JURY SELECTION PROCESS

Presented by

Trish Nasworthy
Assistant City Attorney
Grand Prairie, Texas

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I. Authority

Art. 35.17, Texas Code of Criminal Procedure. Voir dire examination

> 1. When the court in its discretion so directs … the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.
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> Acts 1965, 59th Leg., p. 317, ch. 722, Sec. 1, eff. Jan. 1, 1966. Amended by Acts 1973, 63rd Leg., p. 1127, ch. 426, art. 3, Sec. 5, eff. June 14, 1973.

II. Purpose

a. The purpose of the voir dire examination is --

1. to enable counsel to intelligently to exercise peremptory challenges. Emanus v. State (Cr.App. 1975) 526 S.W.2d 806.

2. to convene competent, fair, impartial, and unprejudiced jury to judge facts of case. Bowser v. State (App. 13 Dist. 1993) 865 S.W.2d 482.

3. to expose bias or interest of prospective jurors which might prevent full consideration of evidence presented at trial and to test qualification of jurors. Tobar v. State (App. 13 Dist. 1994) 874 S.W.2d 87, pdr refused.

4. to develop rapport between officers of the court and jurors, expose juror bias or interest warranting challenge for cause, and elicit information necessary to the intelligent use of peremptory challenges. Godine v. State (App. 14 Dist. 1994) 874 S.W.2d 197

5. to insure, to the fullest extent possible, that intelligent, alert, disinterested, impartial, and truthful jury will perform the duty assigned to it. Armstrong v. State (Cr.App. 1995) 897 S.W.2d 361, rehearing on petition for discretionary review denied.

b. Voir dire is integral part of defense counsel's role in providing adequate legal assistance as it allows counsel to exercise peremptory challenges for cause intelligently during jury selection process. Dinkins v. State (Cr.App. 1995) 894 S.W.2d 330, certiorari denied 116 S.Ct. 106, 516 U.S. 832, 133 L.Ed.2d 59

c. Role of jury panel members is to answer the questions which they are asked, not to attempt to divine the intent of the questioner. Armstrong v. State (Cr.App. 1995) 897 S.W.2d 361, rehearing on petition for discretionary review denied.

d. Predominant interest of trial court presiding over voir dire should be to protect right of each party to intelligent exercise of peremptory challenges. Clemments v. State (App. 4 Dist. 1996) 940 S.W.2d 207, pdr refused.)

e. Counsel for the State and defendant have the right to question the jury to expose any interest or partiality in order to use peremptory strikes intelligently. Franklin v. State (Cr.App. 2000) 12 S.W.3d 473, on remand 23 S.W.3d 81, petition for discretionary review granted.

f. If prospective juror has been convicted or indicted for theft or any felony or is insane, trial court has the authority to excuse the juror sua sponte. Green v. State (Cr.App. 1989) 764 S.W.2d 242.

g. If prospective juror is qualified to serve, trial court has no authority to sua sponte excuse the juror. Green v. State (Cr.App. 1989) 764 S.W.2d 242.

III. Regulation of Voir Dire

a. Generally.

1. Trial court is afforded much latitude in determining how voir dire should be conducted. Soria v. Johnson, C.A.5 (Tex.)2000, 207 F.3d 232, certiorari denied 121 S.Ct. 2, 530 U.S. 1286, 147 L.Ed.2d 1027.

2. If juror's answer be equivocal or qualified, further interrogation of juror is permissible in order to ascertain his viewpoint. Pittman v. State (Cr.App. 1968) 434 S.W.2d 352.

3. Conduct of voir dire examination rests within sound discretion of trial court and only abuse of such discretion will call for reversal on appeal; trial court may, therefore, impose reasonable restrictions on exercise of voir dire examination. Brumley v. State (App. 7 Dist. 1991) 804 S.W.2d 659.

4. Trial court may impose reasonable restrictions on exercise of voir dire examination. Cadoree v. State (App. 14 Dist. 1991) 810 S.W.2d 786, pdr refused.

5. Discretion of trial judge regarding control of voir dire is not limitless and benefits achieved by accelerating the process must never be attained at the risk of denying to a party on trial a substantial right. Caldwell v. State (Cr.App. 1991) 818 S.W.2d 790, certiorari denied 112 S.Ct. 1684, 503 U.S. 990, 118 L.Ed.2d 399.

6. In determining whether defendant's voir dire of jurors has been unreasonably limited, two rights coexist and must be harmonized; first right is the constitutionally guaranteed right to counsel, which encompasses right to question prospective jurors in order to intelligently and effectively exercise peremptory challenges and challenges for cause during jury selection process, and second right is that of trial judge to impose reasonable restrictions on exercise of voir dire examination. McCarter v. State (Cr.App. 1992) 837 S.W.2d 117, rehearing on petition for discretionary review denied.

