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COURT OF CRIMINAL APPEALS
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IN THE COURT OF

CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
8/5/2019
DEANA WILLIAMSON, CLERK

JOE LUIS BECERRA,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Petition for Discretionary Review from the Tenth Court of Appeals in No. 10-17-00143-CR affirming the conviction in Cause Number 14-03925-CRF-361 from the 361st District Court of Brazos County, Texas

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APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

This case, to Appellant's knowledge, places in issue at least three unresolved questions of Texas law:

1. Whether a petit juror affidavit supporting a Motion for New Trial attesting a non-petit, alternate juror deliberated and voted on the verdict preserves error for violation of Article V, Section 13 of the Texas Constitution and Articles 33.01 and 36.22 of the Texas Code of Criminal Procedure.

2. Whether a sufficiently specific Motion for Mistrial, voiced in response to a trial court proposed curative instruction to the presence and deliberation of alternate juror with the petit jury, with some evidence that the alternate voted, preserve error for claims of violation of Article V, Section 13 of the Texas Constitution and Articles 36.22 and 33.01 of the Texas Code of Criminal Procedure.

3. Whether Article V, Section 13 of the Texas Constitution and Article 33.01 of the Texas Code of Criminal Procedure are waiver-only rights under *Marin v. State,* 851 S.W.2d 275 (Tex. Crim. App. 1993), as interpreted by *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017) and can be urged for the first time on appeal if procedural default has otherwise occurred.

The fully developed record in this case, combined with the legal issues of first impression, are significant, and oral argument would assist in the resolution of those issues.

STATEMENT OF THE CASE

Joe Luis Becerra ("Appellant") was originally charged by indictment with Murder and Manslaughter. A second count of the indictment alleged Appellant was in Possession of a Firearm by a Felon and contained a deadly weapon notice. The indictment was amended by Order signed September 29, 2016. (CR 7).

The State gave a *Brooks* Notice filed September 29, 2016 (2 RR 8) notifying of their intent to enhance Appellant to habitual offender status (25 years to life) if convicted. (2 RR 8). Appellant chose punishment by the court. (2 RR 6).

On March 6, 2017, a jury was selected and seated. (2 RR). In addition to the twelve jurors, an alternate was selected, seated, and sworn in. (2 RR 138). Before the start of the first phase of trial, the State announced they were not proceeding on the Murder or Manslaughter charges. (3 RR 9). Following jury trial on the Possession of a Firearm by Felon charge, Appellant was found guilty, and the jury answered in the affirmative to Special Issue Number One – the Deadly Weapon finding. (CR 84).

Appellant was assessed fifty-five years in the Texas Department of Criminal Justice. (4 RR 90-91). A Motion for New Trial was filed April 3, 2017, supported by an affidavit signed by a petit juror attesting the alternate juror: 1) participated in deliberations; 2) voted on the guilty verdict rendered; and 3) that no re-vote was taken after the alternate was separated and the petit jurors were instructed by the Trial Judge. (CR 25). Following a hearing, the Motion for New Trial was denied April 27, 2017. (5 RR 26-27). Notice of Appeal was filed the same day. (CR 194).

STATEMENT OF PROCEDURAL HISTORY

In a published Opinion, the Tenth Court of Appeals affirmed Appellant's conviction. *Becerra v. State*, __ S.W.3d __, No. 10-17-00143, 2019 W.L. 2479957 (Tex. App. – Waco, June 23, 2019) (Appendix 1). Appellant filed a Motion for Rehearing on

June 20, 2019. (Appendix 2). The Motion was denied by the Court on July 5, 2019. This Petition is timely filed on or before August 4, 2019.

GROUND FOR REVIEW

> In *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) this Court held Article V, Section 13 of the Texas Constitution was not implicated unless evidence that a number other than exactly twelve jurors voted on a verdict received by the trial court. The uncontroverted evidence from Appellant's Motion for New Trial was a non-petit juror deliberated and voted on Appellant's verdict. Did the Court of Appeals commit error in holding Appellant's Article V, Section 13 and statutory claims under 33.01 and 36.22 of the Texas Code of Criminal Procedure were procedurally defaulted?

REASONS FOR REVIEW

1. The Tenth Court of Appeals has decided an important question of state law that has not been, but should be, settled by the Court of Criminal Appeals. TEX. RULE APP. PRO. 66.3(a).

2. The Tenth Court of Appeals has decided an important question of state law in a way that conflicts with applicable decisions of the Court of Criminal Appeals. TEX. RULE APP. PRO. 66.3(c).

STATEMENT OF FACTS

On March 6, 2017 the elected Judge of the Trial Court, Steve Smith, presided over the jury selection. (2 RR 1). Twelve petit jurors and an alternate juror were selected and all were seated and sworn. (2 RR 138). However, Senior Visiting Judge J.D. Langley presided over the remaining phases of trial. *Becerra* at *1.

Following closing arguments, and without receiving specific instruction, the alternate juror retired with the petit jurors. *Becerra* at *1. About forty-six minutes into deliberations, it was discovered the alternate juror was in the jury room deliberating.

Id. (4 RR 35). The Trial Court immediately separated the alternate juror from the petit jurors. *Id.*

The Trial Court then conducted a hearing about the alternate juror deliberating, which included an extended discussion of *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) ("*Trinidad II*"). *Becerra* at *1. The Trial Court settled on the following proposed verbal instruction, included in the Court of Appeals decision:

> 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.

Becerra at *2.

Before giving this curative instruction, the Trial Court overruled a defense Motion for Mistrial. The Court of Appeals found this Motion for Mistrial met error assignment specificity requirements regarding the presence of the alternate during jury deliberations. *Id.* at *2. The jury was then instructed. (4 RR 43). The jury retired a second time, finding Appellant guilty, and answering the Special Issue (deadly weapon finding) in the affirmative. (4 RR 46). The jury was polled and discharged. (4 RR 48).

Appellant filed a timely, affidavit supported Motion for New Trial, alleging violation of Article V, Section 13 of the Texas Constitution and Articles 33.01, 33.011, and 36.22 of the Texas Code of Criminal Procedure, that, following hearing, was denied. *Becerra* at *2.

