YEAR 2004 CASE SUMMARIES

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No error in restricting jury voir dire time; respondent opened the door to questions about his prior offenses [In re V.M.S.] (04-4-18).

On November 4, 2004, the Houston First District Court of Appeals held that the juvenile court judge in a capital murder determinate sentence adjudication hearing did not error in restricting the length of respondent's jury voir dire; respondent's questioning of a witness opened the door to questions about respondent's prior offenses.

04-4-18. In the Matter of V.M.S., UNPUBLISHED, No. 04-03-00072-CV, 2004 WL 2475111, 2004 Tex.App.Lexis ___ (Tex.App.--Houston [1st Dist.] 11/4/04) Texas Juvenile Law (6th Ed. 2004).

Facts: After we issued our original opinion in this case, appellant moved for rehearing. We grant the motion for rehearing, withdraw our opinion, and judgment of July 1, 2004, [JLN 04-3-11] and substitute the following.

A jury found that appellant, a juvenile, engaged in delinquent conduct by committing capital murder. The jury further found that appellant used a deadly weapon, namely, a firearm, during the commission of the delinquent conduct, and that appellant was in need of rehabilitation. Based on the jury's verdict, the trial court committed appellant to the Texas Youth Commission, with a possible transfer to the Texas Department of Criminal Justice, for a period of 39 years. Appellant appeals three issues: (1) whether the trial court erred by denying appellant's motion to compel production of he "actual identities" of the witnesses against him; (2) whether the trial court erred by limiting appellant's time for voir dire and thus, appellant's voir dire questions; and (3) whether the trial court erred by admitting extraneous offense evidence during disposition.

On August 25, 2001, appellant, age 13, got out of a car with two other juveniles and approached four men walking in an apartment complex parking lot. Appellant pointed a gun at the four men and demanded their money and valuables. The juveniles forced the men to kneel while they robbed them, and, after robbing the men of their possessions, appellant told the men to turn around and walk away. As the men were walking away, appellant fired three shots. As a result, Sergio Ramirez, a/k/a Willie Flores, died from a gunshot wound to the back, and another man was injured.

Held: Affirmed.

Opinion Text:
Motion to Compel

In his first issue presented, appellant asserts that the trial court violated his state and federal constitutional rights to confront and cross-examine witnesses by denying his motion to compel the production of the "actual identities" of the State's three eyewitnesses. [FN3]

FN3. In his motion, appellant contended that the State's eyewitnesses provided fictitious names and requested that the trial court order the State to "produce all the evidence it knows ... regarding any criminal history or the true identification information of the states [sic] eyewitnesses."

During the hearing on his motion, appellant asserted that his investigator had determined that the State's witnesses were using false names and/or social security numbers. Appellant requested that the trial court order the State to investigate whether or not its eyewitnesses were using fictitious names or social security numbers and, if true, to provide appellant with the true identification of the witnesses for appellant's own independent background check and due diligence. In response, the State informed the trial court that, although the State had recently interviewed some of the witnesses, the State did not possess any new information that differed from what the witnesses originally told police. The trial court denied appellant's motion.

1. Due Process

The State has an affirmative duty to disclose evidence in its possession that is favorable or material to a defendant's guilt or punishment under the Due Process Clause of the Fourteenth Amendment. Shpikula v. State, 68 S.W.3d 212, 219-20 (Tex.App.-Houston [1st Dist.] 2002, pet. ref'd) (relying on Brady v. Maryland, 373 U.S.83, 86, 83 S.Ct. 1194, 1196-97(1963)). However, the State has no independent duty to seek out exculpatory information on a defendant's behalf. Shpikula, 68 S.W.3d at 219-20; see also Palmer v. State, 902 S.W.2d 561, 566 (Tex.App.-Houston [1st Dist.], 1995 no pet.) (citing United States v. Bagley, 473 U.S. 667, 675, 105 S.Ct. 3375, 3379-80 (1985)).