7. Trial court's discretion to impose reasonable restrictions on conduct of voir dire includes power to terminate needlessly duplicitous or repetitious questioning. Allridge v. State (Cr.App. 1991) 850 S.W.2d 471, rehearing denied, certiorari denied 114 S.Ct. 101, 510 U.S. 831, 126 L.Ed.2d 68.

8. Trial court may intervene in voir dire for purpose of clarification or instruction or to expedite proceedings. Post v. State (App. 2 Dist. 1996) 936 S.W.2d 343, rehearing overruled , pdr refused.

9. Trial court may restrict confusing or misleading voir dire questions. Tate v. State (App. 14 Dist. 1997) 939 S.W.2d 738, pdr refused.

b. Exclusion of media

1. Jury voir dire is integral initial part of trial which is clearly a criminal proceeding under rules of criminal evidence and, therefore, rules apply to jury voir dire; rules state that they govern criminal proceedings, jury voir dire is not listed in situation in which rules do not apply, Code of Criminal Procedure specifically addresses voir dire and challenges, and its scope of control is also over all criminal proceedings. Watson v. State (App. 2 Dist. 1996) 917 S.W.2d 65, rehearing overruled , pdr refused.

c. Proper questions

1. Questions asked in an improper form on voir dire may be disallowed. Abron v. State (Cr.App. 1975) 523 S.W.2d 405.

2. Trial court abuses its discretion in restricting voir dire of jury panel when proper question about proper area of inquiry is prohibited. Cadoree v. State (App. 14 Dist. 1991) 810 S.W.2d 786, pdr refused.

3. Voir dire question is proper, and trial court must not restrict it, if its purpose is to detect juror's views on issue applicable to case. Bowser v. State (App. 13 Dist. 1993) 865 S.W.2d 482.

d. Prior jury service

1. Trial court did not improperly restrict voir dire by prohibiting defense counsel from questioning venire member who had previously served as a juror about whether defendant in that prior case had testified. Tate v. State (App. 14 Dist. 1997) 939 S.W.2d 738, pdr refused.

2. Trial court did not improperly restrict voir dire by prohibiting defense counsel from asking venire member whether venire member felt that state had ever prosecuted or convicted someone who was not guilty; venire member had already responded affirmatively to two other questions that were essentially identical to prohibited question, and defense asked venire member other questions concerning presumption of innocence. Tate v. State (App. 14 Dist. 1997) 939 S.W.2d 738, pdr refused.

e. Time Limit

1. Trial court in its discretion may place reasonable time limits on length of voir dire examination, and within such limits defendant may examine each prospective juror individually and pose questions upon any proper area of inquiry; right to pose such questions is part of right to counsel under Const. Art. 1, § 10, in order that peremptory challenges may be exercised intelligently. Florio v. State (Cr.App. 1978) 568 S.W.2d 132.

2. In prosecution for aggravated robbery, placing one hour and 14-minute limitation on defendant's voir dire examination of jury panel was not shown to be error, in view of fact that he would have had ample time to examine all members of panel if he had budgeted his time more carefully and that there was no indication that defendant was forced to take any objectionable juror. Grissom v. State (App. 2 Dist. 1981) 625 S.W.2d 424, review refused.

3. Trial court's limitation of voir dire examination to approximately 30 minutes in murder trial did not constitute reversible error where defense counsel did not present a list of questions which he desired to ask until a hearing on a motion for new trial and where reviewing court was presented with no bill of exceptions showing how defendant was injured or deprived of any valuable right by jury selection. Centamore v. State (App. 14 Dist. 1982) 632 S.W.2d 778.

4. Defendant established that 20-minute time limit for voir dire was unreasonable and an abuse of discretion; there was nothing in record to show that defendant's questions, propounded to venire, were an attempt to prolong voir dire examination, questions defendant was not allowed to propound to venire were proper and relevant questions, and defendant was unable to individually examine two jurors. Cartmell v. State (App. 2 Dist. 1990) 784 S.W.2d 138.

5. Absent objection, nothing was preserved for review with respect to amount of time scheduled for individual voir dire of prospective jurors. Long v. State (Cr.App. 1991) 823 S.W.2d 259, rehearing denied, certiorari denied 112 S.Ct. 3042, 505 U.S. 1224, 120 L.Ed.2d 910.

6. Should trial judge determine that either party is prolonging voir dire, simple and effective remedy is to call attorneys to bench and instruct them to expedite process. McCarter v. State (Cr.App. 1992) 837 S.W.2d 117, rehearing on petition for discretionary review denied.

