendant not guilty.

> Everyone believes [appellant] is guilty of robbery, but we cannot determine "beyond a reasonable doubt" that [he] "used or exhibited a deadly weapon." Thus we cannot unanimously find [him] guilty or innocent of "aggravated" robbery as charged.

The court responded by sending the jury the following supplemental instruction:

> Members of the jury:
>
> If this jury finds itself unable to arrive at a unanimous verdict, it will be necessary for the court to declare a mistrial and discharge the jury. The indictment will still be pending, and it is reasonable to assume that the case will be tried again before another jury at some future time. Any such future jury will be empaneled in the same way this jury has been empaneled and will likely hear the same evidence which has been presented to this jury. The questions to be determined by that jury will be the same questions confronting you, and there is no reason to hope the next jury will find these questions any easier to decide than you have found them.
>
> With this additional instruction, you are requested to continue deliberations in an effort to arrive at a verdict that is acceptable to all members of the jury, if you can do so without doing violence to your conscience. Do not do violence to your conscience, but continue deliberating.

Approximately one and one-half hours later, the jury returned a verdict finding appellant guilty of aggravated robbery. Appellant contends on appeal that the supplemental instruction was coercive and violated TEX. CODE CRIM. PROC. ANN. Art. 36.16, which does not provide for an "Allen" or dynamite charge. The jury, he argues, had only been deliberating for approximately five or six hours, and had not indicated it was "hopelessly deadlocked."

The use of an "Allen" or dynamite charge such as the one used here was approved by the Texas Court of Criminal Appeals in *Arrevalo v. State*, 489 S.W.2d 569, 572 (Tex. Crim. App. 1973), and by this Court in *Willis v. State*, 761 S.W.2d 434, 438 (Tex. App.–Houston [14th Dist.] 1988, pet. ref'd). The language of the supplemental instruction was proper and no error is shown by the charge itself. Appellant cannot complain on appeal that the instruction *per se* violated TEX. CODE CRIM. PROC. ANN. Art. 36.16, as he did not raise such objection below. *Lujan v. State*, 626 S.W.2d 854 (Tex. App. – San Antonio 1981, pet. ref'd).

Appellant's primary complaint on appeal and as raised below is that the court gave the charge to the jury at such an early point in the deliberations that it acted to coerce the jury into a verdict. In support, he cites *Jackson v. State*, 753 S.W.2d 706, 712 (Tex. App. San Antonio 1988, no pet.), as authority for the position that sending an "Allen" charge after only four hours of deliberation constitutes error. Appellant's reliance is misplaced. The appellate court in *Jackson* held that, as here, the appellant failed to preserve error by raising

lack of authority under Art. 36.16 below; the court further stated that even had the court's action constituted unobjected to error, it was not such as deprived appellant of a fair and impartial trial.

Moreover, nothing in the record indicates that any juror was coerced by the instruction given. No affidavits or testimony to that effect were produced at a hearing on a motion for new trial or at any other time, nor was there an instantaneous verdict following the charge. *See Golden v. State*, 89 Tex. Cr. R. 525, 232 S.W. 813 (1921) (reversible error where jury deliberated 42 hours with "short and clear" evidence but reached verdict in five minutes following "Allen" charge); *Griffith v. State*, 686 S.W.2d 331 (Tex. App. – Houston (1st Dist) 1985 no pet.). As the charge here is non-coercive on its face and nothing shows it acted to coerce the jury, no error has been shown. *Calicult v. State*, 503 S.W.2d 574, 576 (Tex. Crim. App. 1974).

Appellant's point of error is overruled, and the judgment is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Justices Draughn Lee and Dunn.*

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* Senior Justices Joe L. Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.