NO. : 2-02-498 and 2-02-499

IN THE
COURT OF APPEALS FOR THE
SECOND DISTRICT OF TEXAS
FORT WORTH, TEXAS

BARTON RAY GAINES
Appellant,

V.

THE STATE OF TEXAS,
Appellee.

Appeal from the 213TH District Court
of Tarrant County, Texas,
The Honorable Robert K. Gill presiding

BRIEF IN SUPPORT OF MOTION TO WITHDRAW

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* * * * * * * * * * *

On Appeal
from the
213th Judicial District Court
of Tarrant County, Texas
The Honorable Robert K. Gill presiding

* * * * * * * * * * *

BRIEF IN SUPPORT OF MOTION TO WITHDRAW

TO THE HONORABLE COURT OF APPEALS:

Appellant before the Court of Appeals, BARTON RAY GAINES, herein referred to as Appellant, has perfected his appeal in this cause, appealing his conviction from the 213th Judicial District Court of Tarrant County, Texas, the Honorable Robert K. Gill, Judge presiding, for two convictions of Aggravated Robbery with a Deadly Weapon.

Appellee is the State of Texas, hereinafter referred to as the State.

STATEMENT OF THE CASE

APPELLANT, BARTON RAY GAINES was indicted in two cases. The first charged the offenses of Aggravated Robbery with a deadly weapon, to-wit: a firearm, and Attempted Capital Murder, in Cause No. 0836985A. (CR.0836985A I 3) The second indictment alleged the same charges, with a different victim, in Cause No. 0836979A. (CR0836979A I 3). Both cases were tried together.

Appellant entered a plea of guilty to the jury to the two charges of Aggravated Robbery and the State did not proceed on the Attempted Capital Murder charges. (RR III 5). Aggravated robbery is punishable by confinement in prison from 5 to 99 years, or life, and a fine of up to $10,000.00. Tex.Pen. Code §12.32.

The jury was instructed to return a finding of "guilty" after having heard evidence regarding punishment. (CR0836985A I 32), (CR0836979A I 77). The jury assessed punishment at 35 years in the Texas Department of Corrections and a fine of $10, 000.00. (CR0836985A I 37), (CR0836979A I 82). The trial court sentenced Appellant on December 12, 2002. (CR0836985A I 41), (CR0836979A I 86)

An appeal was filed timely. (CR0836985A I 67), (CR0836979A I 127). Appellant was declared indigent, (CR0836985A I 69), (CR0836979A I 129), and the undersigned attorney was appointed as the second substitute attorney to represent him on appeal. (Supp. CR0836985A I 2), (Supp. CR0836979A I 2).

SUMMARY OF THE EVIDENCE OF THE CASE

The Appellant having entered a plea of guilty to the charges, all evidence offered dealt with the issue of punishment.

Michael Williams testified that on the night of February 21, 2002 Appellant, Robert Anthony Gaines and his two friends Jason Tucker and Daniel Aranda went to a location in Tarrant County south of Fort Worth known as the Rice Paddy. (RR III 50-55). There they met Andrew Horvath and Michael Williams. After speaking with them for a brief time, Appellant asked one of them where he could buy a pound of marijuana. Michael Williams agreed to lead them to a friend who he thought could sell Appellant the marijuana. Michael Williams led Appellant and his friends into Fort Worth.(RR III 57). However on the way in, Appellant indicated he wanted to stop at Wal-Mart to purchase some beer.(RR III 59). Instead of buying beer he purchased shotgun shells. Upon arrival at the Peppertree Acres Apartments, Michael Williams began shuttling between Appellant and Mr. Williams' friend to discuss the purchase of the marijuana.(RR III 62-64). Appellant checked Michael Williams for the presence of weapons.(RR III 66). Appellant and his friends then demanded Michael Williams' wallet and struck him in the head three times with a shotgun. Williams had no money in his wallet but he emptied out his front pockets.(RR III 67-69). Appellant and one of the others struck him.(RR III 70) Williams started running when everyone else was looking at Andrew Horvath.(RR III 71). He ran out of Peppertree Acres Apartments onto James Street. At that point he heard a shot and felt his left shoulder go numb.(RR III 73). He continued running and ended up at the Lucky Stop convenience store. At the store the police were called and an ambulance arrived.

The other complainant was Andrew Horvath. Appellant and the others also demanded his wallet.(RR III 102, 103). As he lay on the ground and Appellant and his friends drove off

in the truck, Appellant shot Horvath.(RR III 104, 105). He went to the apartment complex and someone called 911. The police and an ambulance arrived.

The State called Fort Worth police officer, Roberto Romero to identify crime scene photographs.(RR III 38).

