Affirmed and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00146-CR
NO. 14-99-00147-CR

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LEPOLEON LEE BURTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause Nos. 97CR0223 and 95CR0818

O P I N I O N

Lepoleon Lee Burton appeals a conviction for indecency with a child on the grounds that: (1) the trial court erred in ruling that a juror was incompetent to testify regarding his failure to respond to a voir dire question; (2) if the juror's testimony was properly excluded, then Texas Rule of Evidence 606(b) is unconstitutional because it violates the guarantees of a fair and impartial jury and prevents a juror from testifying that a verdict has been decided in a manner other than a fair expression of the jurors' opinion; (3) appellant was denied due process and a fair trial because the jury improperly considered parole during their

deliberations; and (4) the evidence is factually insufficient to support his conviction. We affirm.

Background

The complainant, a twelve year-old at the time of the incident, reported that appellant, a forty-two year-old man, had been "messing" with her and had touched her breast and buttocks. After an investigation, appellant was indicted for indecency with a child by contact. He was found guilty by a jury, sentenced to seven years in prison, and fined $10,000. The trial court also granted the State's motion to revoke appellant's community supervision from a previous robbery conviction. Appellant filed a motion for new trial alleging jury misconduct in: (1) considering parole laws; and (2) one juror failing to answer a voir dire question truthfully. The motion was denied. This is a consolidated appeal of appellant's conviction for indecency with a child and the resulting revocation of his previous community supervision. Appellant presents five issues for our review.

Exclusion of Testimony

Appellant's first issue claims that the trial court erred, during the hearing on the motion for new trial, in excluding the testimony of a juror, Fred Whitmier, regarding his failure to respond to a question asked during voir dire. Specifically, at the beginning of voir dire, the State asked if any of the prospective jurors knew appellant or his attorney. Although Whitmier knew appellant by sight, he did not respond to the question.[1] At the hearing on the motion for new trial, the State objected to Whitmier's testimony, claiming that it did not appear from his affidavit that he would be testifying to matters constituting exceptions to Texas Rule of Evidence 606(b). The court sustained the objection. In his bill of exceptions, Whitmier testified that he did not know anything about appellant but only knew him "when I see him."[2]

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[1] In an affidavit attached to appellant's motion for new trial, Whitmier stated that he had known appellant for years and had not answered the question truthfully.

[2] Specifically, Whitmier testified as follows:

> DEFENSE ATTORNEY: When did you first recognize [appellant]?
> WHITMIER: Well, when I got up . . . I saw him first . . . . I didn't know his last

Appellant argues that because Whitmier failed to answer a question truthfully on voir dire and failed to acknowledge a personal relationship with appellant, it reflected a bias or prejudice against him. Moreover, because bias or prejudice supports a challenge for cause, appellant contends that it relates to a claim of whether a juror is qualified to serve, which allows Whitmier's testimony under the second exception to Rule 606(b), *i.e.*, pertaining to a claim that he was not qualified to serve. *See* TEX. R. EVID. 606(b).[3] However, Rule 606(b)

> name was Burton. And another thing, I don't know too much about Lepoleon. We haven't been nowhere or no bar or nothing. I just know him when I see him.
>
> DEFENSE ATTORNEY: Now, are you related to him in any way?
>
> WHITMIER: No. No, I just know him when I see him.
>
> * * * *
>
> DEFENSE ATTORNEY: Do you remember talking with the investigator and he came over and talked with you about signing an affidavit?
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> WHITMIER: Yeah, okay. He came down with the affidavit and had it written out. He had on there, you know, what it said the one I got. That I was served for jury duty. And I knew Lepoleon for several years. I didn't know anything about Lepoleon. I still don't know anything about him.
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> DEFENSE ATTORNEY: How long have you known Lepoleon?
>
> WHITMIER: I don't know. Well, I just see him off and on. He gets gas up here at the gas station and he gases his truck up and stuff up and whatever –
>
> * * * *
>
> WHITMIER: Off and on because I don't see too much of the man really. I don't see him no every day or every week. I see him today but I may not see him no more than the next six months or a year just, you know –

[3] Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. *However, a juror may testify*: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) *to rebut a claim that the juror was not qualified to serve.*

TEX. R. EVID. 606(b) (emphasis added).

states that a juror may testify to *rebut* a claim that he was not qualified to serve. *See id.*[4] By contrast, appellant is arguing that Whitmier be permitted to testify in an attempt to *establish* that he was not qualified.

