
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, MARY MARTIN, AND PETER CHICKRIS
SUBJECT: 02/13/08 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 04/08/08
CC: JACK THOMPSON

Warner v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008). [PD-1680-05, PD-1681-05, 02/13/08].

WOMACK, J., *delivered the opinion of the Court, in which* MEYERS, PRICE, JOHNSON, KEASLER, HERVEY, HOLCOMB, *and* COCHRAN, J.J., *joined*. KELLER, P.J., *filed a dissenting opinion*.

FACTS: A jury convicted defendant of two counts of aggravated sexual assault of a child. On appeal, defendant claimed there was an error in the jury charge because it permitted the jury to convict him on a less than unanimous verdict; however, he did not object to the charge at trial. The court of appeals found error in the charge, but held that defendant did not preserve error with an objection and, consequently, did not meet the egregious harm standard required to merit reversal. Finding that the burden of proof has no place in an egregious harm analysis, the Court of Criminal Appeals reversed and remanded to the court of appeals.

STANDARD OF REVIEW—JURY CHARGE

If an error in the charge is the subject of a timely objection at trial, reversal is required if the error is calculated to injure the rights of the defendant and has produced some actual harm.

Warner v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008). [PD-1680-05, PD-1681-05, 02/13/08].

STANDARD OF REVIEW—ALMANZIA TEST—BURDEN OF PROOF

The burden of proof or persuasion has no place in an *Almanzia* harm analysis. **Warner v. State**, ___ S.W.3d ___ (Tex. Crim. App. 2008). [PD-1680-05, PD-1681-05, 02/13/08].

Flores v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

KELLER, P.J., *delivered the opinion of the Court in which* MEYERS, WOMACK, KEASLER, *and* HERVEY, J.J., *joined*. COCHRAN, J., *filed a concurring opinion in which* JOHNSON, J., *joined*. PRICE, *and* HOLCOMB, J.J., *concurred*.

FACTS: A jury convicted defendant of capital murder of an unborn victim and sentenced him to life in prison. Defendant helped terminate his girlfriend's pregnancy by stepping on her

abdomen. On appeal, defendant argued that the statute under which he was prosecuted was unconstitutional and that, because his girlfriend asked him to help terminate the pregnancy, the prosecution was a violation of the equal protection clause. Finding the unborn victim statute constitutionally valid, the Court of Criminal Appeals found the unborn victim statute constitutionally valid and affirmed the conviction.

CAPITAL MURDER—UNBORN VICTIMS STATUTES

The unborn victim state does not contravene the abortion restrictions announced in *Roe v. Wade*. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

CAPITAL MURDER—EQUAL PROTECTION

If a reasonable jury could conclude from the evidence that two parties were not engaging in the same behavior, there is no equal protection violation. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

CAPITAL MURDER—PRE-TRIAL MOTIONS

The purpose of a pre-trial motion is to address those issues that can be determined before there is a trial on the general issues of the case. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

STATUTORY INTERPRETATION—ESTABLISHMENT CLAUSE VIOLATIONS

There is a three prong test to determine if a statute violates the Establishment Clause: 1) the statute must have a secular legislative purpose; 2) its primary effect must be one that neither advances nor inhibits religion; and 3) it must not foster an excessive government entanglement with religion. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

STATUTORY INTERPRETATION—ESTABLISHMENT CLAUSE VIOLATIONS

Mere consistency between a statute and religious tenets does not render a statute unconstitutional. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

JURY INSTRUCTION—LESSER-INCLUDED OFFENSE

A defendant is entitled to a jury charge on a lesser-included offense: 1) if he requests an instruction on a lesser-included offense of the charged offense and 2) if there is “some evidence” that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

JURY INSTRUCTION—LESSER-INCLUDED OFFENSE

A defendant does not satisfy the “some evidence” prong of the lesser-included offense test if there is evidence that he committed an offense that is a lesser-included offense of the charged offense, but greater than the requested lesser offense. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

JURY INSTRUCTION—LESSER-INCLUDED OFFENSE

A defendant is not entitled to a jury instruction on a lesser-included offense if the evidence on which the defendant is relying raises another offense that “lies between” the requested and charged offenses. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

JURY INSTRUCTION—LESSER-INCLUDED OFFENSE--MURDER

Deadly conduct is a lesser-included offense of attempted murder. Because attempted murder is a lesser-included offense of capital murder, deadly conduct is also a lesser-included offense of capital murder. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

MURDER—DEADLY CONDUCT—LESSER INCLUDED OFFENSE--DEGREE

Deadly conduct is a lesser-included offense of capital murder. The offenses only differ in degree of culpability and both offenses include placing another in imminent danger of serious bodily harm. *Flores v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-0265-07, 02/13/08].