In this case, the prosecutor indicated on the record that the State did not possess any new information that differed from the witnesses' original statements to police. Appellant does not argue that the State deprived him exculpatory independent evidence in regard to witnesses that actually testified at trial. Moreover, nothing in the record demonstrates that the State possessed any new evidence regarding the "true identities" of the eyewitnesses, nor does appellant so contend.

2. Confrontation Clause

The Confrontation Clause provides two rights to criminal defendants: the right physically to face those who testify against them and the right to conduct cross-examination. Delaware v. Fensterer, 474 U.S. 15, 18-19, 106 S.Ct. 292, 294 (1985); Shpikula, 68 S.W.3d at 220. The Confrontation Clause protects a defendant's trial rights and is inapplicable to proceedings occurring prior to trial. Pennsylvania v. Ritchie, 480 U.S. 39, 52, 107 S.Ct. 989, 998-99 (1987); Shpikula, 68 S.W.3d at 221. There is no right to pretrial discovery and "[t]he ability to question adverse witnesses ... does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Pennsylvania, 480 U.S. at 52 53, 107 S.Ct. at 998 99; Shpikula, 68 S.W.3d at 221. Under these authorities, to the extent appellant sought pretrial production of the "actual identities" of the State's eyewitnesses, we conclude that the Sixth Amendment did not entitle appellant to relief. See Shpikula, 68 S.W.3d at 221.

The record reflects that the trial court held two hearings outside the presence of the jury: first, a hearing on appellant's motion to compel discovery, and second, a hearing on the State's motion in limine to determine the admissibility of questions concerning the eyewitnesses' residency status.

In the motion to compel hearing, appellant only sought to obtain the real names and identities of the eyewitnesses. The State indicated that it had the addresses of the witnesses at the time of the hearing, which indicates that each of the eyewitness's whereabouts was known and available to both parties. Knowing their whereabouts made it possible for appellant to question each of the eyewitnesses directly about his true identity. The record does not indicate any effort made by appellant to question the eyewitnesses directly to secure the information appellant requested at the hearing. The court denied appellant's motion to compel.

During the hearing on the motion in limine, the trial court determined that: (1) the witnesses were "wide open to question regarding any [prior] statement that they have given," particularly with regard to social security number or place of origin; and (2) status of citizenship was a legitimate question, but parties were not allowed to inquire whether a witness was in this country legally or illegally.

Subsequently, the State presented the eyewitness testimony of Jose Alberto Mendoza (Mendoza), Guadalupe Cano Garza (Garza), and Luis John Carreon (Carreon). Although appellant cross-examined each of them, he did not ask any of the three eyewitnesses about false identities. Therefore, appellant had the opportunity to question each eyewitness with respect to alleged identity fabrications, but did not do so. We conclude that the trial court did not deny appellant his right to investigate the identities of the State's eyewitnesses or to challenge their testimony upon cross-examination. Thus, appellant's rights to confront and cross-examine witnesses were not denied. Accordingly, we overrule appellant's first issue.

Voir Dire Limitation

In his second issue presented, appellant contends that the trial court erred by imposing unreasonable time limits on voir dire and, thus, denying appellant the right to proper voir dire questions. Specifically, appellant complains that the trial court instructed appellant to "wrap it up" on two separate occasions during voir dire. On the first occasion, the trial court warned, "124 minutes[,] this wraps it up." The record reveals that appellant continued voir dire questioning, without penalty, for 12 more pages. Thereafter, the trial court again warned, "wrap it up." After appellant completed his voir dire examination, the following exchange transpired:

APPELLANT: If I may address the Court, Your Honor? Your Honor, because the Court shortened my voir dire, I would like to put on the-I would have discussed experts, and the fact that there might be some. I would have discussed guns, and get the jury's feelings on guns and victims of crimes. I would like to have gone into that holding juveniles to higher or lower standards and prisons for juveniles. Thank you, Judge.
TRIAL COURT: Let the record reflect that the respondent received an hour and twenty-five minutes on voir dire, and Petitioner spent an hour and twenty-five minutes on voir dire. Okay.

