

CASE NO. PD-0280-22

IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
6/14/2022
DEANA WILLIAMSON, CLERK

JOE LUIS BECERRA

VS.

THE STATE OF TEXAS

On Appellant's Petition for Discretionary Review
from the Tenth Court of Appeals, Wace, Texas, in case no. 10-
17-00143-CR affirming the conviction in cause no. 14-03925-
CRF-361 in the 361st District Court of Brazos County, Texas

STATE'S REPLY TO
APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

JARVIS PARSONS
DISTRICT ATTORNEY
BRAZOS COUNTY, TEXAS

Ryan Calvert
Assistant District Attorney
State Bar Number 24036308
300 E. 26th Street, Suite 310
Bryan, Texas 77803
(979) 361-4320
Direct Line: (979) 361-4332
rcalvert@brazoscountytexas.gov

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

APPELLANT: Joe Luis Becerra

Trial Counsel: David Barron (deceased)
118 N. Washington
Bryan, Texas 77803

Appellate Counsel: Lane Thibodeaux
P.O. Box 523
Bryan, Texas 77806
(979)775-5700
lanet1@msn.com

THE STATE OF TEXAS: Jarvis Parsons
District Attorney
300 E. 26th Street, Suite 310
Bryan, Texas 77803

Trial Counsel: Ryan Calvert
Ekua Assabill
Assistant District Attorneys

Appellate Counsel: Ryan Calvert
Assistant District Attorney
(979)361-4320
rcalvert@brazoscountytexas.gov

TRIAL COURT: Hon. Steve Smith (Jury Selection)
Hon. J.D. Langley (Trial)
361st District Court
300 E. 26th Street, Suite 420
Bryan, Texas 77803
Brazos County, Texas
(979)361-4220

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Rule 606(b) of the Texas Rules of Evidence prohibits evidence of “incidents that occurred during the jury’s deliberations.” The uncontroverted petit juror affidavit admitted at Becerra’s Motion for New Trial hearing attested the alternate juror voted on the verdict, and after removal and instruction no further vote was taken. Is the evidence that no further vote was taken an incident during deliberations under Rule 606(b) and, if excludable, must Rule 606(b) yield to the need to prove a violation of Art. V, Sec. 13 of the Texas Constitution and Art. 33.01 of the Texas Code of Criminal Procedure?

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This Court has long held a rebuttable presumption of harm exists if a facial violation of Art. 36.22 of the Texas Code of Criminal Procedure is shown. The Court of Appeals acknowledged Becerra’s admitted evidence that the alternate juror voted on the verdict was admissible as outside evidence under Rule 606(b)(2)(A) of the Texas Rules of Evidence. Did the failure of that Court to apply the presumption based on this evidence so far deviate from accepted law so as to call for the exercise of this Court’s jurisdiction?

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The Tenth Court of Appeals correctly ruled that a jury of twelve rendered the ultimate verdict Appellant received. The alternate juror’s removal from the jury room and the Trial Court’s corrective instructions to disregard the alternate’s participation cured any error. That removal and those corrective instructions occurred well before the jury announced that it had reached a verdict. Further, even if the alternate juror’s participation constituted error, whether constitutional or statutory, the record supports the Trial Court’s finding beyond a reasonable doubt that any error was harmless.

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STATE'S REPLY TO
APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas, by and through its District Attorney, and
files this brief in compliance with Rule 68.9, Texas Rules of Appellate Procedure,
in response to Appellant's ground for review.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument only if granted to Appellant.

STATEMENT OF THE CASE

Appellant, Joe Becerra, was indicted for the offense of Unlawful Possession of a Firearm by a Felon. (CR at 5). The case was tried to a jury and on March 8, 2017, the jury found Appellant guilty. (4 RR 46). The jury also found that Appellant used or exhibited a firearm during the commission of the offense. (CR 84). Prior to trial, the State gave notice of Appellant's punishment enhancements. (2 RR 8). Following Appellant's punishment hearing to the Trial Court, the Judge found the punishment enhancements to be true and assessed Appellant's punishment at 55 years in the ID-TDCJ. (4 RR 89-91). On April 27, 2017, the Trial Court held a hearing on Appellant's Motion for New Trial and denied it. (5 RR 28; Supp. CR 97). Appellant appealed his case to the Tenth Court of Appeals. (Supp. CR 194).

STATEMENT OF PROCEDURAL HISTORY

The Tenth Court of Appeals affirmed Appellant's conviction on June 12, 2019. *Becerra v. State*, No. 10-17-00143-CR, 2019 Tex. App. LEXIS 4850 (Tex. App. – Waco June 12, 2019) (not designated for publication), ruling that Appellant had failed to preserve error. Appellant filed a Motion for Rehearing, which was denied on July 5, 2019. This Court granted Appellant's Petition for Discretionary Review, and ultimately found that Appellant had preserved error. *Becerra v. State*, 620 S.W.3d 745, 748 (Tex. Crim. App. 2021). This Court then remanded the case back to the Tenth Court of Appeals. *Id.* On remand, the Tenth Court of Appeals

again affirmed Appellant's conviction and sentence. *Becerra v. State*, No. 10-17-00143-CR, 2022 Tex. App. LEXIS 2602 (Tex. App. Apr. 20, 2022) (not designated for publication). Appellant filed a Motion for Rehearing, which was denied on May 3, 2022.