The State called Gerardo Moreno, a 17-year-old who lived at the apartments. He testified that he heard the shots and his mother called the police.(RR III 41-47). He told Andrew Horvath to stay off the patio because he was dripping blood on the patio. Moreno testified that he heard three shots.

Also called to testify was Mary Alice Rivas, an employee of Wal-Mart who identified the store video of Appellant and the cash register tape showing the purchase of the shotgun shells.(RR III 119-121).

The State called to as a witness, police officer Weldon Walles to identify shells he found at the scene. He also testified that a shotgun is a deadly weapon.(RR III 122-136).

The State called to testify Fort Worth police officer, Patrick Gass, who recovered the pickup truck and found a military style rifle in the truck.(RR III 139). which did not work properly?

The State also called as a witness Fort Worth police officer, Charlotte Smith. She determined that the pickup truck belonged to Appellant.(RR III 151). ← Transcript

The State also called to testify Mandy Keisel. She had known the Appellant for several years and was at the scene south of Fort Worth on the evening of February 21, 2002.(RR III 154-160). She testified that everyone at that time appeared to be acting normal. But it was unusual for Bart to approach someone for Drugs? She said that Michael and Andrew, and Jason and Daniel and Appellant hung out there for

15 to 20 minutes.(RR III 162). She thought it was a bit awkward for Appellant to ask a random person where he could buy drugs.(RR III 162). When they left they asked her if she wanted to come with them. She and her friend, Tara, decided to remain there instead of leaving with them. She identified the Appellant in the courtroom.(RR III 163). After the five of them left, the witness and her two friends, Tara and Cody waited for 5 to 10 minutes.(RR III 164). She then called Appellant on his cell phone because she had some concerns about the situation. She was worried that the Appellant and his friends were going to beat up Williams and Horvath.(RR III 165). She and Tara took Cody to her house and there they saw Appellant, Jason and Daniel pulling up.(RR III 166). They told the three guys to follow them back to Tara's house. She saw that Daniel's hand was bleeding, and that he was upset and not acting normal.(RR III 168). Jason appeared to be scared. Appellant seemed normal.(RR III 169). Tara drove Daniel and Jason home. When Tara returned, she asked Appellant what was wrong. He asked them not to tell and said that he had robbed Michael and Andrew and that he shot them and left them for dead. He acted normal as if it was no big deal.(RR III 170, 171). He asked her to lie to the police. She viewed the security video from Wal-Mart and identified Appellant on the video, getting shotgun shells.(RR III 178, 179). Appellant had been shooting the shotgun at the Rice Paddy earlier.(RR III 177,178).

Also testifying for the State was Tara Green. Tara called the Appellant while he was at the Wal-Mart store. He told her he was getting shotgun shells in case anything happened, that they would be his protection.(RR III 191). When the three guys left earlier, they were all

acting pretty normal. Later at her house he told them that he shot two people. He thought that they were dead. He did not seem upset.(RR III 195). She had seen him previously with a shotgun. She also viewed the Wal-Mart videotape and identified the Appellant on the tape.(RR III 198). She testified that she considered him to be a good person.(RR III 202, 203). She told the police that the Appellant has been acting strange before this happened. His behavior was different from that she was used to seeing.(RR III 205, 206).

Stephen Ancira also testified for the State. He said that during the early morning hours of February 23, 2002 on Highway 377 in Hood County, Texas, between Granbury and Tolar, he saw Appellant driving in the opposite direction with his emergency lights flashing. He pulled around behind Appellant's vehicle, thinking he needed help. The Appellant got out of his truck, and the witness got out of his vehicle. He asked Appellant whether he needed help. Appellant said he needed tools for engine work. The witness said he did not have any tools and got back into his car. As he was driving off Appellant shot a gun at them. A bullet fragment struck a passenger in the vehicle.(RR III 213-219).

Richard Weaver testified that he was the passenger in the vehicle who was struck by the bullet fragment.(RR III 225).

Jan Ancira corroborated her husband's testimony about the incident on Highway 377. She testified that Appellant appeared to her to be drunk.(RR III 238).

Juan DeLeon, an investigator with the Tarrant County District Attorney's Office, identified the bullet fragment that struck Mr. Weaver.(RR III 240).

Ronald Fazzio, a forensic firearms examiner for the city of Fort Worth police department crime lab, examined two shotgun shells. He determined that the shells were both fired from the same shotgun.(RR III 246). He did not find any usable fingerprints however.

A number of witnesses testified for the Appellant.

William Gordon, president of the Fort Worth city credit union identified business records consisting of checks written on Appellant's bank account.(RR IV 4, 5).