ARGUMENT

> In *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) this Court held Article V, Section 13 of the Texas Constitution was not implicated unless evidence that a number other than exactly twelve jurors voted on a verdict received by the trial court. The uncontroverted evidence from Appellant's Motion for New Trial was a non-petit juror deliberated and voted on Appellant's verdict. Did the Court of Appeals commit error in holding Appellant's Article V, Section 13 and statutory claims under 33.01 and 36.22 of the Texas Code of Criminal Procedure were procedurally defaulted?

This case has the evidentiary record absent in *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) (*"Trinidad II"*) – that an alternate juror deliberated and voted with twelve petit jurors on the ultimate verdict in the trial court. No re-vote occurred after the alternate was removed and the petit jury instructed. (CR 194). The evidentiary record here allows this Court to address issues of first impression concerning method, timing and specificity of error preservation by objection, Motion for Mistrial, or Motion for New Trial for the Constitutional and statutory provisions involved in this request for review.

These questions have remained unresolved in the decade and a half since the 2007 legislative amendments to the alternate juror statute. ART. 33.011(b) TEX. CODE CRIM. PRO. These issues were addressed for the first time in the Court of Appeal's

published Opinion. They are now ripe for decision to clarify both error preservation in this recurring situation and, possibly, construe the 2007 amendments to Article 33.011(b) for the first time in this Court.

A. The need for clarification exists in trial and intermediate courts on how Article 33.011(b) of the Texas Code of Criminal Procedure affects alternate juror service.

The legacy of the 2007 amendment to Article 33.011(b) of the Texas Rules of Criminal Procedure is confusion in dealing with alternate jurors once deliberations begin. *See, e.g. Castillo v. State*, 319 S.W.3d 966, 969 (Tex. App. – Austin 2010, pet. denied) ("The statute does not address what trial courts should do with the alternate jurors during deliberations but prior to the jury rendering its verdict.").

Prior to the amendment, the statute was unambiguous: Article 33.011 required discharge of the alternate juror before the petit jury retired to deliberate. *Id.* This case presents a fully developed record – lacking in previous cases – providing opportunity for this Court to give needed direction to trial courts, intermediate appellate courts, and lawyers on both sides of the criminal docket on this recurring legal issue.

The 2007 amendment has resulted in vastly different ways trial courts deal with alternates when jury deliberations begin. These differences are illustrated by several cases decided by this Court and courts of appeals. Two examples are cases decided by the San Antonio Court of Appeals, *Trinidad v. State*, 275 S.W.3d 52 (Tex. App. – San Antonio 2008) ("*Trinidad I*") and *Adams v. State*, 275 S.W.3d 23 (Tex. App. – San

Antonio 2008), that were consolidated in this Court on discretionary review and reversed in *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) ("*Trinidad II*").

In *Trinidad II*, the trial court instructed the alternate juror not to vote, but because "there has been a change in the law [amended Art. 33.011(b)] [you] will actually go into the jury room and be part of the deliberation process…" *Trinidad II* at 24. In *Adams*, the trial court affirmatively instructed the alternate juror to go into the jury room, not to vote, but provided no instruction on the issue of the alternate's participation in deliberation. *Id.*

In *Castillo*, the trial court instructed jurors the alternate was to retire with petit jurors, but specifically not to deliberate or vote on the verdict. *Castillo,* 319 at 967. In another variant attributable to the ambiguities of the amended statute, a trial court conditionally released the alternate, but with the instruction that "he was still bound by the instruction of the court." *Sandoval v. State*, 409 S.W.3d 259, 276 (Tex. App. – Austin 2013, no pet.).

This case presents an opportunity to inform, clarify and analyze for bench and bar the status of an alternate juror after deliberations begin. Specifically, whether the 2007 legislative amendments to Art. 33.011(b) allow trial courts to instruct the alternate to retire with the petit jury as a silent or participating, non-voting member, or to separate and sequester the alternate during deliberations, or conditionally release them, subject to recall in the event of petit juror disability.

B. An unresolved issue of Texas law exists on when and what methods of error preservation are needed to preserve claims of violation of Article V, Section 13[1] of the Texas Constitution and 33.01 of the Texas Code of Criminal Procedure.

Trinidad II was not decided on procedural default of Article V, Section 13 constitutional and Article 33.01 claims, but lack of evidence that exactly twelve jurors voted on the verdict:

> The [San Antonio] court of appeals found in these cases that the constitutional requirement of a jury composed of exactly twelve members is a waiver-only provision in contemplation of *Marin* [*v. State,* 851 S.W.2d 275 (Tex. Crim. App. 1993], which a defendant must expressly waive in the trial court before it can be said that he has lost it for appeal.
>
> But we need not resolve that question today. Assuming that the court of appeals was correct to address the merits of the appellants' constitutional complaints, we hold that it erred to conclude that the appellants suffered the verdict of a jury of more than twelve members in violation of Article V, Section 13. In neither of the appellants' cases [Trinidad or Adams] was the alternate juror allowed to vote on the ultimate verdict in the case, at either stage of trial.

Trinidad II at 27-28 (emphasis added).

This case has the evidentiary showing absent in *Trinidad*, *Adams*, and *Castillo* that the alternate 1) participated in deliberations; 2) voted on the guilty verdict rendered; and 3) that no re-vote was taken after the alternate was separated and the petit jurors instructed by the Trial Judge. *Becerra* at *2. (CR 25). The Court of Appeals Opinion addressed error preservation of these claims for the first time. Their analysis,

[1] Article V, Section 13 reads in relevant part: "[petit] juries in the District Courts shall be composed of twelve persons…" Art. V § 13 TEX. CONST. Article 33.01 provides in relevant part "[in] the district court, the jury shall consist of twelve qualified jurors. Art. 33.01 TEX. CODE CRIM. PRO.

or the lack of analysis, on method, timing and specificity of error preservation makes the case for review compelling.

1. Does an adverse ruling on a Motion for New Trial supported by petit juror affidavit preserve Constitutional and statutory claims?

The Court of Appeals Opinion found procedural default of Appellant's post-trial, evidence supported Motion for New Trial. Their holding and accompanying analysis consisted of the following sentence:

> Further, because the objection to the presence of the alternate juror was not timely, the complaints raised in [Appellant's] motion for new trial were also not preserved by a timely objection.

Becerra at *2.

This Court should grant review based on this holding. Without analysis or cited authority, this single sentence signals the first Texas precedential appellate holding that procedural default occurs on Article V, Section 13 Constitutional and Art. 33.01 statutory claims despite the existence of a petit juror affidavit supported Motion for New Trial attesting a non-petit juror voted on the verdict in the underlying case.