APPELLANT'S FIRST GROUND FOR REVIEW

Art. 36.22 of the Code of Criminal Procedure provides no person shall be permitted to be with a jury while it is deliberating. The petit juror affidavit admitted in Becerra's Motion for New Trial hearing established the alternate juror was present and participated in deliberations and voted on the verdict. What status, if any, does Art. 33.011(b) confer on alternate juror service permitting the presence and/or participation of the alternate during petit jury deliberations and did the alternate's act in voting violate Art. 36.22?

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This Court has long held a rebuttable presumption of harm exists if a facial violation of Art. 36.22 of the Texas Code of Criminal Procedure is shown. The Court of Appeals acknowledged Becerra's admitted evidence that the alternate juror voted on the verdict was admissible as outside evidence under Rule 606(b)(2)(A) of the Texas

Rules of Evidence. Did the failure of that Court to apply the presumption based on this evidence so far deviate from accepted law so as to call for the exercise of this Court's jurisdiction?

STATE'S REPLY TO APPELLANT'S GROUNDS FOR REVIEW

The Tenth Court of Appeals correctly ruled that a jury of twelve rendered the ultimate verdict Appellant received. The alternate juror's removal from the jury room and the Trial Court's corrective instructions to disregard the alternate's participation cured any error. That removal and those corrective instructions occurred well before the jury announced that it had reached a verdict. Further, even if the alternate juror's participation constituted error, whether constitutional or statutory, the record supports the Trial Court's finding beyond a reasonable doubt that any error was harmless.

Relevant Facts

At the conclusion of Appellant's trial, the jury retired to deliberate at 9:45 a.m. (4 RR 35). Approximately 45 minutes later, the State realized that the alternate had not been removed from the jury room and alerted the bailiff. (4 RR 39-40). At 10:31 a.m., the Trial Court removed the alternate juror from the jury room. (4 RR 35). At 10:45 a.m., the twelve petit jurors sent a note to the Trial Court asking for clarification on the special issue of whether Appellant used a deadly weapon. (4 RR 36); (CR 187).

The Trial Court brought the twelve jurors into the courtroom and instructed them that the alternate should not have been present during to deliberations, and to disregard any participation by the alternate. (4 RR 43). Immediately following the Trial Court's instruction, at 11:01 a.m., the twelve petit jurors resumed their

deliberations. (4 RR 44). At 11:30 a.m., the jury returned with a verdict of guilty of Unlawful Possession of a Firearm by a Felon. (CR 17), (4 RR 45-46). The twelve petit jurors also found that Appellant used or exhibited a firearm in the commission of the offense. (CR 186); (4 RR 46). The Trial Court then polled the jury. (4 RR 46). All twelve petit jurors affirmed their individual verdicts. (4 RR 46-48).

Appellant subsequently filed a Motion for New Trial, wherein he alleged all matters raised in this appeal. (CR 25-92). Appellant supported that motion with the affidavit of petit juror, Joshua Marion. (CR 43). Juror Marion's affidavit stated, in relevant part:

During the jury deliberations in the case, the individual later identified by the trial judge as the "alternate juror" voted on the verdict of "guilty" ultimately returned by the jury. The alternate juror's presence in the jury room was not discovered until after the verdict vote was taken on guilt by the jury.

...

After the alternate juror was excused the remaining 12 jurors did not revote on the issue of guilt as the verdict vote taken while the alternate juror was present in the jury room was unanimous.¹

(CR 43).

¹ Juror Marion's affidavit also claims that the alternate juror was discovered when the bailiff collected a note concerning the deadly weapon issue, and that the alternate remained with the jury until the entire jury was brought out for instructions. (CR 43). However, the record unequivocally shows that the alternate was removed at 10:31 a.m. after the State notified the bailiff. (4 RR 35, 39-40). The jury note concerning the deadly weapon was not received by the Trial Court until 10:45 a.m. (CR 187). The petit jurors were brought out and admonished to disregard the alternate at 11:01 a.m. (4 RR 44). The jury returned with a verdict at 11:30 a.m. (CR 17).

Discussion

For the sake of brevity, the State will respond to Appellant's three Grounds collectively.

In its analysis, the Tenth Court of Appeals appropriately considered the issues through the lens of whether the Trial Court abused its discretion in denying Appellant's Motion for New Trial, wherein all matters raised in this appeal were litigated. *Becerra*, 2022 Tex. App. LEXIS 2602 at *5, *8.

Constitutional Issue

The Tenth Court of Appeals correctly held that Appellant was convicted by a jury of twelve, rather than thirteen jurors. *Id.* at *10 (stating “The **ultimate verdict received** by [Appellant] was voted on by a panel of twelve jurors, and therefore, we find that in this proceeding there was no violation of Article V, Section 13 of the Texas Constitution.”) (emphasis added). In *Trinidad v. State*, this Court held that no violation of Article V, Section 13 occurs, so long as the “ultimate verdict” which the defendant “received” was decided by twelve jurors. 312 S.W.3d 23, 28 (Tex. Crim. App. 2010).

