**Opinion of October 26, 2000 Withdrawn; Motion for Rehearing Overruled; Reversed and Remanded and Opinions filed May 24, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-01233-CR**

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**PATRICK VERNESS TILLMAN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 209th District Court**
**Harris County, Texas**
**Trial Court Cause No. 787363**

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## M A J O R I T Y  O P I N I O N

Appellant was charged by indictment with the offense of aggravated robbery. Prior to trial, appellant filed a motion to have the jury assess punishment. He also filed a motion for community supervision. The charge at the guilt phase permitted the jury to convict appellant as either a principal or a party to the charged offense. Following his conviction, appellant proved his eligibility for community supervision; the punishment charge authorized the jury to recommend the sentence be suspended and appellant be placed on community supervision. The jury assessed punishment at twenty years confinement in the Texas Department of Criminal Justice--Institutional Division.

Appellant raises ten points of error. Each point of error makes the same allegation, namely that the trial court erred in overruling appellant's challenges for cause to veniremembers who could not consider community supervision for a person convicted as a principal actor in an aggravated robbery. Specifically, the points of error relate to appellant's challenges for cause to veniremembers 5, 6, 10, 17, 18, 19, 21, 22, 23 and 24.[1]

## I. Preservation of Error

### A. Factual Summary.

During his voir dire examination, initially defense counsel covered the subject of the trial of a criminal case generally and issues related to the determination of guilt. Counsel then spent the bulk of his remaining time on the issue of punishment. Counsel first questioned the venire to determine if they could consider probation for one convicted as a party to the offense of aggravated robbery. Counsel then asked the venire if they could consider probation for one convicted as a principal. At that point, appellant's voir dire was interrupted by the trial court: "Counsel, you understand we're going to go back through this again, and *it will not be the basis of a challenge*." Counsel asked to approach the bench where the following exchange occurred:

> THE COURT: I know what you're doing.
>
> COUNSEL: I understand. *I'm just trying to see if this is the way you want to handle it.* I am about to ask each of these people ... could you consider probation for a person convicted as ... a principal. Okay?
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> THE COURT: *You can ask it but it's not going to be the basis of a challenge.*

Counsel then proceeded to ask each member of the venire if they could consider probation for someone convicted of aggravated robbery as the principal. Following that questioning, another bench conference was held where the following exchange took place:

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[1] On the same legal basis, appellant also challenged for cause the following veniremembers: 26, 27, 29, 30, 31, 38, 39, 41, 42, 43, 44, 45, 46, 48, 49 and 50.

THE COURT: Let me say that those challenges on the ones who could not consider probation on the principal who handles the weapon, *I will not grant your challenge*. I listened while you made the record, so I'm familiar with who they are. If you have the need to restate the numbers into the record, I will let you do so, but I think this actually covers it.

COUNSEL: Here is my sort of logistical problem, and of course, if you will give me some time to think about how we might do this so we can get this other part out of the way. My understanding of the state of the law now is that if you want to preserve a challenge for cause, you have to go through the same, quote, rigamarole that you have to do for a peremptory challenge. That's the state of the law right now. In other words, I have to use a strike on the particular [veniremember], I have to request additional strikes for the particular [veniremember], I have to exhaust my peremptories, I have to state to the Court, *whenever we have the 12 seated*, which ones I would have used a peremptory challenge on if I had it.

THE COURT: *If you do all that, it's going to bore me silly*.

Later, at the bench, counsel identified 27 veniremembers who could not consider probation for the principal in an aggravated robbery. Thereafter, the following exchange occurred:

THE COURT: All of those are unable to give probation.

COUNSEL: Consider probation.

THE COURT: *Consider probation for a defendant who had been convicted as a principal in an aggravated robbery where a firearm was used*.

COUNSEL: Yes, sir.

THE COURT: *I'm going to deny all of them. … Anything else?*

COUNSEL: Not at this point. *I'll further do what I have to do prior to the jury being sworn*.

THE COURT: *Sobeit*. ...