Moreover, Whitmier's testimony established only that appellant was someone whom Whitmier recognized from having seen before but not with whom Whitmier had a personal relationship. Although venireperson is challengeable for cause by either party if "he has a bias or prejudice in favor of or against the defendant,"[5] such a bias or prejudice requires knowledge or an opinion of a party.[6] If anything, Whitmier's testimony established a lack of knowledge or opinion of appellant and that his failure to answer the voir dire question was due to that lack of knowledge rather than any bias or prejudice. Accordingly, appellant's first issue fails to demonstrate error in excluding the testimony of Whitmier and is overruled.

Constitutionality

Appellant's second and third issues argue that if Whitmier's testimony is excludable under Texas Rule of Evidence 606(b),[7] then Rule 606(b) is unconstitutional in that it: (1) violates the guarantees of a fair and impartial jury;[8] and (2) prohibits testimony regarding another form of

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[4] Rule 606(b) was amended effective March 1, 1998, to narrow the permissible areas in which jurors could testify to regarding their deliberative process. *See Sanders v. State*, 1 S.W.3d 885, 887 (Tex. App.–Austin 1999, no pet.). Former Rule 606(b) permitted jurors to testify as to anything relevant to the validity of a verdict or indictment. *See id.* The former rule "threw open the door to the jury room too widely." *See id.*

[5] TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9) (Vernon 1989).

[6] When a venireperson states that his personal experiences, knowledge or opinions might bias or prejudice him against a party, the question becomes whether the venireperson can set aside prior knowledge and opinion and render an impartial verdict. *See Anson v. State*, 959 S.W.2d 203, 206 (Tex. Crim. App. 1997).

[7] *See supra* note 2.

[8] *See* U.S. CONST. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."); TEX. CONST. Art. I, § 10 ("In all criminal prosecutions the accused shall have a . . . trial by an impartial jury.").

jury misconduct, *i.e.*, that the jurors changed their vote from nine not guilty and three guilty to a unanimous verdict of guilty so the jurors could go home.[9]

The record in this case reflects that appellant did not preserve these constitutional complaints for our review because he did not raise them in the trial court. *See* TEX. R. APP. P. 33.1; *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (noting that constitutional errors may be waived by failure to object in the trial court). Appellant does not

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[9] To support this argument, appellant relies on the following testimony given during the bill of exceptions:

> DEFENSE ATTORNEY: Now, when you were – during jury deliberation you had voted for not guilty; is that correct? And you said that one juror told you that the Judge had said that you had to vote for guilty. Do you recall that?
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> * * * *
>
> WHITMIER: But we done that and then got to vote again and then we come up with something different.
>
> DEFENSE ATTORNEY: But you said the reason you changed your vote was because a juror told you –
>
> WHITMIER: No, not really what a juror said. It was just other people on the jury say, "Well this man, he's guilty."
>
> DEFENSE ATTORNEY: Do you recall telling me that one juror came back in and told you that the Judge said you had to vote for guilty?
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> * * * *
>
> WHITMIER: No. No, what happened there, all of us kept voting and voting until we got everybody equal.
>
> * * * *
>
> WHITMIER: Well, . . . what is it nine, three something like that or ten, two all that kind of stuff. . . . So we come back there again and we had to, you know, change it just like we did.
>
> DEFENSE ATTORNEY: Okay. You said you had to change it. Why are you saying you had to change it?
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> WHITMIER: Well, it was like this here everybody wanted to get this over with and go home.
>
> * * * *
>
> WHITMIER: Everybody . . . had to vote this out and get ready to go home.
>
> DEFENSE ATTORNEY: So you're saying because you want to go home, you changed your vote from –
>
> WHITMIER: Well, we all agreed, okay. Got to reading those documents and stuff that was on the table there. And they said, well, that's a lot of documents out there. So like I say, I don't half understand it anyway.

dispute that these claims were not raised in the trial court but instead, relying on *Rabb*,[10] argues that the constitutionality of a statute "*upon which a conviction was based* may be raised for the first time on appeal." However, Rule 606(b) is not a statute upon which appellant's conviction was based. Instead, it is an evidentiary rule regarding a proceeding which occurs subsequent to a defendant's conviction, and merely regulates proof of jury misconduct. *See Hines v. State*, 3 S.W.3d 618, 622 (Tex. App.–Texarkana 1999, pet. ref'd); *Soliz v. Saenz*, 779 S.W.2d 929, 935 (Tex. App.–Corpus Christi 1989, writ denied).