The record is undisputed that no verdict had been received at the time the Trial Court removed the alternate from the jury room, instructed the petit jurors that the alternate lacked equal status with them, and ordered the jurors to disregard the alternate's participation. (4 RR 35). Thus, at the time of the alternate's removal

and the court's corrective instructions, no verdict had been delivered, announced, or received by anyone.

Statutory Issue

On the issue of whether the alternate constituted an "outside influence" over the petit jurors, the Court of Appeals rightly observed that no authority exists for the notion that Tex. Code Crim. Proc. art. 36.22 is violated by an alternate juror's presence during deliberations. *Becerra*, 2022 Tex. App. LEXIS 2602, at *11.

Moreover, the Tenth Court of Appeals ruled that the affidavit of petit juror, upon which Appellant relies, is only partially admissible. *Id.* at *10. Specifically, the Court noted that the juror's affidavit is only admissible under Tex. R. Evid. 606(b) to the extent that it discusses whether a potential outside influence was brought to bear on the jury. *Id.*

Appellant's entire argument rests upon Juror Marion's statement that jurors did not re-vote on Appellant's guilt after the alternate's removal because all jurors agreed Appellant was guilty. (CR 43); (*See* Appellant's Petition, pp. 6-11). Juror Marion's affidavit was only admissible to determine "whether an outside influence was brought to bear on any juror." Tex. R. Evid. 606(b). However, the Court Appeals correctly observed that the portion of Marion's affidavit discussing the absence of a re-vote pertained to events occurring *after* the alleged outside influence was gone, and contained no evidence of whether the alternate juror impacted any

juror or the deliberations. *Id.* Thus, the Court of Appeals appropriately held that the portion of Juror Marion's affidavit discussing the absence of a re-vote after the alternate's removal was inadmissible.

Harm

This Court need not even address whether an alternate is a juror under the Texas Constitution, the statutory construction of the alternate juror provisions, the scope of evidence admissible pursuant to Tex. R. Evid. 606(b), or whether the Court of Appeals failed to presume harm to Appellant. Such analyses are unnecessary because the record supports the Trial Court's implicit finding *beyond a reasonable doubt* that, even if erroneous, the alternate juror's participation did not harm Appellant.

At the conclusion of Appellant's Motion for New Trial Hearing, the Trial Court found that, even if error existed, whether constitutional or statutory, it was "harmless." (5 RR 26). The Trial Court further found from the evidence that the alternate's actions did not "have an adverse affect on the guilty verdict returned by the other 12 individuals." *Id.*

If a statutory violation of Tex. Code Crim. Proc. art. 36.22 occurred, then harm is presumed unless the record establishes that the alternate juror did not actually influence any petit jurors. *See Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997). The Tenth Court of Appeals rightly observed, though, that "an outside

influence is only problematic if it has the effect of improperly affecting a juror's verdict...for or against a particular party.” *Becerra*, 2022 Tex. App. LEXIS 2602 at *9 (quoting *Colyer v. State*, 428 S.W.3d 117, 129 (Tex. Crim. App. 2014) (internal quotation marks removed)).

If constitutional error occurred, an even more stringent harm analysis is triggered, wherein reversal must occur unless the record establishes beyond a reasonable doubt that the error did not contribute to Appellant's conviction. Tex. R. App. Proc. 44.2(a). Thus, assuming that constitutional error occurred in Appellant's case, the Trial Court's denial of Appellant's Motion for New Trial amounts to a finding beyond a reasonable doubt that the alternate's participation did not contribute to Appellant's conviction. *See Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004) (stating that, when reviewing a trial court's denial of a motion for new trial, appellate courts presume that all reasonable findings that could have been made against the losing party were made). As outlined below, the record amply supports the Trial Court's finding beyond a reasonable doubt that Appellant was not harmed, even if error is assumed and the most stringent harm analysis is applied.

The core of Appellant's argument here is Juror Marion's affidavit, which states that the remaining twelve jurors did not re-vote on the issue of guilt after the alternate's removal because everyone agreed Appellant was guilty. (*Id.*). Taken at

face value, though, Juror Marion's affidavit means that, within a mere 46 minutes that the alternate was present, all thirteen people in the jury room agreed beyond a reasonable doubt that Appellant was guilty, without any disagreement among them.

Additionally, the twelve petit jurors did not notify the Trial Court that they had reached a guilty verdict until 29 minutes after being instructed to disregard the alternate's participation. (4 RR 44; CR17). Those jurors are presumed to have followed the Trial Court's instruction, and no evidence in the record suggests that they did not. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005) (stating that jurors are presumed to follow a trial court's instructions unless rebutted by evidence). During polling after the verdict, all petit jurors individually affirmed their belief beyond a reasonable doubt that Appellant was guilty of possessing a firearm. (4 RR 46-48).

Appellant contends that he was harmed merely because alternate initially had "equal voice and vote" with the other jurors. (Appellant's Petition, p. 5). Appellant claims that the error itself is the harm². With that argument, Appellant seeks to create a de facto structural error which is effectively immune from harm analysis. However, the right to twelve jurors is not structural. *Williams v. Florida*, 399 U.S.