The need for review is more compelling when taking into account this Court's directive in *Trinidad II* to lower courts and practioners that claims involving Art. V, Section 13 and 33.01 should be construed – and therefore logically preserved – as jury misconduct claims:

> The error in these cases, if any, in allowing the alternates to be present with the regular jurors during their deliberations <u>is more usefully</u>

> conceived of as an error in allowing an outside influence to be brought to bear on the appellants' constitutionally composed twelve-member juries. As the court of appeals recognized, such error, if any, would be controlled by Article 36.22, which is the statute that expressly prohibits any outside 'person' from being 'with a jury while it is deliberating.' As we have already noted, however, the court of appeals did not expressly address whether this statutory error was subject to forfeiture, consistent with *Marin*.

Trinidad II at 28-29 (citations omitted) (emphasis added).[2]

No less important: The Court of Appeals holding is jarringly contrary to settled law on error preservation involving the actual statutory jury misconduct claim made under Article 36.22 of the Texas Code of Criminal Procedure in this case. *See*, *e.g., Trout v. State*, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985) ("A motion for new trial is the proper course to be taken in preserving alleged jury misconduct error for appeal. It is further required that such motion for new trial be supported by the affidavit of a juror or some other person who was in a position to the facts." [citation omitted]) (emphasis added), *see also, Menard v. State*, 193 S.W.3d 55, 59 (Tex. App. – Houston [1st Dist.] 2006, pet. ref'd). ("In order to properly preserve an error regarding jury misconduct, a defendant must move for a mistrial or new trial.") (emphasis added).

This case illustrates why a juror supported affidavit accompanying a Motion for New Trial is a preferred method of error preservation in this situation. The Court of Appeals Opinion placed importance on Trial Counsel's failure to request the Trial

[2] Footnote 24 to *Trinidad II* did not resolve the controversy whether alternate jurors deliberating with petit jurors violates Article 33.011(b) and is an "outside influence" under Art. 36.22 of the Texas Code of Criminal Procedure. Footnote 24 communicates that given the holding of *Trinidad II*, 1) the alternate did not vote on the verdict; and 2) that defendants procedurally defaulted their Art. 36.22 claims, [We] leave resolution of this issue for another day." *Trinidad II* fn. 24.

Court interview the alternate juror or otherwise articulate the harm stemming from the presence of the alternate juror in the jury room. *Becerra* at *2. This sidesteps questions about possible violations of Rule 606(b) of the Texas Rules of Evidence – especially during ongoing jury deliberations.

Instead, the juror affidavit supporting the Motion for New Trial supplied the information not available during trial. This is the logical method of showing the extra-record harm necessary for preservation of error. Though raised in all of Appellant's briefing and Motion for Rehearing in the Court of Appeals, this contention was met with silence by that Court.

Castillo involved a special instruction and later supplemented instruction to the petit and alternate jurors who were allowed to all retire together. *Castillo,* 319 S.W.3d at 967-68. The *Castillo* analysis on procedural default echoed that of *Trinidad II* on the Article V, Section 13 analogy to juror misconduct claims, but added citation to *Trout* and *Menard*.[3] The Court of Appeals in that case wrote the following in context of their finding of procedural default based on variance of appellate and trial objection to two written instructions, one before the jury retired and one verbal curative instruction:

> Additionally, to the extent [defendant] is alleging a violation of article 36.22, he is essentially arguing juror misconduct. To preserve error caused by juror misconduct, the defendant must either move for a mistrial or file

[3] The Court of Appeals also relied on *Trinidad II* that no evidence existed that a number other than twelve voted on the verdict. *Castillo,* 319 S.W.3d at 971 ("[In] this case there is no indication in the record that the alternate jurors voted on the verdict.").

> a motion for new trial supported by affidavits of a juror or other person in a position to know the facts alleging misconduct.

Id. at 970 [citing *Trout* and *Menard* [other citations omitted]] (emphasis added).

This Court should grant review and determine if Article V, Section 13 claims are preserved by this method of preservation—specifically a ruled upon Motion for New Trial supported by a petit juror affidavit. Separately, the Court should grant review based on the Court of Appeals decision cutting against settled law that a supported Motion for New Trial asserting a claim of juror misconduct under Article 36.22 is sufficient to preserve such error for appellate review.

2. Is timely contemporaneous objection or Motion for Mistrial required when the non-petit juror retires with the petit jury or when a trial court instruction is proposed?

The Court of Appeal's decision is the first to hold that to preserve the Constitutional and statutory claims urged here, objection is required when the alternate retires with the petit jurors to deliberate, rather than when a special or curative instruction is proposed by the trial court. *Becerra* at *2.

In *Castillo v. State, supra*, procedural default on the Constitutional and statutory claims – except for Art. 36.22 – turned on variance of trial objection and complaint on appeal to trial court supplemental written instruction, and lack of objection to a later verbal curative instruction. *See, e.g. Castillo*, 319 S.W.3d at 970. The Court of Appeals Opinion in this case on procedural default is different, much more expansive, and not supported by authority or citation. In short, it breaks new legal ground.

Review is also necessary because the analysis engaged by the Court of Appeals is inconsistent with this Court's holding in *Trinidad II* on the issue. The Court of Appeals holding on the required timing of objection is as follows:

> [The] grounds for [Appellant's] objection to the alternate juror being sent into the jury room were apparent at the time it happened, which was when the jury began deliberations. [Appellant's] counsel was aware that there was an alternate juror selected and that the alternate juror sat with the jury during the trial. There is nothing in the record to indicate that [Appellant's trial counsel] was not present or was in some other way unable to observe the jury panel at the time the jury panel was sent to begin deliberations. Because [Appellant's] counsel did not object at the time the jury was sent to deliberate, his objection and motion for mistrial were not made at the time the trial court was in the proper position to prevent the error, and therefore were not timely.

Becerra at *2.

Contrast the Court of Appeals holding – procedurally defaulting Article V, Section 13, Article 33.01 and 36.22 claims – with this Court's holding in *Trinidad II* in reference to procedural default on solely the statutory based Article 36.22 jury misconduct claims urged in that case:

> We perceive no reason that a defendant should not be deemed to have forfeited the protections of Article 36.22 <u>in the event that he becomes aware of its breach</u> during the course of the trial but fails to call the transgression to the trial court's attention so that the error may be rectified or, barring that, so that the defendant can make a timely record for appeal.