Appellant's mother, Missy Adams, testified. She moved in with Appellant's father when she was 14 years of age. Appellant was born in 1982. His father was killed when he was two years old.(RR IV 9,10). The relationship between Appellant's mother and father was abusive.(RR IV 11). Thereafter she married Robert Hampton. During that time Appellant spent a lot of time at his grandmother's house.(RR IV 13). Appellant's mother then began a relationship with a man named Dean Coldwell. He was an alcoholic and he would be abusive, and Appellant witnessed some of that abuse.(RR IV 14). Thereafter she married another man named Terry Stephens. During that time she continued to have a relationship with Dean.(RR IV 15).

When Appellant was four years old, his mother saw a big change in him. He cried a lot and was scared to leave her. Appellant felt dirty and would go to the bathroom and wash his hands a lot. During this time he spent a lot of time with his mother's stepfather.(RR IV 16, 17). When Appellant was 10 years old, he did not do well in school. He was having problems in school.(RR IV 22-23). She married another man, named Cory. At the time of trial she was still married to him.(RR IV 24).

Appellant repeated third grade. His mother worked with a counselor at school to try to help him. When Appellant turned 13, he became more despondent and seemed to withdraw more.(RR IV 25, 26). Appellant also was getting into drugs.(RR IV 28). Appellant's mother applied for special education for him.(RR IV 27, 28). When Appellant was 13, he was shy. Appellant's grandmother and grandfather on his father's side both committed suicide.(RR IV 31). When Appellant was 14 years of age one of his friends committed suicide.(RR IV 34). He dropped out of school in the ninth-grade. He could not understand how to complete employment applications and his mother would have to help.(RR IV 37, 38). Appellant had a girlfriend for five years but they broke up in January of 2002.(RR IV 44). His mother took him to the Texas Rehabilitation Commission when he was 19 years old, in January of 2002.(RR IV 44). They gave him a prescription for Paxil. While waiting several weeks to complete the paperwork in order to have the prescription filled, his mother gave him Paxil that his stepfather had been prescribed.(RR IV 46, 47). His mood at first began to get better.(RR IV 48).

On February 15, 2002, she went with him to the bank and noticed that he was talking faster.(RR IV 50). The next day, Saturday, February 16, Appellant received phone calls that disturbed him. His friends were telling him that his girlfriend had been sleeping with other men.(RR IV 52-54). His eyes were wide and he was bouncing his legs under the kitchen table. His thoughts appeared to be rushing, he was a rambling and he asked his mother to physically examine him for a sexually transmitted disease.(RR IV 55).

The following day he went to church. After coming home, he took his truck to the carwash and was gone for an hour and a half. After coming home he washed the truck again.(RR IV 56). He then showered, ate some food, and began lifting weights. He alternated watching television and lifting weights and when he spoke, he seemed loud.(RR IV 57, 78). The next day he went to work and after coming home went to Discount Tire, and later that evening began lifting weights, alternating with watching television.(RR IV 59, 60). The next day, Tuesday, he did the same thing. He seemed very agitated, his legs moving constantly and was very loud and sounded drunk. His mother had never seen him like that before.(RR IV 61-63).

Appellant had never been convicted of a felony in the State or any other state.(RR IV 63).

When she spoke to him on Thursday, he was so loud on the phone his stepfather could hear him from across the table. He was really loud, talking faster, and sounded like he was drunk. She was alarmed by his behavior.(RR IV 64). She spoke to him by telephone on Thursday night and he was slurring his speech so badly that she could not understand him. On Friday she spoke with him by telephone, and he sounded like a wild man.(RR IV 65). On Saturday, the Appellant came home and his eyes were the size of eggs and he was bouncing around, slurring his speech, and loud. The next time she spoke with him, he was in jail.(RR IV 67-69).

Tiffany Philips testified she had previously dated Appellant for a number of years. She said that he was very sweet, caring, well mannered, shy, and wanted to please

people.(RR IV 99). The Sunday before the incident she saw him in church. He was very fidgety, bouncing his legs and could not sit still. He whispered to her very loudly. He could not keep his legs still, could not sit down for a long period of time.(RR IV 101, 102).

She next spoke with him on the day following Thursday, February 21. She called him because she had spoken with his mother who reported that he was not acting like himself and was being weird. When she spoke to him on the telephone he was talking really fast and not making any sense. He started ranting and raving about something that she did not understand. Appellant did not ordinarily use profanity but was doing so in this conversation.(RR IV 103-105).

She next saw Appellant the following Saturday at her mother's residence in Granbury. He showed up unannounced with his friend Daniel. He came in without knocking. He was very loud. His eyes were wide open and he was slurring his speech and talking faster and talking loud and his face was blank and angry.(RR IV 106-110).

Paula Adams Thomas was called as a witness. She was a friend of the family and had known Appellant since he was 10 years old. Appellant never used profanity around her. He was always a loving person. She saw him in church on Sunday before the incident. He was very fidgety.(RR IV 143-150).