After the parties exercised their peremptory strikes, and the clerk called the names of those to serve as jurors, counsel again approached the bench:

> COUNSEL: ... For the record, *this is before the jury is sworn*. They have been seated *but not sworn*. Previous to this time, the Defense put on the record challenges for cause and gave the numbers of the [veniremembers] that it was asked to be challenged. Those same [veniremembers] that the Defense asked to be challenged, those same numbers, the Judge – the court overruled the challenges for cause. ... The Defense would state at this time that it used peremptory challenges as reflected on the Defendant's Jury Strike List on [counsel lists ten veniremembers]. All of those ... whose numbers were mentioned were also people that the Defense had challenged for cause and the Judge had overruled those challenges. The defense would put on the record that it has used 10 peremptory challenges, therefore, exhausting the peremptory challenges. The Defense at this time would request the Court an additional peremptory challenge for the 10 people that the Court had ruled on that the Defense had challenged for cause and that the Defense had to use a peremptory strike on.
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> THE COURT: *Are you finished?*
>
> COUNSEL: Yes, sir.
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> THE COURT: *That's denied.*
>
> COUNSEL: Okay. *My understanding would be that the Court would not even grant one additional peremptory on that basis, is that right?*
>
> THE COURT: *That's correct.*
>
> COUNSEL: The law requires, in fact, at this time to point out to the Court, and I am doing so, that as a result, there are not jurors on this jury that the Defense finds objectionable and is stating into the record now the number of those particular jurors that the Defense finds objectionable and against whom the Defense would have exercised a strike if the Court had granted an additional peremptory strike for all of those challenged. [Counsel then listed the objectionable jurors] *Thank you for your patience*.

The trial court then excused the remainder of the venire and swore those selected to serve on the jury.

**B. Analysis.**

The following steps must be taken to preserve error following the erroneous denial of a challenge for cause:

1. The voir dire of the challenged veniremember(s) must be recorded and transcribed;

2. The challenge(s) must be clear and specific;

3. Following the denial of the challenge(s) for cause, the defendant must peremptorily strike the veniremember(s);

4. All peremptory strikes must be exhausted;

5. After the peremptory strikes are exhausted, the defendant must request additional peremptory strikes sufficient to offset erroneously denied challenge(s) for cause;

6. The request for sufficient additional peremptory strikes to cure the error from the erroneous denial of the challenge(s) for cause must be denied; and

7. Finally, the defendant must identify at least one member who was selected to serve on the jury as objectionable. The significance being that the objectionable juror(s) would have been peremptorily struck had the trial court not erred in denying the challenge(s) for cause.

*Jacobs v. State*, 787 S.W.2d 397, 405 (Tex. Crim. App. 1990) (citing *Harris v. State*, 790 S.W.2d 568 (Tex. Crim. App. 1989).

The record reveals that appellant undertook each of these steps. The State's only contrary argument is that appellant's request for additional peremptory challenges should have been made before the veniremembers were seated in the jury box. After each side exercised its peremptory strikes, the clerk called the names of the first twelve veniremembers who had not been struck. TEX. CODE CRIM. PROC.

ANN. art. 35.26. Then, prior to those veniremembers being sworn as jurors, appellant requested ten additional peremptory strikes. The trial court denied the request.[2]

The State's argument rests on that portion of article 35.26 which provides the names called by the clerk "shall be the jury." The State relies on the mandatory language of the statute but cites no cases as to its interpretation.[3] For the following reasons, we reject the State's argument. First, prior interpretations of article 35.26 have looked to the statute's spirit and intent rather than the mandatory nature of its language. For example, in *Brossette v. State*, 885 S.W.2d 841, 842 (Tex. App.–Dallas 1994, pet. ref'd), after the peremptory strikes were made, the court called the first twelve persons who were not stricken. However, one of those individuals failed to return after the break and was not present in the courtroom. *Ibid*. A second person informed the court that her new job might affect her ability to concentrate on the evidence. *Ibid*. Over the defendant's objection, the trial court replaced those two jurors with the next two veniremembers who had not been stricken. *Ibid*. On direct appeal, the defendant argued for reversal because the trial court had not followed the mandatory language of 35.26. *Ibid*. In affirming the actions of the trial court, the Dallas Court of Appeals considered the "spirit and intent of the article under the facts of the case." *Ibid*, (citing Griffin v. State, 481 S.W.2d 838, 840 (Tex. Crim. App. 1972) ("We simply hold that we do not find a violation of the spirit and intent of [article 35.26] under the unique factual situation of this case.")). The *Brosette* Court recognized "there would be circumstances, after which both parties exercised peremptory challenges, when a trial court could excuse a juror." *Id*. at 843. The Court concluded "in keeping with the spirit and intent of article 35.26" that "the trial court had authority to excuse both jurors until the time the jury was sworn and impaneled." *Ibid*.