Trinidad II at 27-28 (emphasis added).

This language from *Trinidad II* indicates trial counsel's actual knowledge of the alternate juror's purported outside influence with the petit jury – by deliberating, or

worse, voting – is that triggering the need for error preservation. This could take the form, depending on circumstance, of objection, objection to a purposed curative instruction, or Motion for Mistrial, or, as argued above, a juror supported Motion for New Trial.

This was not the error preservation embraced by the Court of Appeals Opinion in this case. Instead, the Court of Appeals held procedural default occurred when the alternate juror retired into the jury room without objection because grounds "were apparent when it happened." *Becerra* at *2. The Court of Appeals holding overlooks the Senior Visiting Trial Judge, two senior Assistant District Attorneys, the Court Bailiff and Court Reporter were all present with Appellant's Trial Counsel when the jury retired, yet spoke not a word about the alternate retiring with the petit jury.

This Court should grant review to clarify and inform bench and bar whether objection, Motion for Mistrial, either, or both are required, and under what circumstances these methods of error preservation are necessary.

C. An unresolved issue exists under Texas law whether Article V, Section 13 of the Texas Constitution and Article 33.01 of the Texas Code of Criminal Procedure require affirmative waiver under *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993).

This Court should grant review to answer the legal question unresolved since *Trinidad II*: Whether Article V, Section 13 is a waiver only right under *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993). Unlike *Trinidad II*, this case has the evidentiary record to decide whether Article V, Section 13 and Article 33.01 are

waiver only rights that may be raised for the first time on appeal. The Court of Appeals published Opinion in this case was silent on this significant, unresolved issue under Texas law. The issue was briefed and discussed at oral arguments in the court below. Appellant also urged at rehearing for the Court of Appeals to write on the issue, but to no avail. (Appendix 2).

Proenza v. State, 541 S.W.3d 786 (Tex. Crim. App. 2017), decided after filing of Appellant's Brief in the court below[4], added to the *Marin* calculus by adding comments on the weight of the evidence by trial judges to the *Marin* waiver only right rubric, but specifying these rights under *Marin* would be those imposing "[U]pon the judge a duty that exists independently of the parties' decision to speak up." *Id.* at 797. As a result of not being decided until after the filing of Appellant's Brief, *Marin* in light of *Proenza* was extensively briefed in Appellant's Reply Brief.

The record is fully developed for a decision on this issue. This Court should resolve the issue if procedural default is determined to have occurred in this case.

D. Potential harm issues

Although harm would be dealt with on remand, Appellant wishes to avoid denial of review because of lack of harm. The harmless error argument in this case is

[4] In *Arrellano v. State*, the First Court of Appeals requested supplemental briefing on this issue of how *Proenza* impacted the issue of procedural default and *Marin* affirmative waiver rights in the context of a statutory claim of comment on weight of evidence. *Arrellano v. State*, 555 S.W.3d 647, 652 (Tex. App. – Houston [1st Dist.] 2018 pet. ref'd). ("[This] court requested supplemental briefing on the error-preservation rules applicable to this issue.") In this case, Appellant addressed the issues raised by *Proenza*, *Marin* and procedural default in the Reply Brief in the court below.

as follows: Thirteen jurors agreed on guilt, and after separation, the petit jury of exactly twelve jurors agreed on the separate deadly weapon finding submission; thus, any error is harmless.

This argument has facile appeal, but harm to Appellant springs from not just the alternate juror voting, but the presence of the alternate for forty-six minutes of deliberations. The alternate had equal voice and vote during that forty-six minutes of deliberation. When an instruction of the type given in *Trinidad, Adams,* and *Castillo*, the alternate and petit jurors would know before retiring to deliberate of this distinction in rank and status, and potentially some, perhaps all, voting members would give arguments from the alternate less weight.[5]

Not here. The alternate juror was an equal in all ways in the jury room. The record does not, and cannot, establish what exactly was deliberated upon, but no affirmative evidence indicates the special issue was not discussed before the alternate was discovered.

PRAYER FOR RELIEF

The Court of Criminal Appeals should grant discretionary review due to the repeated occurrence in trial courts of the issues here raised. This Court should grant

[5] Open questions also exist whether harm is presumed in juror misconduct claims in this context, and importantly, whether an alternate juror is an "unauthorized person" when they converse with petit jurors during deliberations. *See, e.g.*, *Klapesky v. State*, 256 S.W.3d 442, 452 (Tex. App. – Austin 2008, pet. ref'd) (finding in pre-2007amendment case that no record evidence supported that alternate "conversed" with petit jurors thus triggering presumption). *See also, Castillo* at 972 (discussing *Klapesky* the presumption of harm in juror misconduct cases).

discretionary review in this case, order briefing on the merits and oral argument. Following submission, this Court should reverse and remand this case to the Tenth Court of Appeals with instructions to reach the merits of Appellant's Constitutional and statutory claims.

RESPECTFULLY SUBMITTED,

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CERTIFCIATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

This Petition for Discretionary Review complies with TEX. R. APP. P. 9.4(i)(2)(D) in that it contains 3,414 words, in Microsoft Word 2019, Garamond, 14 point.

/s/ LANE D. THIBODEAUX
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above has been delivered *via* electronic filing on this the 5th day of August, 2019 to the following:

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APPENDIX NO. 1

OPINION

JOE LUIS BECERRA

V.

STATE OF TEXAS

CASE NO. 10-17-00143-CR

IN THE
COURT OF APPEALS
TENTH APPELLATE DISTRICT OF TEXAS
AT WACO, TEXAS

IN THE
TENTH COURT OF APPEALS

No. 10-17-00143-CR

JOE LUIS BECERRA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 361st District Court
Brazos County, Texas
Trial Court No. 14-03925-CRF-361

OPINION

Joe Luis Becerra appeals from a conviction for possession of a firearm by a felon. TEX. PENAL CODE ANN. § 46.04 (West 2011).[1] Becerra complains that his right to a twelve-person jury pursuant to the Texas Constitution was violated because an alternate juror was present during deliberations, that the presence of the alternate juror during

[1] Becerra was also charged with murder; however, the State elected to proceed to trial on the possession of a firearm offense only.

deliberations violated Articles 33.01, 33.011, and 36.22 of the Code of Criminal Procedure, that the evidence was legally insufficient, and that the admission of impeachment testimony violated the Confrontation Clause of the United States Constitution. Because we find no reversible error, we affirm the judgment of the trial court.