Dr. Edwin John Stone, MD, a psychiatrist, testified that psychologist, Dr. Warren, had given Appellant a battery of psychological tests.(RR IV 154-159). The test results showed that Appellant had a learning disability, Attention Deficit Hyperactivity Disorder and that he had been overusing alcohol and marijuana.(RR IV 159). He testified that ADD caused

difficulty in keeping attention focused. Further, it makes it difficult to concentrate and follow-through or pay consistent attention. Further such persons have a tendency to act on impulse, and a tendency to respond with strong emotional responses to things that they encounter.(RR IV 160-165). He also saw evidence of dyslexia.(RR IV 166).

He testified that people with ADD are more disrupted by stress than someone who doesn't have it.(RR IV 169). It was his opinion that Appellant, prior to the first couple of weeks in February of 2002, had learned to cope with it.(RR IV 170-171). Psychiatrists, Dr. Ouseph, who prescribed the Paxil did no testing of Appellant.(RR IV 173-174).

Dr. Stone testified that he would not have prescribed Paxil to someone with attention deficit disorder.(RR IV 175). Dr. Stone, in his professional medical opinion testified that the actions of the Appellant in the days preceding the incident exhibited symptoms of hypomania, which Paxil contributed to and induced.(RR IV 179, 180).

add more of what the doctor stated.

In rebuttal the State called Scott Christian, an employee of the Tarrant County Sheriff's Department who testified that Appellant had not been a disciplinary problem while in jail.(RR IV 205-207).

↑ need to add logs from jail statements,

Also testifying for the State was Mimi Parks, a case worker with the Department of Mental Health and Mental Retardation. She testified that Appellant had made no complaints regarding Paxil since being in jail.(RR IV 216). She testified that Appellant had admitted to using Xanax for a year, and had been using marijuana since age 14. He also admitted to using alcohol since age 15. (RR IV 212)

not so put medication change in.

made jail medline in appeal.

Appellant had never been convicted of a felony in the State or any other state.(RR IV 63).

SPECIAL STATEMENT TO THE COURT

This brief is filed by Court appointed Counsel for Appellant on appeal, in accordance with the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and *Stafford v. State*, 813 S.W.2d 503 (Tex.Crim.App. 1991). Court appointed Counsel for Appellant has filed with this Court a Motion to Withdraw as Court appointed Counsel on Appeal with supporting exhibits in accordance with the procedures and standards set out in *Johnson v. State*, 885 S.W.2d 641 (Tex.App. - Waco 1994, pet ref'd). After thorough examination of the clerk's record and reporter's record, Counsel for Appellant can find no Ground of Error that can be supported by the record. Pursuant to the guidelines for such briefs set out in *High v. State*, 573 S.W.2d 807 (Tex.Crim.App. 1978), Counsel for Appellant has in the Summary of the Evidence above discussed the evidence adduced at trial, and pointed out where pertinent testimony may be found in the record, and Counsel on Appeal has set out the points in the record where objections were made, the nature of the objections, the trial court's rulings on the same, and discussed why the trial court's ruling is correct or why the Appellant was not harmed by the ruling of the court as possible Points of Error below.

Any objections of the State that were overruled and objections by Appellant's Counsel that were sustained where no request for instruction to disregard or motion for mistrial was made following such favorable ruling of the court are not included since no harm can be

shown. Appellant's Counsel has examined the indictment which is sufficient in light of no motion to quash being filed. *Rodriguez v. State*, 799 S.W.2d 301(Tex.Crim.App.1990).

Appellant did not object to the State's questioning of potential jurors on voir dire. The State objected to Appellant's questioning of potential jurors, but the court overruled such objections.

Standard of Review of Error Following Plea of Guilty

Tex. R. App. P. 25.2(b)(3) provides that if the appeal in a criminal case is from a judgment rendered on a defendant's plea of guilty or nolo contendere under Code of Criminal Procedure, Article 1.15, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant the notice of appeal must: (a) specify that the appeal if for a jurisdictional defect; (b) specify that the substance of the appeal was raised by written motion and ruled on before trial; or (c) state that the trial court granted permission to appeal. Code of Criminal Procedure, Article 1.15 provides as follows:

> "No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause."

Article 1.15 applies however only when there is no jury trial. *Berry v. State*, 504 S.W.2d 501 (Tex.Crim.App. 1974). *Lindley v. State*, 736 S.W.2d 267, 275 (Tex.App. - Fort Worth 1987, pet ref'd untimely filed). [Article 1.15 applies only when the defendant has waived his right of trial by jury.]

