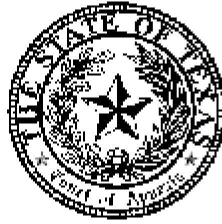
Affirmed and Opinion filed December 7, 2000.



In The

Fourteenth Court of Appeals

____

NO. 14-98-00444-CR

____

DONALD R. FRANK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 278th District Court
Walker County, Texas
Trial Court Cause No. 19,497-C

O P I N I O N

The State charged Donald Frank, appellant, with the felony offense of assault on a public servant. *See* TEX. PEN. CODE ANN. § 22.01(b)(1) (Vernon 1994). Appellant pleaded not guilty to the indictment and the case was tried to a jury. The jury found him guilty of the assault and assessed his punishment at 25 years confinement in the Texas Department of Criminal Justice, Institutional Division. In ten points of error, appellant contends that the trial court erred by (1) preventing him from asking the venire panel questions, (2) denying his request to quash the array, (3) allowing evidence of his prior criminal history during the guilt/innocence phase of

the trial, and (4) allowing the prosecutor to use racially-motivated peremptory challenges at the conclusion of jury selection. We will affirm the judgment of the trial court.

Background Facts

The Texas Department of Criminal Justice ('TDCJ') assigned Correctional Officer Adolph Boothe to work in the prison law library. Boothe also distributed writing supplies to inmates. In March 1997, appellant requested ten sheets of writing paper. According to his interpretation of the prison regulations, Boothe would only provide appellant with five sheets of paper. After Boothe delivered the paper, appellant hit him in the head with his hand. Appellant admitted to the assault; he claimed, however, that Boothe "wired him up" when Boothe called him a "nigger" during the encounter. Boothe claimed that he did not provoke appellant and did not call him a "nigger."

Refusal to Allow Questions During Voir Dire

In his first, second, third, and fourth points of error, appellant contends that the trial court erred by preventing him from asking the venire panel questions. Appellant specifically complains of questions regarding the venire panels attitude about race and about the lawful discharge of Officer Boothe's duties as a public servant. We find that the questions were an improper attempt by the defense to commit the venire panel to a certain verdict given particular facts.

The right to be represented by counsel, guaranteed by Article 1, Section 10, of the Texas Constitution, includes the right of counsel to question the members of the venire panel to intelligently exercise peremptory challenges. *See Shipley v. State*, 790 S.W.2d 604, 608 (Tex. Crim. App. 1990). A trial judge, however, is given wide discretion to control voir dire. The trial court's decision to restrict voir dire may only be reviewed to determine whether the restriction constitutes an abuse of discretion. *See Allridge v. State*, 762 S.W.2d 146, 163 (Tex. Crim. App. 1988).

Appellant first complains that the trial judge would not allow questioning about violations of TDCJ regulations. During voir dire, appellant's trial attorney asked the venire panel if they would find a guard lawfully discharging his duties if he violated a TDCJ regulation. The trial judge would not allow appellant's trial counsel to ask questions concerning violations of regulations. But the judge did allow counsel to ask questions about violations of law.

Counsel then asked the court if he could discuss whether it was proper for a guard to call an inmate a "nigger" or whether using the term "nigger" is unlawful. The prosecutor objected, saying that the question committed the venire panel to a specific set of circumstances. The trial judge sustained the objection. Additionally, the court did not allow appellant's counsel to ask the panel if they could consider the guard's use of the word nigger to a black inmate in deciding the issue of whether or not a public servant is lawfully discharging his duties.

A trial court does not abuse its discretion by refusing to allow a defendant to ask venire members questions based on facts peculiar to the case on trial. *See Raby v. State*, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998). The questions by appellant's counsel were not asked to explain law, or develop the panels attitudes about race; the sole purpose of the questions was to commit the jurors to particular factual scenarios. Although parties must be allowed to fairly and adequate probe the venire's qualifications and attitudes, they cannot attempt to commit the venire to a particular verdict given particular facts of the case. *See Maddux v. State*, 862 S.W.2d 590, 592 (Tex. Crim. App. 1993). Appellant's first four points of error are overruled.

Motion to Quash the Array

In his fifth, sixth, and seventh points of error, appellant contends that the trial court erred in denying his motion to quash the array, allowing potential jurors that were employed by TDCJ to serve on the jury panel in violation of TEX. GOV'T CODE ANN. § 62.105 (Vernon 1994).

To properly challenge an array, the party must allege in writing that the officer summoning the jury has wilfully summoned jurors with a view to securing a conviction or acquittal. See TEX. CODE CRIM. PROC. ANN. Art. 35.07 (Vernon 1992). Further, when the challenge is by the defendant, it must be supported by his affidavit or the affidavit of any credible person. *Id*. Appellant, in the instant case, has failed to frame his objection in the terms dictated by the Code; the motion was not accompanied by the requisite affidavit.

Appellant did not move for a continuance so that he could prepare an affidavit, nor did he present evidence from any other person in support of his motion. *See Esquivel v. State*, 595 S.W.2d 516 (Tex. Crim. App.1980). If there is no affidavit, nothing is preserved for appellate review. *See Stephenson v. State*, 494 S.W.2d 900, 905 (Tex. Crim. App.1973); *Brokenberry v. State*, 853 S.W.2d 145, 149 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd). Thus, a proper challenge to the array was not presented to the trial court. Appellant's fifth, sixth and seventh points of error are overruled.

Extraneous Offense

In his eighth point of error, appellant contends that the trial court erred in allowing evidence of his prior criminal history in the guilt/innocence phase of the trial.