Watkins v. State, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

PRICE, J., *delivered the opinion of the Court in which MEYERS, WOMACK, JOHNSON, KEASLER, HERVEY, HOLCOMB, and COCHRAN, J.J., joined.* KELLER, P.J., *filed a concurring opinion.*

FACTS: A jury convicted defendant of burglary of a habitation and sentenced him to twenty years in prison. Defendant objected at trial that the prosecution had improperly used several of its preemptive challenges to remove African-American panelists on account of race. The court of appeals affirmed the trial court’s ruling that defendant failed to establish purposeful discrimination. Finding that a rational judge could find the strikes were race neutral, the Court of Criminal Appeals affirmed the court of appeals.

JURY SELECTION—BATSON CHALLENGES

A criminal defendant has the right to demonstrate that the State has engaged in purposeful discrimination in the exercise of its preemptory challenges by relying solely on the

facts concerning jury selection in his case. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—BATSON CHALLENGES

To make a *Batson* challenge, a defendant is not required to present proof of systematic exclusion of minority jurors over the course of an extended period of time. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—BATSON CHALLENGES

To make a *Batson* challenge, the defendant must demonstrate, by the preponderance of the evidence, that the prosecutor, in exercising his peremptory challenges, indulged in purposeful discrimination against a member of a constitutionally protected class. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—BATSON CHALLENGES

Once the opponent of a peremptory challenge has made out a *prima facie* case of racial discrimination, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation for the strike. Then, the trial court must decide whether the opponent of the strike has proved purposeful racial discrimination. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—BATSON CHALLENGES

The ultimate plausibility of a race-neutral explanation is decided by the trial court when it determines whether the proponent of the strike has met his burden of persuasion in presenting his explanation for striking a juror. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—BATSON CHALLENGES

Once the opponent of the challenged strike raises a question of purposeful discrimination, the trial court should proceed immediately to the second step and ask the proponent of the strike whether he had a non-discriminatory purpose. A reviewing court should assume that the opponent of the strike has satisfied his step-one obligation to make a *prima facie* case of purposeful discrimination and address only the second and third steps of the challenge analysis. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—*BATSON* CHALLENGES

A reviewing court should not overturn the trial court's resolution of the *Batson* issue unless it determines that the trial court's ruling was clearly erroneous. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—*BATSON* CHALLENGES

When reviewing a *Batson* challenge, the appellate court should consider the entire voir dire record. The reviewing court need not limit itself to arguments specifically brought the trial court's attention as long as those arguments are manifestly grounded in the appellate record. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—*BATSON* CHALLENGES

A reviewing court should, with great deference, examine a trial court's conclusion that a facially race-neutral explanation for a peremptory challenge is genuine rather than pretextual and should reverse only when the record, as a whole, shows the trial court's decision was clearly erroneous. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

JURY SELECTION—*BATSON* CHALLENGES—FACTORS

The Supreme Court uses a list of non-exclusive factors to guide courts in deciding whether peremptory challenges are based on racial discrimination. These factors include, but are not limited to, whether: 1) the State exercised its peremptory challenges to eliminate a far greater proportion of minority veniremen than white veniremen; 2) whether the reasons the State asserted for eliminating minority veniremen applied equally well to the white veniremen whom the State did not challenge; 3) whether the State utilized its option to shuffle the jury panels in a manner that supported an inference of race discrimination; 4) whether the State directed questions expressly designed to elicit grounds for peremptory challenges disproportionately, in a manner that suggested an intent to single out minority veniremen for elimination; and 5) whether the particular county in which the case was prosecuted had, in the past, followed a formal policy to exclude minorities from jury service. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

EVIDENCE—JUDICIAL NOTICE—WHEN REQUIRED

The Rules of Evidence require a trial court to take judicial notice of a fact if requested by a party and supplied with the necessary information. *Watkins v. State*, __S.W.3d __ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

EVIDENCE—JUDICIAL NOTICE – WHEN DISCRETIONARY

Judicial notice may be taken at any time during a proceeding, but should be taken only when necessary to avoid an unjust judgment. *Watkins v. State*, ___S.W.3d ___ (Tex. Crim. App. 2008). [PD-1438-06, 02/13/08].