7. Time limitations imposed by trial judge on voir dire process are reviewed under abuse of discretion standard. Cantu v. State (Cr.App. 1992) 842 S.W.2d 667, rehearing denied, certiorari denied 113 S.Ct. 3046, 509 U.S. 926, 125 L.Ed.2d 731, rehearing denied 114 S.Ct. 16, 509 U.S. 941, 125 L.Ed.2d 768.

f. Permissible questions

1. Decision as to propriety of any question on voir dire, of prospective jurors is left to discretion of trial court, but prohibition of proper question about proper area of inquiry is abuse of that discretion. Smith v. State (Cr.App. 1974) 513 S.W.2d 823.

2. Great latitude should be allowed in voir dire examination of jury, and in view of detailed explanation given by trial court on applicable law in area of questioning, State's inquiries into whether jury could convict defendant in murder case if there was no body, no scientific evidence, no autopsy report and solely on testimony of one eyewitness were properly allowed. Williams v. State (App. 5 Dist. 1981) 629 S.W.2d 791, review refused.

3. Proper question on voir dire is one which seeks to discover juror's views on issue applicable to case, and harm occurs when appellant is deprived of voir dire sufficient to enable him or her to decide intelligently those jurors he or she may wish to strike. Brumley v. State (App. 7 Dist. 1991) 804 S.W.2d 659.

4. In determining propriety of voir dire questions, the fact that no definition will be provided for a term during trial does not render prospective juror's understanding of that term irrelevant, but may make that understanding more crucial to the intelligent exercise of peremptory challenges. Woolridge v. State (Cr.App. 1992) 827 S.W.2d 900, rehearing on petition for discretionary review denied.

5. Defendant should have been permitted to question potential juror about juror's understanding of term “reasonable doubt”; defendant's questions sought to discover jurors views on issue applicable to trial were not repetitious, and were not in improper form. Lane v. State (Cr.App. 1992) 828 S.W.2d 764.

6. Voir dire questions that were repetitious or vexatious, those that were not in proper form, and those that inquired into personal habits rather than personal prejudices and moral beliefs were properly excluded. Mauldin v. State (App. 12 Dist. 1993) 874 S.W.2d 692, pdr refused.

7. Defense counsel is entitled to rely on the questions asked by the court and prosecutor during voir dire. Armstrong v. State (Cr.App. 1995) 897 S.W.2d 361, rehearing on petition for discretionary review denied.

8. Questions that would require prospective jurors to commit themselves as to how they might resolve factual issues in the case are improper. Garcia v. State (Cr.App. 1994) 919 S.W.2d 370, rehearing granted , on rehearing.

9. Defendant was not entitled to discuss with jurors Spanish Inquisition and Salem witch trials during voir dire examination in prosecution for aggravated sexual assault with a child, even though defendant claimed that he needed to discuss historical events with venire to illustrate purpose of placing burden of proof on State, where questions were so broad they did not apprise trial court of exact issue defendant intended to explore with jurors and could have elicited information on issues unrelated to case. Cooper v. State (App. 3 Dist. 1997) 959 S.W.2d 682, rehearing overruled , pdr refused.

10. Voir dire question in jury selection that constitutes a “global fishing expedition” is not proper. Cooper v. State (App. 3 Dist. 1997) 959 S.W.2d 682, rehearing overruled , pdr refused.

11. Voir dire questions seeking to elicit bias or prejudice from prospective jurors are proper. Garza v. State (App. 2 Dist. 2000) 18 S.W.3d 813, pdr refused.

g. Effect of Denial of Permissible Question

1. Denial of proper question during voir dire is always reversible error and will not be subject to harm analysis. Penry v. State (Cr.App. 1995) 903 S.W.2d 715, rehearing overruled , certiorari denied 116 S.Ct. 480, 516 U.S. 977, 133 L.Ed.2d 408, rehearing denied 116 S.Ct. 759, 516 U.S. 1069, 133 L.Ed.2d 705, habeas corpus dismissed 2005 WL 3072165.

h. Testing Juror's Ability to Read

1. Trial court did not abuse its discretion in refusing to permit defense counsel during voir dire to test venireman's ability to read and write by requesting that juror read statute, where trial court stated that defense counsel could ask additional questions. Rodriguez v. State (App. 4 Dist. 1995) 919 S.W.2d 136.

i. Committing to Specific Issues

1. Defendant should not be allowed to propound questions to venireman that would tend to commit him in detail to any course of reasoning in advance of his selection. Barry v. State (Cr.App. 1957) 165 Tex.Crim. 204, 305 S.W.2d 580, certiorari denied 78 S.Ct. 71, 355 U.S. 851, 2 L.Ed.2d 56.

2. State's voir dire questions during which State outlined some of prearrest activities of police officers and asked if any juror would be so offended by such conduct that he or she would find defendant not guilty regardless of whether or not State had met its burden was not improper attempt to commit juror to specific set of facts. Ransom v. State (App. 7 Dist. 1982) 630 S.W.2d 904.