² Note that, during oral argument at the Tenth Court of Appeals, Appellant overtly argued that "the harm is the vote, and the error is the vote." (Appellant's Oral Argument at the Tenth Court of Appeals - <https://www.youtube.com/watch?v=RHuFDo7KPdg&t=728s>, at 36:07).

78, 86, 99-100 (1970); *see also Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (noting errors immune from harm analysis are limited to “certain federal constitutional errors labeled by the United States Supreme Court as ‘structural’”). Thus, whether statutory or constitutional, any potential error in Appellant’s case is certainly subject to harm analysis.

Here, the record indisputably shows that, well-before informing the Trial Court that they had reached a verdict, the petit jurors knew that the alternate lacked equal voice and vote with them, and further knew to disregard anything the alternate might have said. Nevertheless, they convicted Appellant and individually affirmed their respective verdicts when polled. (4 RR 46-48).

Perhaps even more significantly, after the alternate’s removal and his status became clear, the twelve petit jurors decided beyond a reasonable doubt that Appellant *used or exhibited the firearm*. (CR 186). That fact proves that the alternate, who was not present when the deadly weapon issue was decided, bore no influence over the petit jurors in reaching their guilty verdict.

One cannot use a gun without first possessing it. Thus, the fact that the twelve petit jurors found beyond a reasonable doubt that Appellant *used* the gun necessarily means that they also independently believed beyond a reasonable doubt that Appellant *possessed* the gun, and was therefore guilty of the charged offense of Unlawful Possession of a Firearm by a Felon. *See* Tex. Penal Code §46.04.

Additionally, when reviewing constitutional or statutory error, overwhelming evidence of guilt is a factor to be considered. *Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002); *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). In Appellant's case, evidence that he possessed a firearm was truly overwhelming.

The record in Appellant's case established the following facts:

- A bullet which killed Jose Guadardo was recovered from his body. (3 RR 189, 192);
- No firearm was present at Guadardo's house by the time police arrived. (3 RR 174-75, 178);
- Appellant was the only person to leave Guadardo's house before police arrived. (3 RR 68-73, 147-152);
- Appellant had gunshot residue on his hands. (3 RR 205);
- Appellant's sister and niece both testified that Appellant asked his girlfriend, Sylvia, to retrieve his gun from the couple's car before the shooting. (3 RR 94-97, 160, 164-165);
- Sylvia confirmed that Appellant that she retrieved a gun from the couple's car and placed it in Appellant's hand. (3 RR 124-125).

Thus, the record establishes beyond a reasonable doubt that the alternate's participation neither influenced the petit jurors' verdict nor contributed to Appellant's conviction. Consequently, the Trial Court rightly denied Appellant's Motion for New Trial and the Tenth Court of Appeals' ruling is appropriate.

Despite Appellant's arguments, the record in this case does not call for this Court to wade into statutory construction, or to create out of whole cloth a new form of structural error which is immune from harm analysis. Because the Tenth Court

of Appeals properly ruled that no error was shown, because Appellant was not harmed even if error had been shown, and because the fact-specific nature of Appellant's case would not advance state-wide jurisprudence, Appellant's grounds for review are without merit and his Petition for Discretionary Review should be refused.

PRAYER

Wherefore, the State prays that the Court refuse Appellant's Petition for Discretionary review.

Respectfully submitted,

JARVIS PARSONS
DISTRICT ATTORNEY
BRAZOS COUNTY, TEXAS

/s/ Ryan Calvert

Ryan Calvert
Assistant District Attorney
300 E. 26th Street, Suite 310
Bryan, Texas 77803
State Bar Number 10098100
(979) 361-4320
Fax: (979) 361-4332
rcalvert@brazoscountytexas.gov

CERTIFICATE OF SERVICE

I, Ryan Calvert, do hereby certify that a true and correct copy of the State's Reply to Appellant's Petition for Discretionary Review was emailed on the 13th day of June, 2022 to:

- Lane Thiboedeaux, Attorney for Appellant, at lanet1@msn.com;
- State Prosecuting Attorney at information@spa.texas.gov.

/s/ Ryan Calvert


CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4(i)(3)

I certify that the foregoing document has a word count of 2,261 based on the word count program of Word 2013.

/s/ Ryan Calvert

APPENDIX A

***Becerra v. State*, No. 10-17-00143-CR, 2022 Tex. App. LEXIS 2602 (Tex. App. – Waco Apr. 20, 2022)**

 Neutral
As of: June 13, 2022 5:08 PM Z

Becerra v. State

Court of Appeals of Texas, Tenth District, Waco

April 20, 2022, Opinion Delivered; April 20, 2022, Opinion Filed

No. 10-17-00143-CR

Reporter

2022 Tex. App. LEXIS 2602 *; 2022 WL 1177391

JOE LUIS BECERRA, Appellant v. THE STATE OF TEXAS, Appellee

Notice: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] From the 361st District Court, Brazos County, Texas. Trial Court No. 14-03925-CRF-361.

Becerra v. State, 2019 Tex. App. LEXIS 4850, 2019 WL 2479957 (Tex. App. Waco, June 12, 2019)

Disposition: Affirmed.