In Texas, trial courts have broad discretion over the jury selection process. Barajas v. State, 93 S.W.3d 36, 38 (Tex.Crim .App.2002); Caldwell v. State, 818 S.W.2d 790, 793 (Tex.Crim.App.1991). The trial court does not err in restricting voir dire unless it abuses its discretion. Barajas, 93 S.W.3d at 38. It is within the trial court's discretion to place reasonable time limits on voir dire and to prohibit improper questions. Id.

The Court of Criminal Appeals has developed a test to determine whether a trial court has erred in preventing a party from asking questions after the trial court's time limit has expired. See Ratliff v. State, 690 S.W.597, 599 (Tex.Crim.App.1985). If, as in this case, the defendant was not allowed to ask a question of the entire venire, the reviewing court must decide (1) whether defense counsel attempted to prolong voir dire by asking questions that were irrelevant, immaterial, or unnecessarily repetitious and (2) whether the questions defense counsel was not allowed to ask were proper voir dire questions. [FN4] Id.

FN4. If the defendant was not allowed to ask a question of a particular venire member, the reviewing court must also decide whether the actual jury included persons whom defense counsel was not permitted to question. McCarter v. State, 837 S.W.2d 117, 120 (Tex.Crim.App.1992).

A voir dire question is proper if it seeks to discover a juror's views on an issue applicable to the case. Barajas, 93 S.W.3d at 38. An otherwise proper question is impermissible, however, if it attempts to commit the juror to a particular verdict based on particular facts. Id. Further, a voir dire question that is so vague or broad in nature as to constitute a global fishing expedition is not proper and may be prevented by the trial judge. Id at 39.

First, defense counsel reported to the trial court that he "would have discussed experts, and the fact that there might be some." Thus, defense counsel indicated a topic he wanted to address, but did not state a specific question about experts. However, a topic is not the same as a proper question, and the form of a question may be improper even if the topic is a legitimate and relevant area of inquiry. Howard v. State, 941 S.W.2d 102, 110-11 (Tex.Crim.App.1996). In this instance, there are potentially proper and improper questions that could be asked within the topic of experts. Caldwell, 818 S.W.2d at 794. Thus, we conclude that counsel did not present a properly framed question to the trial court.

Second, defense counsel reported to the trial court that he "would have discussed guns, and get the jury's feelings on guns and victims of crimes." Once again, this is not a specific question. It is not clear what defense counsel would have asked, and thus, the trial court could not have known whether it was a proper question. See Caldwell, 818 S.W.2d at 794. Accordingly, the trial court did not abuse its discretion by disallowing defense counsel's inquiry.

Finally, defense counsel indicated to the trial court that he "would like to have gone into that holding juveniles to higher or lower standards and prisons for juveniles." Again, this is not a specific question. It is not clear what defense counsel would have asked, and thus, the trial court could not have known whether it was a proper question. See id. We conclude that the "question" was improperly broad and, accordingly, that the trial court did not abuse its discretion in disallowing it. See Barajas, 93 S.W.3d at 41. [FN5]

FN5. In Smith v. State, the Court of Criminal Appeals held that defendant's inquiry "what their thoughts were on the insanity defense" was so broad that it was a global fishing expedition. 703 S.W.2d 641, 645 (Tex.Crim.App.1985). The inquiry did not, the court held, "seek particular information from a particular panel member; rather, it presented a general topic for discussion." Id; see also Barajas, 93 S.W.3d at 39 (discussing Smith in analysis of impermissible fishing expeditions during voir dire).

Moreover, appellant admits that defense counsel was permitted in inquire into the following areas: (1) juvenile crime and different standards of treatment from adults; (2) differences in rehabilitating children and adults; and (3) range of punishment (including probation). The record further reveals that the State made inquires as to the issues of (1) different standards applied to juveniles, (2) prison for juveniles, and (3) rehabilitation versus punishment for juveniles.

Thus, in this case, appellant did not preserve his complaint about a shortened voir dire for review on appeal. See Howard, 941 S.W.2d at 110. See also Barajas, 93 S.W.3d at 42 ("The trial court is within its discretion to prevent fishing expeditions during voir dire that may extend jury selection ad infinitum."). Because we conclude that the topics cited by defense counsel were not proper voir dire questions, we need not address whether defense counsel attempted to prolong voir dire. Accordingly, we overrule appellant's second issue.