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.

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 (West 2006). 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 and shall be discharged after the jury has rendered a verdict. TEX. CODE CRIM. PROC. ANN. art. 33.011(b) (West Supp. 2018). The statute does not give direction as to the whereabouts of the alternate juror during 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 (West 2006).

In this proceeding, voir dire was conducted by the elected judge of the district court. An alternate juror was selected 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 holdings 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 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 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 returned a verdict of guilty, which was confirmed when the jury was polled individually.

Becerra filed a motion for new trial, alleging violations of Texas Constitution Article V, Section 15 and Articles 33.01, 33.011, and 36.22 of the Code of Criminal Procedure with an affidavit from one of the jurors (not the alternate) attached. In the affidavit, the juror stated that the alternate juror voted on the verdict of guilty prior to the bailiff discovering the alternate juror's presence and that the remaining panel did not vote again on the issue of guilt or innocence after the alternate was removed.

The State argues that Becerra's motion for mistrial was not preserved because he did not state the specific legal grounds for his motion at the time that it was made. While Becerra's motion was not in and of itself specific, the dialogue between the trial court and the attorneys demonstrates that the legal theories upon which the motion was based were

those set forth in *Trinidad* and were apparent from the context. *See* TEX. R. APP. P. 33.1(a). We do not agree with the State that the issues raised in the motion were not adequately preserved due to the lack of specificity.

However, we must also determine whether or not the objection and motion for mistrial were timely. In order to preserve a complaint for appellate review, a party must timely object, stating the specific legal basis for the objection if it is not apparent from the context of the objection. TEX. R. APP. P. 33.1(a)(1); *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). An objection is timely if made at the earliest opportunity or as soon as the grounds for the objection become apparent and made at a time when the judge is in the proper position to do something about it. *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). This gives the trial judge an opportunity to correct, or in this case, prevent the error. Even most constitutional errors can be forfeited at trial if a party fails to properly object. *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990).

In this instance, the grounds for Becerra's objection to the alternate juror being sent into the jury room were apparent at the time it happened, which was when the jury began deliberations. Becerra's counsel was aware that there was an alternate juror selected and that the alternate juror sat with the jury during the trial. There is nothing in the record to indicate that Becerra's counsel was not present or was in some other way unable to observe the jury panel at the time the jury panel was sent to begin deliberations. Because Becerra did not object at the time the jury was sent to deliberate, his objection and motion

for mistrial were not made at the time the trial court was in the proper position to prevent the error, and therefore were not timely.[2] Further, because the objection to the presence of the alternate juror was not timely, the complaints raised in Becerra's motion for new trial were also not preserved by a timely objection. We overrule issues one and two.

SUFFICIENCY OF THE EVIDENCE

In his third issue, Becerra complains that the evidence was insufficient for the jury to have found that he possessed a firearm or that he used or exhibited a deadly weapon in the course of his possession of a firearm. The jury found that Becerra was a felon who possessed a firearm and in a special issue, the jury also made an affirmative deadly weapon finding, which required the jury to find that he used or exhibited the deadly weapon during the commission of the offense.

The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017). This standard requires the appellate court to defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. We may not re-weigh

[2] Even if the objection did not have to be made at the earliest time it should have been discovered, we find that Becerra could have objected to the instruction given to the jury and requested to question the juror regarding what had already transpired and ask that the jury be required to revote if needed. We find that this also would have allowed the trial court the opportunity to correct the error. Any complaint regarding the instruction was waived by Becerra's failure to object to it.

> the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The court conducting a sufficiency review must not engage in a "divide and conquer" strategy but must consider the cumulative force of all the evidence. *Villa*, 514 S.W.3d at 232. Although juries may not speculate about the meaning of facts or evidence, juries are permitted to draw any reasonable inferences from the facts so long as each inference is supported by the evidence presented at trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (*citing Jackson*, 443 U.S. at 319); *see also Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). We presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that resolution. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13.
>
> We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*; *see also Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Daugherty*, 387 S.W.3d at 665.

Zuniga v. State, 551 S.W.3d 729, 732-33 (Tex. Crim. App. 2018).

As relevant to this proceeding, a person who has been convicted of a felony commits the offense of unlawful possession of a firearm if he possesses a firearm after the

fifth anniversary of the person's release from confinement following a conviction of the felony "at a place other than the premises at which the person lives." TEX. PENAL CODE ANN. § 46.04(a)(2) (West 2011). To support a conviction for possession of a firearm, the state must prove (1) that the accused exercised actual care, control, or custody of the firearm, (2) that the accused was conscious of his connection with it, and (3) that he possessed the firearm knowingly or intentionally. *Bollinger v. State*, 224 S.W.3d 768, 773 (Tex. App.—Eastland 2007, pet. ref'd).

The sufficiency of the evidence to prove possession of a firearm by a felon is analyzed under the same rules for determining the sufficiency of the evidence in controlled substance possession cases. *Bollinger*, 224 S.W.3d at 773. The State can meet its burden with direct or circumstantial evidence, but it must establish that the defendant's connection to the firearm was more than fortuitous. *Id*. at 774. Factors which can establish that the accused's connection to the firearm was not merely fortuitous include whether the firearm was in a car driven by the accused, whether the firearm was in a place owned by the accused, whether the firearm was conveniently accessible to the accused, whether the firearm was found in an enclosed space, and whether the accused made any affirmative statement connecting him to the firearm. *Id*.

Becerra does not dispute that he had previously been convicted of a felony offense. Rather, he argues that there was insufficient evidence to connect him to the firearm in question. Becerra also argues that the evidence was insufficient to show that the special

issue regarding a deadly weapon was true. The special issue finding made by the jury was that Becerra had committed the possession of the firearm by "using or exhibiting a deadly weapon, to-wit: a firearm, which in the manner of its use or intended use was capable of causing death or serious bodily injury, namely, by discharging said firearm at, or in the direction of, Jose Guardado-Rivera."