Core Terms

alternate juror, juror, deliberations, trial court, jury room, motion for a new trial, voted, motion for mistrial, outside influence, violations, alternate, Appeals, jury deliberations, ultimate verdict, jury misconduct, regular juror, new trial, guilt

Case Summary

Overview

HOLDINGS: [1]-In an appeal from a conviction for possession of a firearm by a felon, the trial court did not abuse its discretion under Tex. Code Crim. Proc. Ann. art. 36.22 by denying the motion for mistrial based on the information it had before it at the time of its ruling. It was undisputed that the alternate juror was with the jury for approximately forty-five minutes before he was discovered and removed, however, defendant did not attempt to question any member of the jury or the alternate juror regarding what had taken place. Without a showing at time of the motion for mistrial that the

alternate juror had actually participated in deliberations or communicated with the regular jurors about the case, defendant had not at that time met his initial burden to raise a presumption of harm.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Alternate Jurors

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Alternates

Criminal Law & Procedure > Juries & Jurors > Size of Jury > Twelve Persons

Criminal Law & Procedure > Juries & Jurors > Size of Jury > Alternates

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Materials Allowed in Jury Room

HN1 **Disqualification & Removal of Jurors, Alternate Jurors**

Tex. Const. art. V, § 13 and Tex. Code Crim. Proc. Ann. art. 33.01 direct that juries in district courts are to contain twelve members. Tex. Const. Art. V, Sec. 13; Tex. Code Crim. Proc. Ann. art. 33.01. Alternate jurors are permitted to be selected and sworn in, and Tex. Code Crim. Proc. Ann. art. 33.011(b) that an alternate juror, if not called upon to replace a regular juror, shall no longer be discharged at the time the jury retires to deliberate but shall be discharged after the jury has

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rendered a verdict. Tex. Code Crim. Proc. Ann. art. 33.011(b). The statute does not give direction as to the whereabouts of the alternate juror during deliberations or if allowed to be in the jury room, the permitted extent, if any, of their role in deliberations. However, Tex. Code Crim. Proc. Ann. art. 36.22 states that no person shall be permitted to be with a jury while it is deliberating. Tex. Code Crim. Proc. Ann. art. 36.22.

Criminal Law & Procedure > Juries & Jurors > Size of Jury > Alternates

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Outside Influences

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Burdens of Proof

HN2 Size of Jury, Alternates

Tex. Code Crim. Proc. Ann. art. 36.22 provides that no person is permitted to be with a jury while it is deliberating, or to converse with a juror about the case on trial except in the presence and by the permission of the trial court. Tex. Code Crim. Proc. art. 36.22. Harm to the accused is presumed when a juror converses with an unauthorized person about the case. If the presumption of harm arises, the State has the burden to rebut the presumption by showing no injury or prejudice to the accused. However, the defendant has the initial burden to show that some discussion about the case on trial occurred between a juror and an unauthorized person. The defendant's burden is not satisfied if there is no showing what a reported conversation was about.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Juror Misconduct

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN3 Jury Deliberations, Juror Misconduct

Tex. Const. art. V, § 13 are jury misconduct claims and, as such, should be preserved as jury misconduct claims. A motion for new trial, supported by an affidavit, is the proper method for preserving a jury misconduct error.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > New Trial

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Juror Misconduct

HN4 Standards of Review, Abuse of Discretion

An appellate court reviews a trial court's denial of a motion for new trial under an abuse of discretion standard. A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. A defendant will be granted a new trial when the jury has engaged in such misconduct that the defendant did not receive a fair and impartial trial. Tex. R. App. P. 21.3(g). To warrant a new trial based on jury misconduct, the movant must establish not only that jury misconduct occurred, but also that it was material and probably caused injury.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Inquiry

Evidence > ... > Competency > Jurors > Deliberations

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Juror Misconduct

Evidence > ... > Competency > Jurors > External Influences

Evidence > ... > Competency > Jurors > Verdict Accuracy

HN5 Disqualification & Removal of Jurors, Inquiry

Generally, a juror may not testify as to any matter or statement occurring during the jury's deliberations, the effect the matter had on any juror's mind or mental process, or how the matter influenced the juror's decision-making. However, when there is an allegation of juror misconduct, Tex. R. Evid. 606(b) allows a juror

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to testify on whether an outside influence was improperly brought to bear on any juror. Tex. R. Evid. 606(b). Then, without delving into the jury's deliberations, the trial court must conduct an objective analysis to determine whether there is a reasonable probability that the outside influence had a prejudicial effect on the hypothetical average juror. The existence of an outside influence does not result in an automatic reversal, however. An outside influence is only problematic if it has the effect of improperly affecting a juror's verdict in a particular manner—for or against a particular party.

Counsel: For **Becerra**, Joe Luis, Criminal - Appellant: Lane D. Thibodeaux.

For The State of Texas, Criminal - State of Texas: Ryan Charles Calvert, Douglas Howell III, Jarvis J. Parsons, Nathaniel T. Wood.

Judges: Before Chief Justice Gray, Justice Johnson, and Justice Wright.