Appellant also argues, relying on *Marin*[11] and *McGowan*,[12] that Rule 606(b) is a limit on the subject matter that can be introduced at a hearing on a motion for new trial, and thus goes directly to the "judicial power" of the court, vesting us with power to address these claims whether or not they were brought to the attention of the trial court. Appellant further asserts that because the rule is facially unconstitutional in that it excludes testimony of juror misconduct, the claim is properly before us. However, the arguments that Rule 606(b) is

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[10] *See Rabb v. State*, 730 S.W.2d 751, 752 (Tex. Crim. App. 1987) (examining the constitutionality of the Dallas County Magistrate's Act and noting that "[q]uestions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by the appellate courts, even when such issues are raised for the first time on appeal").

[11] *See Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993). In *Marin*, the Court examined waiver of the right to appeal and noted that "our system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." *Marin*, 851 S.W.2d at 279. Only the last category of rights can be waived and all but the most fundamental rights are thought to be forfeited if not asserted by the party to whom they belong. *See id*. at 279. Further most evidentiary and procedural rules are of the forfeitable type. *See id*. at 278.

[12] *See McGowan v. State*, 938 S.W.2d 732, 741 (Tex. App.–Houston [14th Dist.]1996, *aff'd*, 975 S.W.2d 621 (Tex. Crim. App. 1998). In *McGowan*, the court determined that "the *Rabb* rule is properly applied in instances where the questioned statute affects the jurisdiction of the court to render a judgment against the defendant, *i.e.*, when the statute affects 'the power of the court over the "subject matter" of the case . . . coupled with "personal" jurisdiction over the accused.'" *See McGowan*, 938 S.W.2d at 741 (quoting *Webb v. State*, 899 S.W.2d 814, 818 (Tex. App.–Waco 1995, pet. ref'd.)). The McGowan court added to this analysis that an appellant is not required to object at trial if he is challenging the facial constitutionality of the statute or arguing the statute is *void ab initio*. *See McGowan*, 938 S.W.2d at 741.

unconstitutional because it deprives the defendant of due process, due course of law, open courts, and a fair trial have previously been rejected by both federal and Texas courts.[13] Therefore, appellant's failure to raise his constitutional challenges to Rule 606(b) in the trial court fails to preserve them for our review, and his second and third issues are overruled.[14]

Discussion of Parole Laws

Appellant's fourth issue claims he was denied due process and a fair trial, under both the United States and Texas Constitutions, when the trial court denied his motion for a new trial alleging that the jury improperly discussed parole laws during deliberation.

Under Texas law, parole is not a proper topic for jury deliberation. *See Colburn v. State*, 966 S.W.2d 511, 519 (Tex. Crim. App. 1998). However, not every mention of parole during deliberations requires reversal. *See id.* To show reversible error based upon improper jury discussion, the appellant must prove: (1) a misstatement of the law; (2) asserted as a fact; (3) by one professing to know the law; (4) which is relied upon by other jurors; and (5) who, for that reason, changed their vote to a harsher punishment. *See Lewis v. State*, 911 S.W.2d 1, 7-8 (Tex. Crim. App. 1995); *Sneed v. State*, 670 S.W.2d 262, 266 (Tex. Crim. App. 1984).[15]

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[13] *See Tanner v. United States*, 483 U.S. 107, 120-21 (1987) (holding that government's interest in preserving "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople" outweighs the possible infringement of a defendant's Sixth Amendment rights); *Golden Eagle Archery, Inc. v. Jackson*, 43 Tex. Sup. Ct. J. 989, 999 (June 29, 2000); *Hines*, 3 S.W.3d at 622; *Sanders*, 1 S.W.3d at 887-88; *Soliz*, 779 S.W.2d at 934-35; *King v. Bauer*, 767 S.W.2d 197, 199 (Tex. App.-Corpus Christi 1989, writ denied).

[14] We also do not agree with appellant that Whitmier's testimony reflects that the jurors decided the case in a manner other than a fair expression of their opinions. *See* TEX. R. APP. P. 21.3(c) (stating that a new trial must be granted to a defendant when the verdict has been decided by lot or in any manner other than a fair expression of the jurors' opinion). The testimony reflects that the jurors deliberated, reviewed documents, and continued to vote until all agreed on a verdict.