FACTS

Becerra's sister Michelle was at a party at the residence of her daughter, Heather Becerra and the victim, Jose Guardado-Rivera. Becerra and Becerra's girlfriend, Sylvia were at the party also. Becerra was upset with how Jose treated Heather because he had left bruises on her arms. After some time, Michelle and Sylvia were going to leave to take Michelle's daughter Selena home when Becerra asked Sylvia for "cuete" out of her vehicle. The vehicle was owned by Sylvia, but Becerra had been driving it that day because Sylvia was at work. Michelle told the detectives who interviewed her later that Becerra was asking for a gun.[3] Michelle testified that Sylvia looked in the car and retrieved something small from under the driver's seat of her vehicle which Michelle believed was a gun. Michelle attempted to convince Sylvia to hide the gun and not give it to Becerra. According to Michelle's testimony based on the statement she had given to law

[3] Michelle testified for the first time at trial that "cuete" could also mean that Becerra was asking for drugs or fireworks. It was the jury's role to determine whether to believe that Becerra was asking for drugs or a gun. Presumably the jury found that Michelle's prior statements that Becerra was asking for a gun was credible. We do not find that determination to be unreasonable.

enforcement four days after the shooting, Sylvia took the gun and gave it to Becerra. Selena also testified that she thought that she had heard Becerra yell for Sylvia to bring him a gun and that Sylvia had rummaged around and gone to where Becerra was.[4]

One of the investigating detectives testified that Sylvia had told him that Becerra had asked her to retrieve a gun from under the driver's floor mat.[5] Sylvia did not know what type of gun it was but that it was "little bitty." Sylvia told the detective that she had delivered the gun to Becerra.

After Sylvia and Michelle returned from taking Selena home, Becerra and Jose got into an altercation and Becerra punched Jose. Michelle, Sylvia, and Heather decided to leave because there were children present. A neighbor testified that three men went upstairs after this and approximately ten minutes later, the neighbor heard a gunshot. The neighbor saw one man leave and walk in a certain direction. A second man later came and told the neighbor's husband that someone had shot someone else. Becerra was located approximately twenty minutes later walking in the direction the neighbor had indicated. At trial, the neighbor was not asked to identify Becerra and did not do so. Jose had been shot and died from his injury.

The forensic examiner who conducted the autopsy testified that based on her

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[4] Selena also testified for the first time at trial that "cuete" could also mean drugs or fireworks but admitted that she had told law enforcement and the prosecutors each time they spoke with her before trial that Becerra had asked for a gun.

[5] Sylvia did not testify at trial. The propriety of the admission of this testimony is the basis of Becerra's fourth issue which will be discussed below.

examination of the gunshot wound, the wound was caused by a gunshot that came from the distance of between a centimeter to up to 2-3 feet away. A forensic chemist testified that gunshot residue was found on Becerra's hands, but explained that gunshot residue can travel up to 20 feet out of the muzzle and can transfer onto someone else. Further, the chemist testified that gunshot residue could be caused by firing the weapon, being close to the person who fired the weapon, or touching something that had the residue on it, such as the weapon or casing.

The bullet recovered from Jose's remains was from a small caliber weapon which was likely a .22. The gun was not recovered.

ANALYSIS

We find that the evidence was sufficient for the jury to have found that Becerra possessed the firearm. Sylvia's statement to law enforcement that she had given the gun to Becerra when he requested it is supported by Michelle and Selena's testimony. While Sylvia's statements were objected to on the basis of confrontation and hearsay as will be discussed in issue four, the evidence was admitted for all purposes when Becerra did not seek to limit the purpose of the testimony to impeachment only. Our review of the sufficiency of the evidence includes all of the evidence, whether properly or improperly admitted. *Moff v. State*, 131 S.W.3d 485, 489 (Tex. Crim. App. 2004). We do not find that the jury was unreasonable to infer that based on what Michelle and Serena saw and heard that Sylvia gave Becerra a gun that he knew was in the vehicle that he had been driving

that day.

As to the deadly weapon finding, article 42A.054(b) of the Texas Code of Criminal Procedure provides in relevant part that a trier of fact may make, upon sufficient evidence, an "affirmative finding" "that a deadly weapon … was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon." TEX. CODE CRIM. PROC. art. 42A.054(b)-(c). "The State need not establish that the use or intended use of an implement actually *caused* death or serious bodily injury; only that 'the manner' in which it was either used or intended to be used was 'capable' of causing death or serious bodily injury." *Moore v. State*, 520 S.W.3d 906, 908 (Tex. Crim. App. 2017) (emphasis in original).

Generally, mere possession of a firearm by a felon, without more, is not susceptible to a deadly weapon finding.[6] Mere possession of a weapon without utilizing it to achieve an intended result or purpose does not constitute the use of that weapon for the purposes of an affirmative finding. *See Ex parte Petty*, 833 S.W.2d 145 (Tex. Crim. App. 1992); *Narron v. State*, 835 S.W.2d 642, 644 (Tex. Crim. App. 1992); *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989).

Becerra argues that there was insufficient evidence to link him to the use of the deadly weapon to shoot Jose. We find that the evidence was sufficient to affirmatively

[6] Because the issue is not preserved or briefed, we need not decide the issue discussed at oral argument of whether a deadly weapon finding is appropriate in a case in which the only offense tried and for which the defendant is found guilty is the possession of a firearm by a felon. We address this issue as presented.

link Becerra's possession of the firearm given to him by Sylvia to the shooting of Jose. We do not find that the jury's determination was unreasonable that Becerra had hidden the gun that was used to shoot Jose under the mat in the driver's seat in the vehicle that he had driven that day, and that Becerra asked Sylvia to bring him the gun, which she did. A short time later, Jose was shot by a small-caliber firearm that was consistent with the description of the gun given to Becerra as "little bitty." Three men were in the apartment at the time of the shooting—the victim, Becerra, and a third man. Becerra left immediately after the neighbor heard the gunshot; however, the other man remained at the scene. It is not unreasonable to infer that after Becerra shot Jose, he immediately departed and got rid of the gun, which would explain how the gun was not found at the scene of the shooting. The evidence to support the jury's affirmative finding regarding the deadly weapon was sufficient. Having found that the evidence was sufficient as to both the possession of the firearm and the deadly weapon finding, we overrule issue three.