In the present case, the defendant entered a plea of guilty to the jury. Accordingly, by its terms, Tex.R.App.P. 25.2 also does not apply since the appeal is not "from a judgment rendered on the defendant's plea of guilty or nolo contendere under the Code of Criminal Procedure, Article 1.15 . . . ".

Cite case on not being Compitant

A valid plea of guilty or nolo contendere waives the right to appeal a claim of error only when the judgment of guilt was rendered independent of and is not supported by the error. This is true whether the plea is entered with or without an agreed recommendation of punishment by the state. *Young v. State*, 8 S.W.3d 656, 667 (Tex.Crim.App. 2000). The record in this direct appeal does not reflect any error that caused the entry of a guilty plea. Therefore, the analysis below will deal only with the evidence, argument and jury charge dealing with punishment. Any question of the propriety of the actions of trial counsel is not addressed, as same may not be raised in a direct Appeal. *Rylander v State,* 101 S.W. 3d 107(Tex Crim.App. 2003).

POSSIBLE POINT OF ERROR NUMBER ONE

THE TRIAL COURT COMMITTED ERROR IN STRIKING TWO PROSPECTIVE JURORS AT THE REQUEST OF THE STATE

Standard of Review

To show error in the trial court's grant of the State's challenge of a prospective juror for cause, appellant must demonstrate one of two things: (1) the trial judge applied the wrong legal standard in sustaining the challenge, or (2) the trial judge abused his discretion in applying the correct legal standard. *Vuong v. State*, 830 S.W.2d 929, 943 (Tex.Crim.App.), *cert. denied*, 506 U.S. 997, (1992); *Jones v. State*, 982 S.W.2d 386, 388 (Tex. Crim. App. 1998). The erroneous granting of a challenge for cause will not result in harm to the defendant so long as the jury actually selected was composed of qualified persons. It is presumed that jurors are qualified absent some indication in the record to the contrary. In essence, the record shows that the defendant is not harmed by such an error when it contains no indication that those who served on the jury were unfit for duty. *Ford v. State*, 73 S.W.3d 923, 925 (Tex. Crim. App. 2002).

Argument and Authorities

At the request of the state, prospective jurors Nos. 30 and 49 were stricken for allegedly being unable to be fair and impartial. (RR II 134). Here there is no evidence that the resulting members of the jury were not qualified to serve. Therefore, there is no error, or in the alternative, no harm.

POSSIBLE POINT OF ERROR NUMBER TWO

THE TRIAL COURT COMMITTED ERROR IN FAILING TO STRIKE A JUROR AT THE REQUEST OF APPELLANT

Standard of Review

To preserve error on the failure of the trial court to grant a challenge for cause against a prospective juror, an appellant must demonstrate on the record that he asserted a clear and specific challenge for cause, that he used a peremptory challenge on the complained-of venireperson, that all his peremptory challenges were exhausted, that his request for additional strikes was denied, and that an objectionable juror sat on the jury. *Green v. State*, 934 S.W.2d 92, 105 (Tex.Cr.App. 1996), *cert. denied*, 520 U.S. 1200, (1997). When the trial judge errs in overruling a challenge for cause against a venireperson, the defendant is harmed only if he uses a peremptory strike to remove the venireperson and thereafter suffers a detriment from the loss of the strike. *Demouchette v. State*, 731 S.W.2d 75, 83 (Tex.Cr.App. 1986), *cert. denied*, 482 U.S. 920, (1987).

Argument and Authorities

Here Appellant requested the court to strike for cause prospective juror No. 53 (RR III 135). The Court denied this request. However, Appellant did not request additional peremptory challenges from the court. Therefore whatever error may have occurred was not preserved.

POSSIBLE POINT OF ERROR NUMBER THREE

THE TRIAL COURT COMMITTED ERROR IN VARIOUS EVIDENTIARY RULINGS

Standard of Review

Evidence rulings in general are non-constitutional errors. *Couchman v. State*, 3 S.W.3d 155, 160 (Tex.App. - Fort Worth 1999, pet ref'd). Further, any such error that does not affect the substantial rights of the Appellant must be disregarded. Tex.R.App.P. 44.2(b).

The admission or exclusion of evidence is reviewed under an abuse of discretion standard. *Briones v. State*, 12 S.W.3d 126, 128 (Tex.App. - Fort Worth 1999, no pet). To preserve error when the court erroneously excludes evidence the appellant must make the substance of the evidence known to the court by offer unless it was apparent from the context within which questions were asked. Tex. R. Evid. 103(a)(2). The appellant must further offer what the witness's excluded response would have been. *Johnson v. State*, 925 S.W.2d 745, 749 (Tex. App.-Fort Worth 1996, pet. Ref'd.).