[15] The viability of the *Sneed* factors has been called into question by the 1998 amendments to Rule 606(b). *See Hines*, 3 S.W.3d at 621 (concluding that the 1998 amendments to Rule 606(b) overrules the holding in *Sneed*). In this case, however, the State did not object to the testimony of the juror regarding the discussion of parole laws. Therefore, we do not examine an application of Rule 606(b) in this context.

The granting or denial of a motion for new trial is reviewed for abuse of discretion. *See Lewis*, 911 S.W.2d at 7.

In this case, one juror, Kimberly Boyd, testified regarding the juror's discussions of parole law. Boyd stated that there was one woman who indicated that she knew about parole laws and "how cases usually go." Boyd inferred this to mean that appellant would not serve "that much time." However, when asked if Boyd thought the other juror knew what she was talking about, she said no. Boyd also testified that she had not changed her vote because of what the juror said, but believed some of the other jurors had. She admitted, though, that she did not know of any particular juror who might have changed their minds based on the remark and that she was speculating in her conclusion that another juror may have done so. Boyd also stated that she had changed her vote on punishment from two years to seven due to finding the enhancement true and the requisite increase in the minimum punishment range. This testimony fails to satisfy the *Sneed* factors. The comment, that the juror "knew how cases usually go," is not a misstatement of the law. Nor does the juror's testimony establish that the comment was in fact relied upon in causing anyone to vote for increased punishment. Therefore, appellant's fourth issue fails to demonstrate error in denying his motion for new trial and is overruled.

Factual Sufficiency

Appellant's fifth issue claims that the evidence is factually insufficient to prove he committed the offense of indecency with a child by contact. Appellant asserts that the complainant's testimony was so contradictory and conflicting that, when examined in light of the testimony of the defense witnesses, the jury was clearly wrong and the verdict unjust.

A factual sufficiency review takes into consideration all of the evidence and weighs that tending to prove the existence of the fact in dispute against the contradictory evidence. *See Medina v. State*, 7 S.W.3d 633, 637 (Tex. Crim. App. 1999) *cert. denied*, 120 S. Ct.1840 (2000). That a different verdict would be more reasonable is insufficient to justify reversal;

the verdict will be upheld unless it is so against the great weight of the evidence that it is clearly wrong and unjust. *See id*.

In this case, the State presented testimony from six witnesses. The first two witnesses were the officers initially called to the complainant's home. Although the complainant had denied to the officers that any sexual contact had occurred, she admitted that the appellant had given her a marijuana cigarette and had asked her when her mother would be home and whether he could come in. Darryl Matheson, a Texas City detective assigned to investigations of child abuse and sex related crimes, followed up on the initial call and took statements from the complainant and her mother. Matheson testified that it was not unusual for victims to recant or initially deny the incident occurred. Another witness, an eleven year-old friend and neighbor of the complainant, testified that on the day of the incident, she observed appellant wave the complainant over to him, touch the complainant's arm as she stood talking with him, and slide his hand across the complainant's behind as she walked away.

The complainant testified that appellant occasionally tried to engage her in conversation by telling her she was pretty and asking her if she had a boyfriend. On the day of the alleged incident, appellant approached her from behind and touched her arm and her bottom. Later that evening, at about 9:00 p.m., the complainant was walking toward her home when appellant stopped her, began telling her she was pretty and smart, and made references to her hanging around with "fast girls." At that point, appellant touched her breast over her clothes and attempted to touch her between her legs. The complainant testified that she had initially denied there had been any sexual contact between her and appellant because she believed it meant skin to skin contact rather than over her clothes.

Appellant presented five witnesses who testified that, to their knowledge, the appellant had intended to go fishing during the time of the alleged incident. In addition, Belinda "Renee" Overshowe, appellant's girlfriend, testified that she and appellant had, in fact, gone fishing on the evening of the alleged incident and that appellant was with her that whole evening. The complainant's aunt, Norma "Tina" Andrews, testified that the complainant had told her twice

that appellant had not touched her. Andrews stated that the complainant was lying as a cry for attention.

Although appellant's witnesses controvert that appellant was in the neighborhood on the night of the incident, the only specific testimony regarding his whereabouts that evening came from the complainant and from appellant's girlfriend. Although their testimony is conflicting and the complainant did make contradictory statements, we are not persuaded that the verdict is so against the great weight of the evidence as to be clearly wrong and unjust. Therefore, we overrule appellant's fifth issue and affirm the judgment of the trial court.

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Richard H. Edelman
Justice

Judgment rendered and Opinion filed July 13, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
Do not publish — TEX. R. APP. P. 47.3(b).