Evidence of a person's character is not admissible at the guilt/innocence phase of the trial to prove that he acted in conformity with his character. TEX. R. EVID. 404. This is due to its inherent prejudice and tendency to confuse the issues. If, however, the defendant creates what is purported to be a false impression about his nature as a law abiding citizen or his propensity for committing criminal acts, then he has opened the door for his opponent to present rebuttal evidence. *See Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993). Furthermore, the rebuttal evidence can consist of his criminal history. *Id*. A ruling permitting use of a prior conviction to impeach will be reversed on appeal only upon a showing of a clear abuse of discretion. *See Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992).

Appellant contends that his statement did not create a false impression about his past criminal history. The prosecutor asked the appellant "Did you intend to hurt Officer Boothe?"

Appellant answered, "No. I didn't intend to hurt him. I don't intend to hurt no one unless I'm being hurt." He claims the statement was far too ambiguous to permit impeachment under the false impression doctrine.

Theus requires that appellant must in some way convey the impression that he has never committed a crime. *See Theus*, 845 S.W.2d at 879. We do not read *Theus* to require a defendant specifically state that he has not committed any prior felonies in order for the door to be opened. *See id.* What the *Theus* court did hold is that a witness must, in some way, convey the impression that he has never committed a crime.

In order to determine if the witness had conveyed such a false impression, it is important to consider the answer provided in relation to the question asked, and whether or not it was responsive. *See Delk*, 855 S.W.2d at 704-05. In this case, it is clear from the appellant's answer was not responsive to the question asked. The statement indicates that appellant is nonviolent and only fights back when he is attacked. His criminal history indicates otherwise.

His nonresponsive comment was volunteered, without prompting or maneuvering by the prosecutor, and could have been answered by a simple yes or no response. His prior convictions directly contradicts the statement made at trial. Because appellant's testimony did indeed "open the door" by creating a false impression as to his past criminal conduct, we hold that the trial court did not abuse its discretion in allowing the state to impeach appellant concerning his prior convictions. We overrule appellant's eighth point of error.

Batson **Challenges**

In his ninth and tenth points of error, appellant contends that the trial court erred by overruling his *Batson* objections to the State's exercise of peremptory challenges against

Wanda Johnson and Carolyn Willis. He claims that the State violated his constitutional rights and TEX. CODE CRIM. PROC. ANN. Art. 35.261 (Vernon 1994), because the challenges were racially motivated. Both women are African-American. We find, however, that the trial court could have reasonably concluded that the peremptory strikes in question were not racially-motivated.

The use of peremptory challenges to exclude persons from the petit jury because of their race violates the Equal Protection Clause of the Fourteenth Amendment, Article I, Sec. 3a of the Texas Constitution, and Section 35.261 of the Texas Code of Criminal Procedure. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1716-1717, 90 L.Ed.2d 69 (1986); *Esteves v. State*, 849 S.W.2d 822 (Tex. Crim. App. 1993); TEX. CODE CRIM. PROC. ANN. Art. 35.261 (Vernon 1994). We give the trial court great deference in determining whether a violation occurred and must not disturb its decision unless it is clearly erroneous. *See Ladd v. State*, 3 S.W.2d 547, 562 (Tex. Crim. App.1999).

In *Batson*, the Supreme Court provided a procedural structure to ascertain whether the exercise of peremptory strikes in a given case violates the Equal Protection Clause. The Court delineated a three-step process for how a *Batson* challenge is to be properly determined. *See Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). First, the opponent of a peremptory challenge must make out a prima facie case of racial discrimination, essentially a burden of production. Second, the burden of production shifts to the proponent of the strike to respond with a race-neutral explanation. If a race-neutral explanation is proffered, then the trial court must decide whether the opponent of the strike has proved purposeful racial discrimination.

If the responding party supplies racially neutral explanations for his peremptory challenges, the claimant has the ultimate burden of proving by a preponderance of the evidence that the peremptory challenges were actually used for racially discriminatory purposes. *See Satterwhite v. State*, 858 S.W.2d 412 (Tex. Crim. App. 1993); *Camacho v. State*, 864 S.W.2d

524, 529 (Tex.Crim.App.1993). Thus, the burden of production shifts from the defendant in step one to the State in step two, but the burden of persuasion never shifts from the defendant.

The prosecutor claimed that he struck Juror 21, Carolyn Willis, because she was a history teacher. The prosecutor expressed his opinion that persons in the education field are more liberal. A prospective juror's employment can provide a legitimate nonracial reason supporting a peremptory challenge. *See Williams v. State*, 939 S.W.2d 703, 706 (Tex.App. – Eastland 1997, no pet.). The prosecutor's explanation that he struck teachers was not challenged by the appellant. In the present case, there was no evidence of disparate treatment in striking members of the venire panel that were teachers. *See Newsome v. State*, 829 S.W.2d 260 (Tex. App.–Dallas 1992, no pet.). The trial court did not err in finding that the State's use of a peremptory strike on Mrs. Willis was not racially motivated.

The prosecutor challenged Wanda Johnson because of her age and because she indicated that she would go out of her way to given appellant a fair trial. A party may remove a prospective juror on the basis of age. *See Barnes v. State*, 855 S.W.2d 173 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd). The prosecutor argued that he struck the juror because she was closer to the age of the appellant than the victim. On cross-examination, the prosecutor mentioned three other people, who were not African-American, that were struck because of their age. The defense attorney then asked why three members on the jury who were also close to appellant's age were not struck. The prosecutor contended that age was not the only factor he used to determine his peremptory challenges. Because, the record reveals that the prosecutor struck other non-minority members with the same characteristics, we find the trial court's ruling was not clearly erroneous.

Appellant's ninth and tenth points of error are overruled.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed December 7, 2000.

Panel consists of Justices Sears, Cannon, and D. Camille Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Ross A. Sears, Bill Cannon and D. Camille Hutson-Dunn sitting by assignment.