Argument and Authorities

A. Appellant objected to the prosecutor leading the witness, which was overruled. (RR III 112) However, the prosecutor then asked the question in a non-objectionable manner and the appellant did not object. Any error was cured.

B. The State objected to Appellant's mother telling what her stepfather did for a living, and the court sutained the objection. (RR IV 8). However, the same information was elicited within the next few questions. Any error was cured.

C. The State objected to Appellant's mother's non-responsive answer, which was sustained. (RR IV 11). The answer was non-responsive and there was no error.

D. The State objected to the relevancy of Appellant's mother testifying about Robert Hampton and it was sustained (RR IV 12). Later questioning elicited information about Robert Hampton. Any information that was not elicited was not presented in an offer of proof, so any error was waived.

E. The State objected to Appellant's mother's non-responsive answer, which was sustained. (RR IV 13). The answer was non-responsive and there was no error. Further, additional information was elicited by later questioning.

F. The State objected to Appellant's mother speculating about what her son knew. (RR IV 16). The question, as phrased, did call for speculation and there was no error.

G. The State objected to Appellant's mother testifying about what her son's school teacher said to her, as being hearsay. Such objection was sustained. (RR IV 22). There was no error. Further, Appellant's school records were admitted later in the trial. (RR IV 88). Therefore, any error was cured when such evidence was placed before the jury. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

H. The State objected to Appellant's mother testifying about what her son's school teacher said to her, as being hearsay. Such objection was sustained. (RR IV 23). There was no error. Further, Appellant's school records were admitted later in the trial. (RR IV 88). Therefore, any error was cured when such evidence was placed before the jury. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

I. The State objected on relevancy grounds regarding the fact that Appellant's mother's step-father was arrested on molestation charges. The objection to relevancy was sustained. (RR IV 26, 27). Specifically, that portion of the record showed:

Q. And when Bart was 13, was this man arrested?
A. Yes.
MS. HARTMANN: Excuse me, Your Honor. May we approach?
THE COURT: Okay.
(Outside the hearing of the jury)
MS. HARTMANN: Object to relevance.
THE COURT: What is the relevance?
MR. WESTFALL: He was arrested for sexually abusing children in the neighborhood --
THE COURT: What is the relevancy of the arrest?
MR. WESTFALL: He's Bart's family. He was arrested for sexually abusing children.
THE COURT: The relevancy is?
MR. WESTFALL: I mean, it's family dynamics. In a punishment case anything you deem relevant is relevant. It is family dynamics, something for the jury to take into consideration. The allegation was his grandfather abused --
MS. HARTMANN: If it is relevant, the prejudicial outweighs the relevancy. We would object under --
MR. WESTFALL: He abused her for several years, and then she continued to take him over to Dub's house, and then Dub is arrested for molesting neighborhood

children, and all of this kind of had an effect on Bart. It was traumatizing to him. It is not clear whether he ever abused Bart. I am not going to make an allegation that he did.

MS. HARTMANN: That's way out there.

THE COURT: I am not going to find that it is relevant."

Evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing . Tex. Code Crim. Pro. Art. 37.07, §3(a). In *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999) the court said;

> "Admissibility of evidence at the punishment phase of a non-capital felony offense is a function of policy rather than relevancy. This is so because by and large there are no discreet factual issues at the punishment stage. There are simply no distinct "facts . . . of consequence" that proffered evidence can be said to make more or less likely to exist. Rather, "deciding what punishment to assess is a normative process, not intrinsically factbound."
>
> Miller-El v. State, 782 S.W.2d 892, 895-96 (Tex. Cr. App. 1990) (footnote and citations omitted). Determining what is relevant then should be a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case."

One purpose of Art. 37.07 §3(a) is for the factfinder to discover as much relevant information as possible about the defendant before assessing punishment. *Arthur v. State*, 11 S.W.3d 386, 392 (Tex. App.--Houston [14th Dist.] 2000, pet. ref'd). It encourages "truth in sentencing" by opening the doors to all relevant evidence in the punishment phase. *Peters v. State*, 31 S.W.3d 704, 716-17 (Tex. App.--Houston [1st Dist.] 2000, pet. ref'd). The failure of the trial court to admit evidence otherwise relevant to sentencing can result in reversal. *Id.*

Here the arrest occurred seven years before the offense, Appellant's trial counsel specifically disavowed any intention of offering the evidence to claim that Appellant was molested. Instead it was offered to show family dynamics. No evidence was offered to show the actual effect it had on Appellant. When the considerable amount of other evidence that was admitted about Appellant's family dynamics and upbringing is considered there does not appear to be any arguable ground of error in the exclusion of this testimony, particularly in the absence of any direct effect on Appellant that came from the arrest of his mother's step-father. Had there been testimony that this person molested Appellant it would have clearly been admissible to show the molestation.