We find *Brosette* persuasive on the issue of preservation in the instant case. The record reflects defense counsel was doing his best to preserve this claim for appellate review. Counsel informed the trial

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[2] This is precisely the procedure employed when either of the parties raise an objection under *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 1719 (1986).

[3] In *Sanders v. State*, 688 S.W.2d 676, 678 (Tex. App.—Dallas 1985, pet. ref'd), the court found the use of the word "shall" in article 36.01 of the Texas Code of Criminal Procedure was not mandatory, but merely discretionary. *See also McClendon v. State*, 119 Tex. Crim. 29, 44 S.W.2d 724, 725 (1932).

court at least three times that he was going to request additional peremptory challenges after the names of the veniremembers had been called but prior to their being sworn as the jury. The trial court accepted this manner of preservation and the State did not object. *McCarter v. State*, 837 S.W.2d 117, 121 (Tex. Crim. App. 1992) (State failed to lodge objection to defense voir dire as being repititious or dilatory). Furthermore, the record is clear the trial court was not going to permit a challenge for cause on the basis raised by appellant.[4] Therefore, under the unique factual situation of this case which reflects the intention of appellant to preserve this issue for appellate review and of the trial court to permit the preservation in the most expedient way possible, we do not find a violation of the spirit and intent of article 35.26. *Griffin*, 481 S.W.2d at 840; *Brosette*, 885 S.W.2d at 843.[5]

The spirit and intent of the statute has been preferred over the mandatory language in a number of cases. For example, in those cases where the clerk called the wrong name or where a veniremember mistakenly believed he had been selected to serve on the jury, the trial court is authorized to correct the clerical error or to remove the mistaken veniremember before the jury is sworn. *Bagwell v. State*, 657 S.W.2d 526 (Tex. App.—Corpus Christi 1983, pet. ref'd). In fact, it is reversible error in some instances for the trial court to follow the mandatory language of article 35.26. In *Pogue v. State*, 553 S.W.2d 368 (Tex. Crim. App. 1977), the court held that where, before the jury was sworn, but after the clerk had called out the names of those individuals who would make up the jury, the defendant's attorney called the

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[4] The trial court made his position quite clear in the following exchange:

> COUNSEL: Okay. *My understanding would be that the Court would not even grant one additional peremptory on that basis, is that right?*
>
> THE COURT: *That's correct.*

[5] While this may not be the normal way of complying with the seven steps of *Jacob* for error preservation, it may in some instances be preferable. Oftentimes, a savvy prosecutor will recognize the trial court has committed error and will take corrective action to cure it. In a situation such as in the instant case, the prosecutor could exercise the peremptory strikes in such a way to ensure the objectionable veniremember(s) are not selected to serve on the jury. In such a situation although the trial court erred in denying the defendant's challenges for cause, the error would have been cured by the State's use of its own peremptory strikes. If there are no objectionable jurors, there is no need for the defendant to request additional peremptory strikes. However, that cannot be known until the defendant has seen those chosen for the jury.

trial court's attention to the fact that a juror whom counsel had struck was going to be mistakenly allowed to sit on the jury, it was reversible error for the trial court to allow that juror to continue to serve. This court in *Troung v. State*, 782 S.W.2d 904 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd), reversed the trial court for not permitting the defendant to exercise a peremptory challenge against a veniremember who had been selected to serve on the jury when defense counsel realized he had intended, but failed to peremptorily strike the veniremember. However, once the jury is sworn, the courts have taken a different tact. For example, in *Munson v. State*, 34 Tex.Crim. 498, 31 S.W. 387 (Tex. Crim. App. 1895), a prospective juror who had been peremptorily struck was nevertheless called and sworn as a juror. The *Munson* Court affirmed stating the mistake should have been brought to the trial court's attention "before the jury was sworn." *Id.* at 387; *also Harkey v. State*, 785 S.W.2d 876, 881 (Tex. App.—Austin 1990, no pet.) (same). Consistent with these cases, it is common practice after the clerk has called the names pursuant to article 35.26 for the trial judge to ask the parties if there is any objection to the jury. If an objection is lodged, it can be cured before the jury is sworn. Our holding today is consistent with those cases and the spirit and intent of article 35.26.