Extraneous Offense Evidence

We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. We will, thus, not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. Torres v. State, 71 S.W.3d 758, 760 (Tex.Crim.App.2002); Roberts v. State, 29 S.W.3d 596, 600 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd).

In his third issue, appellant asserts that the trial court erred in admitting extraneous offense evidence during disposition proceedings. Specifically, appellant contends that the trial court erroneously determined that testimony from a defense witness opened the door to cross-examination on extraneous offenses.

The record reveals that, during the disposition proceedings, appellant called Deacon Dan Gilbert (Gilbert) to testify about his interactions with appellant in the juvenile detention center wherein Gilbert provided pastoral counseling. Gilbert testified that he had seen "genuine growth" in appellant since appellant first arrived at the juvenile detention center. Gilbert testified that appellant's behavior was "getting better" and that appellant was "a much more mature youth with a better understanding of his life, in general, today than he is [sic]. He was a very immature, anxious youth from when I first met him."

As an example of appellant's growth, Gilbert related a recent incident wherein a fight broke out between two youths at the detention center and appellant ran to notify detention center employees. Gilbert testified that, "[I]n the past, [appellant] would have been ... rooting the fight on, or he would have even gotten involved ..." Finally, Gilbert indicated that, "given the right conditions," Gilbert expected appellant's growth to continue.

To preserve error for appellate review, the complaining party must make a specific objection and obtain a ruling on the objection. Martinez v. State, 98 S.W.3d 189, 193 (Tex.Crim.App.2003). A proper objection is one that is specific and timely. Tex.R.App. P. 33.1; see id. With two exceptions, a party is required to continue to object each time inadmissible evidence is offered. Id . (discussing Etherington v. State, 819 S.W.2d 854, 858 (Tex.Crim.App.1991) (holding that one objection was insufficient to preserve error for the following "three pages of questions and answers on the subject")). The two exceptions require counsel to either (1) obtain a running objection, or (2) request a hearing outside the presence of the jury. Id. Finally, the point of error on appeal must comport with the objection made at trial. Wilson v. State, 71 S.W.3d 346, 349 (Tex.Crim.App.2002).

Before cross-examining Gilbert, the State argued that appellant had "opened the door" with regard to appellant's potential for growth and whether it was actually what Gilbert believed it to be, or whether appellant had deceived him. The trial court agreed. During the State's cross-examination of Gilbert, the following exchange transpired:

STATE: [D]id you know [appellant] had an extensive criminal involvement during the criminal history [sic]?
APPELLANT: Your Honor, I object to that. That totally violates 408(b) [sic] Notice.
TRIAL COURT: The objection is overruled. Answer the question.
APPELLANT: Ask for a continuing objection on this, a running objection.
TRIAL COURT: My suggestion is that you make your objections so it's real clear exactly what you're objecting to.
APPELLANT: Thank you, Your Honor.
TRIAL COURT: State your question again for the witness.
STATE: Did you know of [appellant's] extensive criminology [sic]?
WITNESS: I have no previous knowledge of [appellant's] previous criminal involvement.
STATE: Did you know that he first came into contact with the criminal justice system back on March 1, 2001?
APPELLANT: Your Honor, objection. As to violates
TRIAL COURT: State the objection.
APPELLANT: I'm going to object as it violates the prior 408(b) [sic] Notice.
TRIAL COURT: It's overruled.

We construe appellant's argument to refer to rule 404(b)'s notice requirement. Rule 404(b) requires that, upon timely request by a defendant in a criminal case, reasonable notice be given in advance of trial of intent to introduce in the State's case in chief evidence of other crimes, wrongs, or acts. Tex.R. Evid. 404(b). In this case, however, appellant objected to evidence elicited upon cross-examination by the State after the State presented its case-in-chief and rested. Thus, appellant's rule 404(b) objection is without merit. Accordingly, we overrule appellant's third issue.