There does not appear to be error here, or if error, no harm that could arguably result in reversal.

J. The State objected to Appellant's mother testifying about what her son's doctor said to her, as being hearsay. Such objection was sustained. (RR IV 29). There was no error. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

K. The State objected to Appellant's mother's non-responsive answer, which was sustained. (RR IV 32). The answer was non-responsive and there was no error.

L. The State objected to Appellant's mother testifying about what her son's principal said to her, as being hearsay. Such objection was sustained. (RR IV 32). There was no error.

Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

M. The State objected to Appellant's mother testifying about what her son's principal said to her, as being hearsay. Such objection was sustained. (RR IV 33). There was no error. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

N. The State objected to Appellant's mother's non-responsive answer, which was sustained. (RR IV 34). The answer was non-responsive and there was no error.

O. The State objected to Appellant's mother's non-responsive answer, which was sustained. (RR IV 35). The answer was non-responsive and there was no error.

P. The State objected to Appellant's mother speculating about what her son knew. (RR IV 36). The question, as phrased, did call for speculation and there was no error.

Q. The State objected to Appellant's mother's non-responsive answer, which was sustained. (RR IV 38). The answer was non-responsive and there was no error.

R. The State objected to Appellant's mother testifying about what her son's employer said in a document, as being hearsay. Such objection was sustained. (RR IV 39). There was no error. Further the question had already been answered before the objection and no request

was made by the State to instruct the jury to disregard or that it be stricken from the record. The witness' answer was part of the body of evidence the jury was allowed to consider. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). Therefore, no substantial right of the appellant was affected. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

S. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 39). The answer was non-responsive and there was no error.

T. The State objected to Appellant's mother testifying about why her son's employer fired him, as being hearsay. Such objection was sustained. (RR IV 40). There was no error. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

U. The State objected to Appellant's mother testifying about what her son's doctor told her, as being hearsay. Such objection was sustained. (RR IV 46). There was no error. Further, that physician's diagnosis was admitted by way of background for a testifying expert's opinions in any event. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark*

v. State, 881 S.W.2d 682 (Tex. Crim. App. 1994).

V. The State objected to Appellant's mother testifying about what her son told her, as being hearsay. Such objection was sustained. (RR IV 47). There was no error. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

W. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 47). The answer was non-responsive and there was no error.

X. The State objected to Appellant's mother testifying about what her son told her, as being hearsay. Such objection was sustained. (RR IV 52). There was no error. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

Y. The State objected to Appellant's counsel leading the witness, and it was sustained. (RR IV 52). There was no error.

Z. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 54). The answer was non-responsive and there was no error.

AA. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 56). The answer was non-responsive and there was no error.

BB. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 59). The answer was non-responsive and there was no error.

CC. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 60). The answer was non-responsive and there was no error.

DD. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 61). The answer was non-responsive and there was no error.

EE. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 62). The answer was non-responsive and there was no error.

FF. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 63). The answer was non-responsive and there was no error.

GG. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 64). The answer was non-responsive and there was no error.

HH. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 66). The answer was non-responsive and there was no error.

II. The State objected to Appellant's mother's nonresponsive answer, which was sustained. (RR IV 69). The answer was non-responsive and there was no error.

JJ. The State objected to Appellant's mother testifying about what her son's doctor told her, as being hearsay. Such objection was sustained. (RR IV 71). There was no error. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim.

App. 1994).

KK. The State objected to Tiffany Philips' testifying about what her grandmother told Appellant on the phone, as being hearsay. Such objection was sustained. (RR IV 104). There was no error. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

MM. The State objected to Tiffany Philips' nonresponsive answer, which was sustained. (RR IV 104). The answer was non-responsive and there was no error.

NN. The State objected to Tiffany Philips' testifying about what Appellant knew, as being speculation. Such objection was sustained. (RR IV 105). There was no error.

OO. The State objected to Tiffany Philips' nonresponsive answer, which was sustained. (RR IV 105). The answer was non-responsive and there was no error.

PP. The State objected to Paula Adams-Thomas testifying about what she learned from others, as being hearsay. Such objection was sustained. (RR IV 150). There was no error. Appellant did not offer the same evidence for any other purpose than the truth of the matter asserted, and therefore no error was preserved if there was any other permissible reason for admission of the evidence. Tex. R. Evid. 105(b); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994).

QQ. The State objected to Dr. Edwin John Stone testifying that it appeared that neither Dr Ouseph nor Dr. Warren read one another's reports. Such objection was sustained. (RR IV

174). However, the question had already been answered and the answer was not stricken from the record and the jury was not told to disregard it. The witness' answer was part of the body of evidence the jury was allowed to consider. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). Therefore, no substantial right of the appellant was affected.