Opinion by: TOM GRAY

Opinion

MEMORANDUM OPINION

Joe Luis **Becerra** appeals from a conviction for possession of a firearm by a felon. Tex. Penal Code Ann. § 46.04. **Becerra** complains that his right to a twelve-person jury pursuant to Article V, Section 13 of the Texas Constitution was violated because an alternate juror was present during deliberations and that the presence of the alternate juror during deliberations violated Articles 33.01, 33.011, and 36.22 of the Code of Criminal Procedure. Because we find no reversible error, we affirm the judgment of the trial court.

On original submission, this Court held that **Becerra** had failed to preserve his complaints regarding the alternate juror because his objection was not made timely. See **Becerra v. State**, No. 10-17-00143-CR, 2019 Tex. App. LEXIS 4850, 2019 WL 2479957 (Tex. App.—Waco June 12, 2019). The Court of Criminal Appeals reversed, stating that the objection was made timely because it was made when **Becerra's** trial counsel became aware of the error. See **Becerra v. State**, 620 S.W.3d 745, 748 (Tex. Crim. App. 2021). The Court of Criminal Appeals remanded the proceeding for us to consider the merits of **Becerra's** [*2] issues.

THIRTEENTH JUROR

In his first issue, **Becerra** complains that his right to a jury composed of only twelve persons pursuant to Article V, Section 13 of the Texas Constitution was violated because an alternate juror was present during part of jury deliberations in the guilt-innocence phase of the trial. In his second issue, **Becerra** complains that the presence of the alternate juror during jury deliberations violated Articles 33.01, 33.011, and 36.22 of the Code of Criminal Procedure.

HN1 Article V, Section 13 of the Texas Constitution and Article 33.01 of the Code of Criminal Procedure direct that juries in district courts are to contain twelve members. Tex. Const. Art. V, Sec. 13; Tex. Code Crim. Proc. Ann. art. 33.01. Alternate jurors are permitted to be selected and sworn in, and Article 33.011(b) of the Texas Code of Criminal Procedure states that an alternate juror, if not called upon to replace a regular juror, shall no longer be discharged at the time the jury retires to deliberate but shall be discharged after the jury has rendered a verdict. Tex. Code Crim. Proc. Ann. art. 33.011(b). The statute does not give direction as to the whereabouts of the alternate juror during deliberations or if allowed to be in the jury room, the permitted extent, if any, of their role in deliberations. However, Article 36.22 of the Texas Code of Criminal Procedure states that "[n]o person shall be permitted to be with a jury while it is deliberating." Tex. Code Crim. Proc. Ann. art. 36.22.

In this proceeding, voir dire was conducted by the elected judge of the district court. An alternate juror was selected [*3] during voir dire. A visiting judge conducted the rest of the trial after voir dire was completed. When the jury retired to begin its deliberations as to guilt or innocence, the alternate juror went into the jury room with the panel. Around forty-five minutes later, the State advised the bailiff that the alternate was in the jury room with the jury, and the bailiff brought it to the attention of the trial court. The trial court removed the alternate juror and placed him in a separate room.

The trial court then conducted a hearing regarding the alternate juror. The trial court and the attorneys for the State and **Becerra** discussed the analysis and holding in **Trinidad v. State**, 312 S.W.3d 23 (Tex. Crim. App. 2010) in order to determine how to proceed. The State requested an instruction to be given to the jury to disregard any participation by the alternate juror. The trial court agreed to give an instruction. Counsel for

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Becerra agreed with the substance of the instruction but asked for a mistrial "based on the presence of the juror, preserving any error, if any" even though he informed the trial court he did not have any indication of harm at that point. Counsel for **Becerra** did not seek to question the alternate juror or other jurors regarding [*4] what the alternate's participation in deliberations had been or whether the alternate had impacted any juror's vote. The trial court overruled **Becerra's** motion for mistrial and called the jury back to give them an instruction.

The instruction given to the jury was as follows:

Members of the jury, jury deliberations began at 9:45 a.m. At 10:31 a.m., the Court realized that the alternate juror, [alternate juror], was allowed into the jury room by mistake and [alternate juror] was at that time asked to separate from the jury. [Alternate juror] has been placed in a separate room over here and he will continue to serve as the alternate juror in this case. He simply cannot be present during the deliberations of the 12 jurors. You are to disregard any participation during your deliberations of the alternate juror, [alternate juror]. And following an instruction on this extra note that the Court received, you should simply resume your deliberations without [alternate juror] being present.

The jury was then sent back into the jury room to resume deliberations and it returned a verdict of guilty, which was confirmed when the members of the jury panel were polled individually.

After trial, **Becerra** [*5] filed a motion for new trial in which he alleged violations of *Texas Constitution Article V, Section 13* and *Articles 33.01, 33.011, and 36.22* of the Code of Criminal Procedure. **Becerra** attached an affidavit to the motion. One of the original twelve jurors signed the affidavit. In the affidavit, the juror stated that the alternate juror voted on the verdict of guilty prior to the time that the bailiff discovered the alternate juror's presence; the remaining panel did not vote again on the issue of guilt or innocence after the alternate was removed.