3. Defense counsel's voir dire inquiry in murder prosecution improperly sought to commit prospective jurors to particular facts in case involving shooting in the back, so prohibiting counsel from asking question was not abuse of discretion; counsel was permitted to properly rephrase questions on issue of self-defense and inquire whether prospective jurors believed they had right to strike first if they believed threat were being made against them and whether they believed use of deadly force was permissible. Cadoree v. State (App. 14 Dist. 1991) 810 S.W.2d 786, pdr refused.)

4. While it is proper to use hypothetical fact situations to explain application of law, it is improper to inquire how venireperson would respond to particular circumstances presented in hypothetical question. Cadoree v. State (App. 14 Dist. 1991) 810 S.W.2d 786, pdr refused.

5. Questions during voir dire which probe into bias and prejudice against applicable law are permissible, but veniremember may not be asked what he or she would do at any particular stage of trial under given set of facts. DeLeon v. State (App. 13 Dist. 1993) 867 S.W.2d 138, pdr refused.

6. Prosecutor's hypothetical to all potential jurors whether they could convict person arrested with crack pipe that contained measurable amount in it was improperly used to commit jury to specific facts before presentation of any evidence at trial. Atkins v. State (Cr.App. 1997) 951 S.W.2d 787, rehearing granted in part, on remand 1999 WL 212992, pdr refused.

7. Defense counsel in prosecution for driving while intoxicated sought improper commitment from veniremen in asking members of jury panel if they could think of reason why person would not want to take breath test, after advising them that there would be no scientific test of alcohol in case, but without explaining that law permitted admission of failure to take breath test, and question was properly disallowed, particularly in that trial court did not prevent counsel from rephrasing question or restrict further interrogation on subject matter. Harkey v. State (App. 3 Dist. 1990) 785 S.W.2d 876.

j. Burden of Proof

1. Prosecutor's question during voir dire regarding the burden of proof, beyond a reasonable doubt, in criminal cases, was proper; it is proper for prosecutor to challenge for cause a prospective juror who would hold the State to a stronger burden of proof than beyond a reasonable doubt, and it is proper for a prosecutor to discuss variant interpretations of burden of proof with voir dire panel in order to make intelligent use of peremptory strikes and challenges for cause. Lavigne v. State (App. 14 Dist. 1989) 782 S.W.2d 253, petition for discretionary review granted , affirmed 803 S.W.2d 302, rehearing on petition for discretionary review denied.

2. Trial court abuses its discretion if it refuses to allow defendant to voir dire prospective jurors about what they think “reasonable doubt” means. Jones v. State (App. 2 Dist. 1993) 850 S.W.2d 223, pdr refused.

k. Personal views of jurors

1. Restriction of inquiry, for purpose of exercising peremptory challenges, into personal drinking habits of jurors, as opposed to inquiry into personal prejudice or moral beliefs, was not an abuse of discretion. Densmore v. State (Cr.App. 1975) 519 S.W.2d 439.

2. Trial court properly sustained objection to voir dire question of whether juror had any hostile feelings toward persons whose life style differed from his own. Adams v. State (Cr.App. 1979) 577 S.W.2d 717, certiorari granted 100 S.Ct. 519, 444 U.S. 990, 62 L.Ed.2d 419, reversed in part 100 S.Ct. 2521, 448 U.S. 38, 65 L.Ed.2d 581, on remand 624 S.W.2d 568.

3. State's voir dire of prospective jurors in capital felony cases, “Is your religious view so strong that nothing can talk you out of them, is that not correct?” was proper. Brooks v. State (Cr.App. 1979) 599 S.W.2d 312, certiorari denied 101 S.Ct. 3146, 453 U.S. 913, 69 L.Ed.2d 996, rehearing denied 102 S.Ct. 25, 453 U.S. 950, 69 L.Ed.2d 1036, rehearing denied 103 S.Ct. 1490, 459 U.S. 1061, 74 L.Ed.2d 643.

l. Veracity of Witnesses

1. Question asking jurors who had known complaining witness whether they would place greater credence on testimony of complaining witness than on testimony of someone who contradicted him and whom they did not know constituted an improper attempt to require prospective jurors to commit themselves as to how they would pass upon credibility of witnesses prior to trial and receipt of evidence and trial court's refusal to permit question to be propounded to prospective jurors was proper. Hunter v. State (Cr.App. 1972) 481 S.W.2d 137.

2. On voir dire, defense counsel should have been permitted to inquire of prospective jurors in general terms as to whether they could conceive of possibility that a police officer might lie from the witness stand. Hernandez v. State (Cr.App. 1974) 508 S.W.2d 853.

m. Friends and Acquaintances

1. Asking juror on voir dire whether he was a customer of defendant was not prejudicial to defendant on trial for violation of law prohibiting possession for sale or sale of intoxicating liquor in a dry area. Shafer v. State (Cr.App. 1948) 151 Tex.Crim. 558, 209 S.W.2d 599.