POSSIBLE POINT OF ERROR NUMBER FOUR

THE TRIAL COURT COMMITTED ERROR IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S JURY ARGUMENT

Standard of Review

The four permissible areas of jury argument are (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answer to the argument of opposing counsel; and (4) plea for law enforcement. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999), *cert. denied*, 531 U.S. 837 (2000); The court of appeals disregards improper jury argument unless it affects the appellant's substantial rights. Tex. R. App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). The prosecutor's statements are analyzed in the context of the entire jury argument, rather than in isolated sentences. *Castillo v. State*, 939 S.W.2d 754, 761 (Tex. App.--Houston [14th Dist.] 1997, pet. ref'd).

If a jury argument exceeds the bounds of proper argument, the trial court's erroneous overruling of a defendant's objection cannot be reversible error unless, in light of the record as a whole, the argument had a substantial and injurious effect or influence on the jury's

verdict. Tex. R. App. P. 44.2(b); *Martinez v. State*, 17 S.W.3d 677, 692-93 (Tex. Crim. App. 2000); *White v. State*, 2003 Tex. App. LEXIS 2033, page 13, (Tex. App.-Fort Worth 2003).

Argument and Authorities

During jury argument the state asserted that there was no evidence of Appellant experiencing hypomania on the day of the offense, to-wit; February 21, 2002. Appellant objected that this mischaracterized the evidence. (RR V 16). The court overruled the objection. A review of the evidence indicates that the state was arguing its position regarding what the evidence showed. As such it constituted summarization and deductions from the evidence, permissible areas of jury argument. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). There was no error.

POSSIBLE POINT OF ERROR NUMBER FIVE

THE EVIDENCE WAS BOTH LEGALLY INSUFFICIENT AND FACTUALLY INSUFFICIENT. TO SUSTAIN A FINDING THAT APPELLANT COMMITTED THE OFFENSES CHARGED

Standard of Review

Legal Sufficiency

The standard for reviewing the legal sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979) Dickey v. State, 693 S.W.2d 386. 387 (Tex. Crim. App. 1984). The standard is the same in both direct and circumstantial evidence cases.

Chambers v. State, 711 S.W.2d 240, 244-45 (Tex. Crim. App. 1986) Miranda v. State, 813 S.W.2d 724, 731 (Tex. App.--San Antonio 1991, pet. ref'd).

Factual Sufficiency

In determining the factual sufficiency of the elements of the offense, the reviewing court views all the evidence without the prism of 'in the light most favorable to the prosecution, [i.e., views the evidence in a neutral light,] and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Clewis v. State, 922 S.W.2d 126, 129 (Tex.Crim.App. 1996). The court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact. Jones v. State, 944 S.W.2d 642, 647 (Tex.Crim.App.1996), cert. denied, 522 U.S. 832, 118 S.Ct. 100, 139 L.Ed.2d 54 (1997). In conducting its factual sufficiency review, an appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. Clewis v. State, 922 S.W.2d at 133. This review, however, must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder, and any evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility given to witness testimony. Jones v. State, 944 S.W.2d at 648. Johnson v. State, 23 S.W.3d 1, 6 (Tex. Crim. App. 2000).

Argument and Authorities

Since Appellant entered a plea of guilty, he may not attack the sufficiency of the evidence. Ex parte Martin, 747 S.W.2d 789, 792 (Tex.Crim.App. 1988). Stahle v. State, 970 S.W.2d 682, 688 (Tex.App. - Dallas 1998, pet ref'd). Therefore, there is no error.

As regards the evidence to support a particular punishment, there is no factual sufficiency review of punishment in noncapital cases when punishment falls within the statutory range. *Hollywood v. State*, 2003 Tex. App. LEXIS 726, page 4 (Tex. App.-Dallas 2003); *Bradfield v. State*, 42 S.W.3d 350, 352 (Tex. App.-Eastland 2001, pet. Ref'd); *Flores v. State*, 936 S.W.2d 478, 479 (Tex. App.-Eastland 1996, writ ref'd).

PRAYER

WHEREFORE, PREMISES CONSIDERED, the undersigned attorney requests the Court of Appeals to review the record on appeal, consider the Motion to Withdraw as Court Appointed Counsel with supporting affidavit and review the foregoing Brief in Support of Motion to Withdraw, and enter its order finding that this appeal is wholly frivolous and grant the Motion to Withdraw.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing was served upon the attorney for Appellee, the State of Texas, Charles Mallin, Tarrant County Justice Center, 401 W. Belknap, 7th Floor, Fort Worth, Texas 76196 by hand-delivery, in accordance with the Texas Rules of Appellate Procedure, this the 16th day of May, 2003.

Paul Francis