ADMISSION OF EVIDENCE

In his fourth issue, Becerra complains that the trial court erred by admitting testimony of the detective regarding statements Sylvia had made to the detective because his right to confrontation was denied because Sylvia did not testify at trial. During Becerra's cross-examination of Michelle, counsel for Becerra asked Michelle if, when Becerra asked for "cuete," Sylvia had said to her that "he wants that stuff," which Michelle

contended was heroin and not a firearm. Michelle answered in the affirmative and agreed that Sylvia's reference to "stuff" would not indicate a gun but did indicate that Becerra was asking Sylvia for heroin, which was a drug that Becerra had abused in the past. Michelle testified that she did not tell the detective this when he questioned her because she was intimidated and felt like the officers were trying to put words into her mouth. Michelle testified that she was also afraid that Becerra would get into trouble over drugs because he was high and drunk the night of the shooting.

The State sought to admit testimony of the detective who had interviewed Michelle and Sylvia pursuant to Rule 806 of the Rules of Evidence in order to attempt to impeach Michelle's testimony regarding what Sylvia had said regarding "cuete" and whether that meant drugs or a gun. Becerra objected that the admission of the statements Sylvia made to the detective were hearsay and violated his right to confrontation pursuant to the United States Constitution. The trial court overruled Becerra's objections and gave him a running objection to the testimony. On appeal, Becerra also contends that the statements admitted went beyond those that were inconsistent with Michelle's testimony, that the evidence did not actually constitute impeachment evidence, and that the evidence was admitted for all purposes rather than impeachment evidence. Those objections were not made to the trial court, however.

Error is not properly preserved when the contention urged on appeal does not comport with the specific complaint made in the trial court. *Lovill v. State*, 319 S.W.3d

687, 691-92 (Tex. Crim. App. 2009); *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). An objection stating one legal basis may not be used to support a different legal theory on appeal. *See Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004). Therefore, Becerra's complaints regarding the scope of the testimony, whether or not the evidence constituted impeachment evidence, or whether it was admitted for the limited purpose of impeachment testimony or for all purposes have not been preserved for our review and we will not address them further.

RIGHT TO CONFRONTATION

The Sixth Amendment protects an accused's right to be confronted with the witnesses against him in all criminal prosecutions. U.S. CONST. amend. VI. In *Crawford v. Washington*, the Supreme Court held this to mean that the admission at trial of a testimonial, out-of-court statement is barred by the confrontation clause, unless the defendant has had a prior opportunity to examine the witness and the witness is unavailable to testify. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Hearsay—an out-of-court statement offered in evidence to prove the truth of the matter asserted—may be admissible under the evidentiary rules. *See* TEX. R. EVID. 801(d). But hearsay statements nevertheless must overcome the confrontation clause bar, which may be implicated if the defendant is not afforded the opportunity to confront the out-of-court declarant. *Shuffield v. State*, 189 S.W.3d 782, 790 (Tex. Crim. App. 2006).

However, statements that are properly offered and admitted not to prove the truth

of the matter, but rather for a non-hearsay purpose do not implicate confrontation clause rights and are admissible under *Crawford*. *See Del Carmen Hernandez v. State*, 273 S.W.3d 685, 688-89 (Tex. Crim. App. 2008) (concluding such where co-defendant's statement to police was offered and admitted as non-hearsay to impeach co-defendant's credibility). The State contends that Rule 806 of the Rules of Evidence is one such non-hearsay purpose.

Rule 806 of the Rules of Evidence states in pertinent part:

> When a hearsay statement … has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had the opportunity to explain or deny it.

TEX. R. EVID. 806. Here, the State expressly stated that it was seeking to admit the testimony for the purpose of impeaching Michelle's testimony that Sylvia had told her that Becerra asked for drugs rather than a gun and not for the truth of the matter asserted.

The statements made by Sylvia to the detective at issue here were offered by the State in order to attack Michelle's credibility regarding her responses to the questions asked during Becerra's cross-examination of Michelle regarding what Sylvia had said about what it was that Becerra asked her to bring to him. Therefore, they were not offered for the truth of the matter asserted and the Confrontation clause was not implicated. Becerra's failure to request a limiting

instruction or to object to the trial court's failure to give a limiting instruction does not alter the fact that the evidence was admissible for a non-hearsay purpose. We overrule issue four.

CONCLUSION

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

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed June 12, 2019
Publish
[CRPM]

APPENDIX NO. 2

MOTION FOR REHEARING

JOE LUIS BECERRA

V.

STATE OF TEXAS

CASE NO. 10-17-00143-CR

IN THE
COURT OF APPEALS
TENTH APPELLATE DISTRICT OF TEXAS
AT WACO, TEXAS

CASE NO. 10-17-00143-CR

JOE LUIS BECERRA *Appellant*	§	IN THE COURT OF APPEALS
V.	§	FOR THE TENTH DISTRICT
STATE OF TEXAS *Appellee*	§	WACO, TEXAS

APPELLANT JOE LUIS BECERRA'S MOTION FOR REHEARING UNDER AUTHORITY OF RULE 49.1 OF THE TEXAS RULES OF APPELLATE PROCEDURE

JOE LUIS BECERRA ("Appellant") files this Motion for Rehearing under Rule 49.1 TEX. R. APP. P. responding to the Court's published panel Opinion of June 12, 2019 ("the Opinion"), *Becerra v. State*, __ S.W.3d __, No. 10-17-00143-CR, 2019 W.L. 2479957 (Tex. App. – Waco, June 12, 2019). The unanimous Opinion was authored by Chief Justice Gray.

Reason for Rehearing Number One

The Court's published Opinion does not address matters briefed regarding the existence of "waiver-only" rights created by Article V, Section 13 of the Texas Constitution and Art. 33.01 TEX. CODE CRIM. PRO.[1] **and able to be raised for the first time on appeal under *Marin* analysis – particularly in light of the Court of Criminal Appeals decision in *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017), decided after Appellant's initial Brief was filed.**

[1] Appellant is specifically asserting this ground for rehearing only as to Article V, Section 13 of the Texas Constitution and Art. 33.01 of the Texas Code of Criminal Procedure.