2. Defense counsel was entitled to inquire on voir dire if anyone on jury panel knew defendant's family. Edwards v. State (App. 1 Dist. 1994) 882 S.W.2d 493, rehearing denied.

3. Panel member and subsequent jury foreperson who remained silent when panel was asked during voir dire whether they knew any of the prosecutors so well that it might affect their verdicts did not commit juror misconduct where appropriate response to subjective question was no response at all if juror believed, as she later testified she did, that her acquaintance with prosecutor would not affect her ability to be fair juror and defense counsel never asked panel if they merely knew or were acquainted with prosecutors, notwithstanding fact that juror had known prosecutor for 26 or 27 years and described him as friend, juror's husband and prosecutor had been best man in each other's weddings, and juror's husband was prosecutor's past and current campaign treasurer. Armstrong v. State (Cr.App. 1995) 897 S.W.2d 361, rehearing on petition for discretionary review denied.

n. Predisposition on Guilt

1. Proposed voir dire question seeking to discover whether any venireperson would have automatic predisposition to find person guilty simply because he refused to take breath test was improper “commitment question;” facts in question would not have led to a valid challenge for cause, as a juror could have permissibly presumed guilt from such evidence. Standefer v. State (Cr.App. 2001) 59 S.W.3d 177, on remand 2003 WL 22333195, petition stricken, pdr refused.

o. Justification Defense

1. In criminal trespass prosecution, trial court did not impermissibly limit scope of voir dire when it prevented defendant from questioning jury concerning defenses of mistake of fact, justification, necessity or defense of third person, where defendant was not entitled to submission of those issues to jury at trial. Brumley v. State (App. 7 Dist. 1991) 804 S.W.2d 659.

p. Attitude toward Law

1. Juror, on voir dire examination, may be interrogated touching his views of law and its application to any fact situation that the evidence may present. Clem v. State (Cr.App. 1958) 166 Tex.Crim. 429, 314 S.W.2d 579.

2. Bias against any of law upon which defendant is to rely is ground for challenge for cause to veniremen and proper matter for query on voir dire. Smith v. State (Cr.App. 1974) 513 S.W.2d 823.

3. Trial court did not abuse its discretion in restricting voir dire questions about First Amendment rights; whether defendant's activities were protected by First Amendment was matter for court, not for jury, in prosecution for disrupting lawful meeting. Morehead v. State (App. 5 Dist. 1988) 746 S.W.2d 830, petition for discretionary review granted , reversed 807 S.W.2d 577, rehearing on petition for discretionary review denied.

q. Legal Terms and Principles

1. Limitations on questions that can be asked of prospective jurors, regarding their definition of terms used in contemplated charge that would not be defined by judge, is left to sound discretion of trial court. Robison v. State (Cr.App. 1994) 888 S.W.2d 473, rehearing denied, certiorari denied 115 S.Ct. 2617, 515 U.S. 1162, 132 L.Ed.2d 859.

2. It is not abuse of discretion for trial court to limit questioning of prospective jurors on subject of definitions of a word. Robison v. State (Cr.App. 1994) 888 S.W.2d 473, rehearing denied, certiorari denied 115 S.Ct. 2617, 515 U.S. 1162, 132 L.Ed.2d 859.

3. Although a party may not bind a juror to a specific set of facts, a prosecutor is entitled to ask a prospective juror on voir dire whether he or she will require evidence the law does not require for a verdict of guilty. Garza v. State (App. 2 Dist. 2000) 18 S.W.3d 813, pdr refused.

r. Silence of Defendant

1. The proper subject of inquiry at voir dire regarding defendant's Fifth Amendment privilege is whether jury panelists would, regardless of their wish for the accused to testify, follow the law and not consider the silence of the accused as evidence against him. Capello v. State (App. 3 Dist. 1989) 775 S.W.2d 476, pdr refused.

s. Hypotheticals

1. It is improper to inquire how venireman would respond to particular circumstances as presented in hypothetical question. Allridge v. State (Cr.App. 1991) 850 S.W.2d 471, rehearing denied, certiorari denied 114 S.Ct. 101, 510 U.S. 831, 126 L.Ed.2d 68.

2. Hypothetical case may not be submitted during voir dire, nor questions designed to bring out the juror's views on case to be tried, although juror's views and sentiments on social and moral subjects generally may be questioned. Montes v. State (App. 8 Dist. 1994) 870 S.W.2d 643.