At the hearing on the motion for new trial, the State objected, under *Texas Rule of Evidence 606(b)*, to the admission of the affidavit. The trial court admitted the affidavit but overruled the motion for new trial.

Becerra's issues are framed as a constitutional violation pursuant to the Texas constitution and statutory violations pursuant to the Code of Criminal Procedure. However, in this proceeding as to these complaints, **Becerra** alleges two separate alleged errors by the trial

court: the denial of his motion for mistrial and the denial of his motion for new trial. The alleged constitutional and statutory violations serve as the basis for the trial court's complained-of errors. We will address the issues within the framework of the [*6] motion for mistrial and the motion for new trial.

MOTION FOR MISTRIAL

Becerra argues that the trial court erred by failing to grant his motion for mistrial due to the alleged violations of the Texas Constitution and the Code of Criminal Procedure. In *Trinidad v. State*, the Texas Court of Criminal Appeals held that allowing alternate jurors to be present in the jury room during deliberations did not violate the constitutional prohibition against deliberation by more than twelve jurors. *Trinidad v. State*, 312 S.W.3d 23, 28 (Tex. Crim. App. 2010). The court declined, however, to determine whether the presence of an alternate juror during deliberations violated *article 36.22* and has recently again declined to answer this question even after granting a petition for discretionary review on its own motion on this very issue. *Id.* at 29-30; *Laws v. State*, No. PD-1124-20, 640 S.W.3d 227, 2022 Tex. Crim. App. LEXIS 83 at *8 (Tex. Crim. App. Feb. 2, 2022).

HN2 [T] *Article 36.22* provides that no person is permitted to be with a jury while it is deliberating, or to converse with a juror about the case on trial except in the presence and by the permission of the trial court. *Tex. Code Crim. Proc. art. 36.22*. Harm to the accused is presumed when a juror converses with an unauthorized person about the case. See *Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997); *Castillo v. State*, 319 S.W.3d 966, 973 (Tex. App.—Austin 2010, pet. ref'd); *Stults v. State*, 23 S.W.3d 198, 206 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). If the presumption of harm arises, the State has the burden to rebut the presumption by showing no injury or prejudice to the accused. *Stults*, 23 S.W.3d at 206 (citing *Quinn*, 958 S.W.2d at 401). However, [*7] the defendant has the initial burden to show that some discussion about the case on trial occurred between a juror and an unauthorized person. *Chambliss v. State*, 647 S.W.2d 257, 265-66 (Tex. Crim. App. 1983); *Castillo*, 319 S.W.3d at 973; *Stults*, 23 S.W.3d at 206-07. This would ostensibly include whether or not the alternate juror participated in any facet of the voting. The defendant's burden is not satisfied if there is no showing what a reported conversation was about. *Stults*, 23 S.W.3d at 207.

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In relation to the motion for mistrial, it is undisputed that the alternate juror was with the jury for approximately forty-five minutes before he was discovered and removed, however, **Becerra** did not attempt to question any member of the jury or the alternate juror regarding what had taken place. Without a showing at the time of the motion for mistrial that the alternate juror had actually participated in deliberations or communicated with the regular jurors about the case, **Becerra** had not at that time met his initial burden to raise a presumption of harm. See Castillo, 319 S.W.3d at 973 (presumption of harm did not arise because defendant presented no evidence that the alternate jurors conversed with the regular jurors). Because of this, the trial court did not abuse its discretion by denying the motion for mistrial based on the information it had before [*8] it at the time of its ruling.

MOTION FOR NEW TRIAL

Becerra also filed a motion for new trial based on the alleged violations of the Texas constitution and Code of Criminal Procedure and attached an affidavit by one of the jurors in support of the motion. The juror's affidavit stated:

My name is [juror]. I was a juror in *State of Texas v. Joe Becerra*, cause number 14-03925-CRF-361. During the jury deliberations in the case, the individual later identified by the trial judge as the "alternate juror" voted on the verdict of "guilty" ultimately returned by the jury. The alternate juror's presence in the jury room was not discovered until after the verdict vote was taken on guilt by the jury. After this vote, there was a question the jury had concerning the special issue submitted to the jury by the trial judge and when the bailiff appeared to collect the question, the bailiff realized the alternate juror was present in the jury room. Thereafter, alternate juror participated in the deliberation until the court bailiff came and collected us and brought us into the courtroom. After the alternate juror was excused the remaining 12 jurors did not revote on the issue of guilt as the verdict vote [*9] taken while the alternate juror was present in the jury room was unanimous.

The State objected to the admission of the affidavit pursuant to Rule 606(b) of the Rules of Evidence at the hearing on the motion for new trial, but the trial court overruled its objection and admitted the affidavit. After hearing the arguments of counsel and considering the

evidence before it, the trial court denied **Becerra's** motion for new trial because it found that **Becerra** had not been harmed by the alleged errors.

The Court of Criminal Appeals stated in its opinion in this proceeding that:

[i]n Trinidad, we stated that violations of Article V, Section 13 are jury misconduct claims and, as such, should be preserved as jury misconduct claims. [Trinidad, 312 S.W.3d at 28-29]. **HN3** [↑] A motion for new trial, supported by an affidavit, is the proper method for preserving a jury misconduct error. Trout v. State, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985).