Lucero v. State, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

HERVEY, J., *delivered the opinion of the Court in which* KELLER, P.J., MEYERS, WOMACK, KEASLER, HOLCOMB *and* COCHRAN, JJ., *joined*. PRICE and JOHNSON, JJ., *concurred*.

FACTS: A jury convicted defendant of murder and sentenced him to death. On direct appeal, defendant argued that: 1) the trial court erred in denying him an evidentiary hearing on his motion for new trial; 2) the jury’s consideration of Biblical scripture during its punishment deliberations and before it rendered its final verdict denied defendant of his rights to an impartial jury and punishment determination in violation of the Sixth, Eighth, and Fourteenth Amendments; 3) the trial court erred in allowing a witness to give a) factual testimony about Texas prison conditions and b) his opinion regarding the violence that occurs in the state penal system; and 4) the trial court erred in overruling defendant’s objection to the State’s argument at punishment phase; and 5) the trial court erred in denying defendant’s motion for a new trial. The Court of Criminal Appeals affirmed the trial court’s judgment.

IMPEACHMENT OF JURY VERDICT - “OUTSIDE INFLUENCE”

Under the Rules of Evidence, and as general rule, a juror may not impeach his own verdict. However, a juror may testify as to: 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.

Lucero v. State, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

MOTION FOR NEW TRIAL- EVIDENTIARY HEARING- MAKE A NEW RECORD

When a defendant establishes that “reasonable grounds” exist in support of his claim that he “could be entitled to relief,” he is entitled to an evidentiary hearing on a new trial motion. This hearing is held for the purpose of making a new record of matters which were not determinable from the original trial record. *Lucero v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

EVIDENCE - FUTURE DANGEROUSNESS- PRISON VIOLENCE- ADMISSIBILITY

It is not an abuse of discretion for a court to allow testimony concerning possible inmate violence under current prison conditions. Because a jury must make its determination regarding future dangerousness as part of its sentencing deliberations in capital murder case, such opinion

testimony has been construed as aiding juries to determine the level of danger a defendant poses. *Lucero v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

STATE’S ARGUMENT- REVIEW

When a trial court’s instruction to disregard is sufficient to cure any prejudice stemming for the State’s argument, the trial court should not grant a defendant’s motion for a new trial that argues the State’s closing argument was improper. *Lucero v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

STATE’S ARGUMENT- REVIEW

The State’s jury argument may include any statements that are reasonably deductible from the evidence. *Lucero v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

STATE’S ARGUMENT- REVIEW

A reviewing court may find a non-constitutional error in a State’s argument harmless if, after examining the record as a whole, the court is fairly sure that the error either did not influence or only slightly affected the jury. *Lucero v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

STATE’S ARGUMENT- REVIEW

If it is not supported by the record, the State’s comment in closing argument regarding a defendant’s lack of expression or remorse may be an impermissible comment on defendant’s failure to testify *Lucero v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

STATE’S ARGUMENT- REVIEW

The State makes an impermissible comment on a defendant’s failure to testify when it uses language that manifestly intends or is of a character that leads the jury to necessarily and naturally take the comment as a reference to the defendant’s failure to testify. *Lucero v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

MOTION FOR MISTRIAL – INCURABLE PREJUDICE

A defendant’s motion for a mistrial should be granted when the defendant’s objection did not prevent the prejudice elicited towards the defendant and when the court’s instruction to the jury to disregard did not cure the incurred prejudice. *Lucero v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

EVIDENCE – PREVIOUS ADMISSION WITHOUT OBJECTION

A court’s judgment should not be reversed because the court overruled a defendant’s objection to the submission of evidence when, either before or after the objection, other similar

evidence is received without objection. *Lucero v. State*, _ S.W.3d_ _ (Tex. Crim. App. 2008) [AP-75,247, 2/13/08].

Prible v. State, _ S.W.3d_ (Tex. Crim. App. 2008) [AP-75,519, 2/13/08].

MEYERS, J. *delivered the opinion of the Court, in which* KELLER, P.J., *and* PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, *and* COCHRAN, JJ., *joined*. HOLCOMB, J., *concurred*.