3. Hypothetical used by prosecutor during voir dire to explain law of self-defense was not improper attempt to bring out juror's views on defendant's case; prosecutor used different names and depicted different factual situation from that presented at trial, although both case and hypothetical involved killing. Montes v. State (App. 8 Dist. 1994) 870 S.W.2d 643.

t. Relevance

1. Voir dire questions are relevant if they involve issues in case, are necessary to intelligent use of peremptory challenges, or are relevant to challenges for cause. Tobar v. State (App. 13 Dist. 1994) 874 S.W.2d 87, pdr refused.

2. Defense counsel did not improperly prolong voir dire by his introductory remarks about his status as retained attorney, his rationale for criminal defense work, and summoning, selection and payments of jurors; remarks were not unduly lengthy, and while they did not, strictly speaking, involve issues in case or any juror's suitability for jury service, remarks generally served larger purpose of establishing rapport between counsel and prospective jurors which was important if jurors were going to speak openly about their attitudes and biases. Tobar v. State (App. 13 Dist. 1994) 874 S.W.2d 87, pdr refused.

u. Repetitious Questions

1. Trial court did not abuse its discretion in failing to permit defense counsel to ask duplicitous questions on voir dire of prospective jurors regarding burden of proof. Smith v. State (Cr.App. 1974) 513 S.W.2d 823.

2. Defense counsel did not unnecessarily attempt to prolong voir dire by covering matters already addressed by trial court and prosecutor, and, thus, covering those matters did not justify limitation on voir dire. Tobar v. State (Cr.App. 1993) 850 S.W.2d 182, on remand 874 S.W.2d 87, pdr refused.

v. Specific Defenses

1. Prosecutor's voir dire examination of jury panel on law that voluntary intoxication did not constitute defense to commission of crime did not inject extraneous offenses into case or prejudice jury panel, in view of fact that prosecutor's question did not assert that defendants had, in fact, been intoxicated, and in view of fact that prosecutor had reason to believe that defendants might

raise issue of intoxication to minimize their culpability. Bernal v. State (App. 4 Dist. 1982) 647 S.W.2d 699.

w. Reasonable doubt

1. Trial court abuses its discretion if it refuses to allow defendant to voir dire venirepersons about what they think reasonable doubt means. Goff v. State (Cr.App. 1996) 931 S.W.2d 537, rehearing denied, certiorari denied 117 S.Ct. 1438, 520 U.S. 1171, 137 L.Ed.2d 545, stay denied 250 F.3d 273.

x. Circumstantial evidence

1. Defendant was not entitled to explain law of circumstantial evidence to members of jury panel during voir dire examination; even though the facts of criminal case rest exclusively on circumstantial evidence, special instruction on circumstantial evidence is no longer required. Spence v. State (Cr.App. 1990) 795 S.W.2d 743, rehearing denied, certiorari denied 111 S.Ct. 1339, 499 U.S. 932, 113 L.Ed.2d 271, denial of habeas corpus affirmed 80 F.3d 989, certiorari denied 117 S.Ct. 519, 519 U.S. 1012, 136 L.Ed.2d 407.

y. Prospective Juror Withholds Information

1.There are two categories of cases where information withheld by juror during voir dire of process is deemed material, thus warranting new trial: (1) where juror withholds information that he or she has personal knowledge about or was in some way acquainted with either complainant or defendant, and (2) where juror, by reason of past personal experiences, has potential to be biased or prejudiced against defendant. Cuellar v. State (App. 13 Dist. 1996) 943 S.W.2d 487, rehearing overruled , pdr refused.

2. A juror who disclosed for the first time during trial for sexual assault that she was alleged victim's assistant Girl Scout leader, after juror previously failed to respond to voir dire question as to whether she knew victim, withheld material information, depriving defendant of opportunity to ask follow-up questions, challenge for cause, or use a peremptory strikes, and thus, defendant was entitled to question juror as to that relationship in order to determine the extent of prejudice that might have existed, even if juror did not intentionally withhold the information and declared at trial that she could be fair and impartial to both state and defendant. Franklin v. State (Cr.App. 2000) 12 S.W.3d 473, on remand 23 S.W.3d 81, petition for discretionary review granted.

3. The good faith of a juror is largely irrelevant when considering the materiality of information withheld during voir dire. Franklin v. State (Cr.App. 2000) 12 S.W.3d 473, on remand 23 S.W.3d 81, petition for discretionary review granted.

4. Mere familiarity with a witness is not necessarily material information, for purposes of determining whether withholding of such information on voir dire amounts to jury misconduct. Franklin v. State (Cr.App. 2000) 12 S.W.3d 473, on remand 23 S.W.3d 81, petition for discretionary review granted.

z. Prejudicial comments, questions, or rulings by Court

1. Trial court's statement to defense counsel during voir dire and in presence of jury to effect that he should not make a jury speech was within discretion of trial court and did not prejudice defendant. Meek v. State (App. 2 Dist. 1982) 628 S.W.2d 543, review refused.