Becerra v. State, 620 S.W.3d 745, 749 (Tex. Crim. App. 2021).

HN4 [↑] We review a trial court's denial of a motion for new trial under an abuse of discretion standard. Okonkwo v. State, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013). A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. McQuarrie v. State, 380 S.W.3d 145, 150 (Tex. Crim. App. 2012). A defendant will be granted a new trial "when the jury has engaged in such misconduct that the defendant did not receive a fair and impartial trial." Tex. R. App. P. 21.3(g). "To warrant a [*10] new trial based on jury misconduct, the movant must establish not only that jury misconduct occurred, but also that it was material and probably caused injury." Ryser v. State, 453 S.W.3d 17, 39 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing Boque v. State, 204 S.W.3d 828, 829 (Tex. App.—Texarkana 2006, pet. ref'd).

HN5 [↑] Generally, "a juror may not testify as to any matter or statement occurring during the jury's deliberations, the effect the matter had on any juror's mind or mental process, or how the matter influenced the juror's decision-making." Ryser, 453 S.W.3d at 40. However, when there is an allegation of juror misconduct, Rule of Evidence 606(b) allows a juror to testify on whether "an outside influence was improperly brought to bear on any juror." Tex. R. Evid. 606(b); see McQuarrie, 380 S.W.3d at 154. Then, without delving into the jury's deliberations, the trial court must conduct an objective analysis to determine whether there is a reasonable probability that the outside influence had a prejudicial effect on the "hypothetical average juror." Colyer v. State, 428 S.W.3d 117, 129 (Tex. Crim. App. 2014). The existence of an outside influence does not

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result in an automatic reversal, however. Ryser, 453 S.W.3d at 41. An outside influence is only problematic "if it has the effect of improperly affecting a juror's verdict in a particular manner—for or against a particular party." *Id.* (quoting Colyer, 428 S.W.3d at 129).

The juror's affidavit indicated that the alternate juror voted during deliberations during guilt-innocence [*11] but was removed from the jury room prior to the return of the ultimate verdict. However, there was nothing included about whether or not the alternate juror otherwise participated in the deliberations, such as whether the alternate juror attempted to convince another juror of Becerra's guilt or the effect of some other aspect of the evidence. Such evidence would have been admissible pursuant to Rule 606(b). However, the part of the juror's affidavit that related to what transpired after the "outside influence" of the alternate juror was removed, alleging that a subsequent vote was not taken was not properly admissible pursuant to Rule 606(b), because it did not involve evidence regarding the outside influence or its impact on any juror or the deliberations.

In Trinidad, the Court of Criminal Appeals stated that "[a]s long as only the twelve regular jurors voted on the verdicts that the appellants received, it cannot be said that they were judged by a jury of more than the constitutionally requisite number." Trinidad, 312 S.W.3d at 28. That court referred to the verdict that was received as the "ultimate verdict." *See id.* The ultimate verdict received by Becerra was voted on by a panel of twelve jurors, and therefore, we find that in this [*12] proceeding there was no violation of Article V, Section 13 of the Texas Constitution. Additionally, because we have found that Article V, Section 13 was not violated, we do not find that Article 33.01(a) of the Code of Criminal Procedure, which codifies Article V, Section 13's requirement of a petit jury of exactly twelve members, was violated either because only twelve regular jurors voted on the ultimate verdict that Becerra received, and thus, his jury did "consist" of twelve jurors for purposes of the statute. *See Tex. Code Crim. Proc. art. 33.01(a)* ("[I]n the district court, the jury shall consist of twelve qualified jurors.").

As to the other alleged statutory violations, primarily article 36.22 regarding the presence of outsiders with the jury during deliberations, we have found no authority that has established a hard rule that the presence of the alternate jurors in the jury room during deliberations is absolutely improper. Until the Court of Criminal Appeals determines otherwise, we find that the evidence of the

alternate juror's presence and even initial participation in voting with the jury during deliberations as presented in this proceeding is not sufficient to constitute a reasonable probability that the alternate juror's outside influence had a prejudicial effect on the "hypothetical average juror." The verdict was unanimous [*13] on the ultimate verdict received by Becerra by the twelve members of the jury, and there is nothing in the record to indicate otherwise.

We do not find that the trial court's denial of the motion for new trial was outside of the zone of reasonable disagreement, and therefore, there was no abuse of discretion by the trial court. We overrule Becerra's issues one and two.

CONCLUSION

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY

Chief Justice

Before Chief Justice Gray,

Justice Johnson, and

Justice Wright¹

Affirmed

Do not publish

Opinion delivered and filed April 20, 2022

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¹ The Honorable Jim R. Wright, Senior Chief Justice (Retired) of the Eleventh Court of Appeals, sitting by assignment of the Chief Justice of the Texas Supreme Court. *See Tex. Gov't Code §§ 74.003, 75.002, 75.003.*

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Doug Howell		dhowell@brazoscountytx.gov	6/13/2022 12:28:13 PM	SENT

Associated Case Party: JoeLuisBecerra

Name	BarNumber	Email	TimestampSubmitted	Status
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