FACTS: A jury convicted defendant of capital murder and sentenced him to death. Pursuant to Chapter 64 of the Code of Criminal Procedure, defendant moved for post-conviction retesting of the DNA used against him at trial. The trial court denied his motion after finding defendant failed to show that: 1) identity was an issue and 2) he would not have been convicted by a preponderance of the evidence if exculpatory DNA results were obtained from a retesting of the DNA. Arguing that that Chapter 64 violated his due process rights because it prevented him from introducing new evidence generated from retesting the DNA that would show that someone else committed the crime, defendant appealed to the Court of Criminal Appeals (CCA). The CCA affirmed.

POST-CONVICTION DNA TESTING - ENTITLEMENT

According to Chapter 64 of the Texas Code of Criminal Procedure, a defendant is not entitled to retesting of DNA unless he shows: 1) that unaltered evidence is available for testing; 2) that identity was an issue in their case; 3) that there is greater than 50% chance that defendant *would not* have been convicted if DNA testing provided exculpatory results; and 4) that the purpose of the request is not to delay the execution of the sentence. *Prible v. State*, _ S.W.3d_ (Tex. Crim. App. 2008) [AP-75,519, 2/13/08].

POST-CONVICTION DNA TESTING

A defendant does not have a constitutional right to post-conviction DNA testing for the purpose of determining the presence of a third party's DNA at the scene of the crime. *Prible v. State*, _ S.W.3d_ (Tex. Crim. App. 2008) [AP-75,519, 2/13/08].

POST-CONVICTION DNA TESTING

Chapter 64 does not exclude all evidence of third-party guilt; rather it proscribes DNA testing which will not result in exculpatory evidence that would have altered the outcome of a defendant's trial. Therefore, a court need not order DNA testing when the retest will not show by a preponderance of the evidence that the defendant would not have been convicted. *Prible v. State*, _ S.W.3d_ (Tex. Crim. App. 2008) [AP-75,519, 2/13/08].

POST-CONVICTION DNA TESTING

The presence of another person's DNA at the crime scene is not exculpatory evidence of the defendant's innocence. *Prible v. State*, _ S.W.3d_ (Tex. Crim. App. 2008) [AP-75,519, 2/13/08].

POST-CONVICTION DNA TESTING

Under Chapter 64 of the Code of Criminal Procedure, the required showing of "issue of identity" is not raised solely by a plea of not guilty, because this requirement relates to the issue of identity as it pertains to the DNA evidence. As such, the requirement is not met unless DNA testing determines the identity of the person who committed the offense or exculpates the defendant. *Prible v. State*, _ S.W.3d_ (Tex. Crim. App. 2008) [AP-75,519, 2/13/08].

EVIDENCE – THIRD PARTY GUILT - POST-CONVICTION DNA TESTING

The U.S Supreme Court has held that a state cannot enforce a statute that prevents a criminal defendant from introducing evidence to prove that someone else committed an offense. The court also held that the defensive evidence of third-party guilt cannot be excluded based solely on the strength of the prosecution's case; to do so would deny the defendant his constitutional right to a meaningful opportunity to present a complete defense. This holding, however, this does not change the outcome of cases involving Chapter 64 post-conviction DNA testing. *Prible v. State*, _ S.W.3d_ (Tex. Crim. App. 2008) [AP-75,519, 2/13/08].

Rangel v. State, _ S.W.3d_ (Tex. Crim. App. 2008) [PD-0447-06. 2/13/08].

PER CURIAM. WOMACK, J., concurred. COCHRAN, J., filed a dissenting opinion in which JOHNSON, J., joined.

FACTS: Defendant was convicted of aggravated sexual assault of a child and the court sentenced him to fifty years imprisonment. On appeal, defendant argued that the trial court violated his right to confrontation by admitting a videotape of a CPS investigator's interview of the child-victim in lieu of the victim's testimony. The court of appeals affirmed, finding that, although the victim's statements were testimonial, defendant had waived his confrontation challenge because he failed to use an alternative to the traditional face-to-face confrontation at trial provided by the Code of Criminal Procedure. The Court of Criminal Appeals granted review, but later dismissed the petitions as improvidently granted.

EVIDENCE – NOT INTRODUCED AT TRIAL - REVIEW

A court of appeals will not review a trial judge's decision based on evidence that the trial judge did not have an opportunity to consider when he made his original decision. *Rangel v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [PD-0447-06. 2/13/08].

JUDICIAL RESTRAINT - REVIEW

Judicial restraint and prudence should prevent a court of appeals from reaching out and grabbing issues to review simply because they are interesting and important. *Rangel v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [PD-0447-06. 2/13/08].