2. In determining whether statements during voir dire are improper and harmful, court must bear in mind that great latitude should be allowed in voir dire examinations so that counsel for both state and defense have good and sufficient opportunity to assess relative desirability of members of the venire. Norton v. State (App. 7 Dist. 1996) 930 S.W.2d 101, pdr refused.

3. Test of whether improper references by the court during voir dire is harmful is whether remark was reasonably calculated to benefit the State or prejudice defendant's rights. Price v. State (App. 13 Dist. 1981) 626 S.W.2d 833.

aa. Prejudicial comments, questions, or rulings by counsel

1. No ground for error was shown by prosecutor's comment to jury panel on voir dire examination that the law did not allow prosecutor to comment in any way upon defendant's failure to testify. Reeves v. State (Cr.App. 1973) 491 S.W.2d 157.

2. Prosecutor's statement to jury panel on voir dire that they could use “common sense, horse sense, your experience during life” to make deductions from the evidence was not improper. Haas v. State (Cr.App. 1973) 498 S.W.2d 206.

3. Prosecutor's statement during the voir dire examination of the prospective jurors that “the defendant has just as much a right to subpoena any witnesses and tell his story to you as the state does” was not of such character that the jury would necessarily have taken it to be a comment on the subsequent failure to defendant to testify. Myers v. State (Cr.App. 1975) 527 S.W.2d 307.

bb. Instruction to Disregard

1. It would have been better practice if defendant, instead of first moving that entire jury panel be quashed as a result of remarks made by prosecutor, had first moved to have jury instructed to disregard the statements, and then moved to quash the jury panel if not satisfied with the instruction. Mendoza v. State (Cr.App. 1977) 552 S.W.2d 444.

cc. Objections

1. Trial court properly sustained state's objection to defense counsel's explanation of presumption of innocence to member of venire, stating that “as he sits there now [defendant] is innocent.” Zimmerman v. State (Cr.App. 1993) 860 S.W.2d 89, rehearing denied , vacated 114 S.Ct. 374, 510 U.S. 938, 126 L.Ed.2d 324, on remand 881 S.W.2d 360.

dd. Veniremen, prejudicial comments, questions, or rulings

1. Record on appeal from conviction for driving while intoxicated failed to reveal error occurring when, on voir dire examination, defendant challenged prospective juror for cause when he said he thought driving while intoxicated law was not "tough enough" and defendant then unsuccessfully moved to discharge entire panel because of merriment shown when prospective juror so replied, where such prospective juror did not serve and reply was not reasonably calculated to prejudice other members of panel. Sassin v. State (Cr.App. 1959) 329 S.W.2d 881.

2. Court properly refused to quash jury panel in burglary prosecution, even though, during voir dire, panel member stated that defendant had "great resemblance" to person who burglarized her home; that member was dismissed for cause, and defendant did not demonstrate that other panel members heard comment and were influenced by it. Christopher v. State (App. 5 Dist. 1989) 779 S.W.2d 459, petition for discretionary review dismissed, pdr refused, petition for discretionary review granted , reversed 833 S.W.2d 526, on remand 851 S.W.2d 318.

3. Trial court did not improperly restrict voir dire by prohibiting defense counsel from asking certain venire members who had been victims of crime whether that would affect their service on jury; court restricted questioning regarding those crimes to venire members' bias or prejudice against defendant. Tate v. State (App. 14 Dist. 1997) 939 S.W.2d 738, pdr refused.

ee. Shuffle

1. Upon timely demand of defendant or his attorney, or state's counsel, trial court must shuffle name of prospective jurors on assigned panel; this is absolute right and, on appeal, defendant need not show harm in order to receive new trial; refusal of motion to shuffle, when timely made, is automatic reversible error. Turner v. State (App. 1 Dist. 1992) 828 S.W.2d 173, petition for discretionary review refused, certiorari denied 113 S.Ct. 1865, 507 U.S. 1037, 123 L.Ed.2d 485.

ff. Review

1. Appellate court must review trial court's ruling regarding voir dire questioning of jurors under an abuse of discretion standard. Collier v. State (Cr.App. 1997) 959 S.W.2d 621, rehearing denied, certiorari denied 119 S.Ct. 335, 525 U.S. 929, 142 L.Ed.2d 276, habeas corpus denied 2001 WL 498095.

gg. Record

1. In order to preserve for appeal error in restriction of voir dire, record must contain question asked by defendant which the trial judge did not allow to be answered. Rodriguez v. State (App. 4 Dist. 1995) 919 S.W.2d 136.

APPENDIX

Art. 35.11, Texas Code of Criminal Procedure. Preparation of the List.