For these reasons, we hold appellant has complied with the seven prong test of *Jacobs*. Therefore, we will address the merits of these points of error.

**II. *Johnson* Error**

During voir dire, appellant questioned the venire on the range of punishment and their ability to consider community supervision for one convicted of the offense of aggravated robbery. During this portion of voir dire, appellant's counsel approached the bench and, outside the hearing of the venire, counsel informed the trial court that he wished to ask if the veniremembers could consider community supervision for a person convicted as a principal to aggravated robbery. The trial court informed counsel that he would permit the question but that the answer would not be a basis for a challenge for cause. Defense counsel proceeded to ask the question to the entire venire. The veniremembers who are the subjects of these ten points of error stated they could not consider community supervision for one convicted as a principal of

the offense of aggravated robbery.[6]

The identical issue was raised in *Johnson v. State*, 982 S.W.2d 403 (Tex. Crim. App. 1998), where the defendant attempted to challenge two veniremembers for cause. The Court of Criminal Appeals held that veniremembers "must be able to keep an open mind with respect to punishment regardless of whether the defendant might be found guilty as a principal or as a party, because the statutory range of punishment for any offense is the same whether the defendant is found guilty as a principal or as a party." *Id*. at 406. Therefore, a prospective juror who does not believe in the full range of punishment for either a defendant found guilty as a principal or a defendant found guilty as a party, is biased against the law as established by the legislature. *Ibid*. Consequently, the trial court erred in denying the challenges for cause. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (defense may challenge for cause veniremembers who have bias or prejudice against law applicable to punishment.); *also, Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992) ("[J]urors must be willing to consider the full range of punishment applicable to the offense submitted for their consideration.").

Based on the holding in *Johnson*, we similarly hold the trial court erred in denying appellant's challenges for cause to veniremembers: 5, 6, 10, 17, 18, 19, 21, 22, 23 and 24.

**III. Harm Analysis**

Following its determination that the trial court erred in denying the defendant's challenge for cause, the *Johnson* Court summarily remanded the case to this court for a harm analysis under TEX. R. APP. P. 44.2(b). More recently, the Court of Criminal Appeals has held that Rule 44.2(b) does not change the way that harm is demonstrated for the erroneous denial of a challenge of cause. *Johnson v. State*, ___ S.W.3d ___ (Tex. Crim. App. March 28, 2001). In the latest *Johnson* opinion, the court found the erroneous denial of challenges for cause resulted in harm because the defendant used a peremptory challenge to remove the venire members, exhausted his peremptory challenges, requested and was denied

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[6] Additionally, the following veniremembers stated they could not consider community supervision for one convicted as a principal of the offense of aggravated robbery and were not successfully challenged for cause on a non-related ground or excused by agreement of the parties: 27, 29, 30, 31, 38, 39, 41, 42, 43, 44, 45, 46, 48, 49, and 50.

additional peremptory challenges, and identified two objectionable venire members who sat on the jury and on whom the defendant would have exercised peremptory challenges had he not exhausted his peremptory challenges to correct the trial court's erroneous denial of the defendant's challenges for cause. *Id.*, slip op. pp. 5-6. We are presented with the same scenario in the instant case. Accordingly, we hold appellant was harmed under Rule 44.2(b).

Points of error one through ten are sustained. The judgment of the trial court is reversed and the case is remanded to that court for further proceedings. TEX. CODE CRIM. PROC. ANN. art. 44.29(a); *Carson v. State*, 6 S.W.3d 536, 539 (Tex. Crim. App. 1999).

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed May 24, 2001.
Panel consists of Justices Wittig, Amidei and Baird.[7]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[7] Former Judge Charles F. Baird and Former Justice Maurice Amidei sitting by assignment.