> [provides for either the defendant or state to a shuffle of the jury panel if the request is made before the start of voir dire]

Art. 35.16, Texas Code of Criminal Procedure. Reasons for Challenge for Cause.
(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

> 1. That the juror is not a qualified voter in the state and county under the Constitution and laws of the state; provided, however, the failure to register to vote shall not be a disqualification;
>
> 2. That the juror has been convicted of misdemeanor theft or a felony;
>
> 3. That the juror is under indictment or other legal accusation for misdemeanor theft or a felony;
>
> 4. That the juror is insane;
>
> 5. That the juror has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render the juror unfit for jury service, or that the juror is legally blind and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case;
>
> 6. That the juror is a witness in the case;
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> 7. That the juror served on the grand jury which found the indictment;
>
> 8. That the juror served on a petit jury in a former trial of the same case;
>
> 9. That the juror has a bias or prejudice in favor of or against the defendant;
>
> 10. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence the juror in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in the juror's opinion, the conclusion so established will influence the juror's verdict. If the juror answers in the affirmative, the juror shall be discharged without further interrogation by either party or the court. If the juror answers in the negative, the juror shall be further examined as to how the juror's conclusion was formed, and the extent to which it will affect the juror's action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that the juror feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that the juror is impartial and will render such verdict, may, in its discretion, admit the juror as competent to serve in such case. If the court, in its discretion, is not satisfied that the juror is impartial, the juror shall be discharged;
>
> 11. That the juror cannot read or write.

No juror shall be impaneled when it appears that the juror is subject to the second, third or fourth grounds of challenge for cause set forth above, although both parties may consent. All other grounds for challenge may be waived by the party or parties in whose favor such grounds of challenge exist.

In this subsection "legally blind" shall mean having not more than 20/200 of visual acuity in the better eye with correcting lenses, or visual acuity greater than 20/200 but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.

(b) A challenge for cause may be made by the State for any of the following reasons:

1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;

2. That he is related within the third degree of consanguinity or affinity, as determined under Chapter 573, Government Code, to the defendant; and

3. That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.

(c) A challenge for cause may be made by the defense for any of the following reasons:

1. That he is related within the third degree of consanguinity or affinity, as determined under Chapter 573, Government Code, to the person injured by the commission of the offense, or to any prosecutor in the case; and

2. That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

Acts 1965, 59th Leg., p. 317, ch. 722, Sec. 1, eff. Jan. 1, 1966. Amended by Acts 1969, 61st Leg., p. 1364, ch. 412, Sec. 3, eff. Sept. 1, 1969; Acts 1975, 64th Leg., p. 475, ch. 202, Sec. 2, eff. Sept. 1, 1975; Acts 1981, 67th Leg., p. 3143, ch. 827, Sec. 8, eff. Aug. 31, 1981; Acts 1983, 68th Leg., p. 619, ch. 134, Sec. 2, eff. Sept. 1, 1983.

Art. 35.19, Texas Code of Criminal Procedure. Absolute Disqualification

No juror shall be impaneled when it appears that he is subject to the second, third or fourth cause of challenge in Article 35.16, though both parties may consent.

Acts 1965, 59th Leg., p. 317, ch. 722, Sec. 1, eff. Jan. 1, 1966. Amended by Acts 1969, 61st Leg., p. 1364, ch. 412, Sec. 4, eff. Sept. 1, 1969.

Art. 45.027, Texas Code of Criminal Procedure. Jury Summoned.

(a) If the accused does not waive a trial by jury, the justice or judge shall issue a writ commanding the proper officer to summon a venire from which six qualified persons shall be selected to serve as jurors in the case.

(b) The jurors when so summoned shall remain in attendance as jurors in all cases that may come up for hearing until discharged by the court.

(c) Any person so summoned who fails to attend may be fined an amount not to exceed $100 for contempt.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1995, 74th Leg., ch. 802, Sec. 1, eff. Sept. 1, 1995. Renumbered from Vernon's Ann.C.C.P. art. 45.25 and amended by Acts 1999, 76th Leg., ch. 1545, Sec. 25, eff. Sept. 1, 1999.

General Voir Dire

1. Introduce yourself

2. This is a criminal court. We try class C misdemeanors – which are "fine only" offenses.

3. All of the rights and privileges apply to these cases –

    a. Burden of proof is beyond a reasonable doubt.

    b. The defendant is presumed innocent.

    c. The state has the burden of proof. --- (I only have to prove beyond a reasonable doubt the elements alleged in the complaint --)

    d. The defendant doesn't have to testify.

    e. The defendant has a right to a jury trial.

    f. The defendant has the right to represent herself. (now, I am an attorney and the defendant is not. Is there anyone here who would make it harder on me to prove my case because the defendant has chosen to represent herself? For example – The judge requires us to try this case according to evidentiary and procedural rules and if the defendant is not familiar with those rules it can affect his/her ability to ask certain questions or get evidence before the jury.

    g. Can you all promise me you can be fair to both sides?