This Court did not reach the merits of Appellant's state Constitutional and statutory claims. The Court instead decided that although Trial Counsel's request for mistrial on grounds of the presence of a thirteenth juror during deliberations was sufficiently specific, it was not timely. *Becerra v. State*, __ S.W.3d.__, 2019 W.L. 2479957, No. 10-17-00143-CR at *2 (Tex. App. – Waco 2019). Specifically, this Court found objection was not urged at the earliest opportunity – when the jury retired to deliberate. *Id.* Further, the Opinion decided because Trial Counsel's request for mistrial was not timely, Appellate Counsel's petit juror supported Motion for New Trial on these same issues was derivatively untimely and all claims related were therefore procedurally defaulted. *Id.*

However, the Opinion did not address whether the thirteenth juror participation in both deliberations and, more importantly, voting on the verdict was insulated from procedural default under *Marin* waiver-only rights analysis. *See, Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993). Significantly, *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017) applied *Marin* waiver-only rights to comments made by a trial judge on the weight of the evidence in violation of Art. 39.05 TEX. CODE CRIM. PRO. and decided by the Court of Criminal Appeals after Appellant's Brief was filed.

Proenza was nevertheless extensively briefed in the context of the constitutional and statutory issues raised in this case at Appellant's first opportunity

after *Proenza* was decided, in Appellant's Reply Brief. (Appellant's Reply Brief, pgs. 10-12).[2] The application of waiver-only rights under *Marin* analysis was also discussed at oral argument and even more extensively briefed in Appellant's post-submission letter brief (pgs. 1-3 [non-paginated]).

Proenza expanded the universe of available *Marin* waiver-only rights that can be asserted for the first time on appeal, while simultaneously providing additional analysis to be used by intermediate courts of appeal to determine their existence. Specifically, rights imposing "[U]pon the judge a duty that exists independently of the parties' decision to speak up." *Id.* at 797. In this case, those duties would be to ensure the mandatory language in Art. 33.01 that "[In] the district court, the jury shall consist of twelve qualified jurors," Art. 33.01 TEX. CODE CRIM. PRO. (emphasis added), and Article V, Section 13's Constitutional requirement that "…petit juries in the District Court shall be composed of twelve persons," Art. V, § 13 TEX. CONST. (emphasis added), be enforced.

Proenza caused a mild furor among intermediate courts of appeals when decided. For example, in *Arrellano v. State*, the First Court of Appeals ordered supplemental briefing after *Proenza* was decided on the legal issue of whether the unobjected to instructions given by the trial court in that case were subject to

[2] The Court of Criminal Appeals treatment of the jury misconduct statute, Art. 36.22 of the Texas Code of Criminal Procedure, in *Trinidad II* was extensively discussed in *Proenza*, both in the Majority Opinion, *Proenza* at 798, and in the dissent. *Id*. at 809 (Keller, P.J., dissenting).

appellate review in light of *Proenza*. *Arrellano v. State*, 555 S.W.3d 647, 652 (Tex. App. – Houston [1st Dist.] 2018, pet. ref'd) ("Arrellano concedes that he did not object to the trial judge's comment. In light of the recent opinion in [*Proenza*], this court requested supplemental briefing on the error-preservation rules applicable to this issue").

The narrow issue of Article V, Section 13, and Art. 33.01's status as waiver-only rights under *Marin* is one of first impression in this Court and should be addressed – especially as the Opinion is published. *Trinidad II* did not reach the *Marin* wavier-only right status of Article V, Section 13 of the Texas Constitution or Art. 33.01 of the Texas Code of Criminal Procedure. *Trinidad v. State,* 312 S.W.3d 23, 28 (Tex. Crim. App. 2010) ("But we need not resolve that question [Art. V, Section 13 as a waiver-only right under *Marin*] today."). Instead, *Trinidad II* decided Article V, Section 13's rights attached only to evidence that a number of jurors other than twelve voted on the verdict, a fact uncontested in this case, *Id*. at 28, and that Art. 36.22 juror misconduct claims are subject to the contemporaneous objection rule. *Id*. at 29.

Although this Court did not request supplemental briefing as the First Court of Appeals did in *Arrellano*, Appellant briefed the issue in light of *Proenza*. This appeal has been pending since 2017 and the Opinion should address all issues raised by Appellant's briefing, including whether or not Article V, Section 13 and Art. 33.01

are waiver-only rights under *Marin* analysis. Once decided, a merits based analysis on both the Constitutional and statutory issues should be engaged in by this Court.

Reason for Rehearing Number Two

A Motion for New Trial with petit juror supported affidavit is a recognized error preservation method by the Court of Criminal Appeals for statutory juror misconduct claims under Article 36.22 TEX. CODE CRIM. PRO.[3]

The Opinion, in the last paragraph addressing error preservation of the Constitutional and statutory violations asserted by Appellant regarding the alternate juror's presence in deliberation and voting, held as follows: "Further, because the objection to the presence of the alternate juror was not timely, the complaints raised in Becerra's motion for new trial were also not preserved by a timely objection." *Becerra* at *2.[4]

Appellant's Brief and Reply Brief extensively cited *Castillo v. State*, 319 S.W.3d 966 (Tex. App. – Austin 2010, pet. ref'd). *Castillo* relied upon, and Appellant's briefing cited, *Trout v. State*, which held:

> A motion for new trial is the proper course to be taken in preserving alleged jury misconduct error for appeal. See [predecessor to Art. 36.22] It is further required that such motions for new trial alleging jury

[3] This ground is limited to Art. 36.22 TEX. CODE CRIM. PRO. Although the logic underpinning this ground would apply to Art. V, Section 13 claims, Appellant is limiting this ground in this Motion because of the settled nature of the law as it relates to motions for new trial supported by juror affidavit preserving appellate complaint of jury misconduct claims.

[4] This language includes Appellant's statutory jury misconduct claims under Article 36.22. *Becerra* at *2.

> misconduct be supported by the affidavit of a juror or some other person who was in a position to know the facts.

702 S.W.2d 618, 620 (Tex. Crim. App. 1985) (emphasis added); *See also, Menard v. State*, 193 S.W.3d 55, 59 (Tex. App. – Houston [1st Dist.] 2006, pet ref'd) ("In order to properly preserve an error regarding jury misconduct, a defendant must move for a mistrial or a new trial." [emphasis added]).

A petit juror supported Motion for New Trial would logically be the preferred method of proving juror misconduct under Art. 36.22. Without juror supported evidence of the nature of the outside influence, a trial court cannot grant new trial, or, alternatively, an appellate court cannot review the basis for the misconduct claim.

Additionally, the language used in *Trinidad II* that Article 36.22 violations are subject to contemporaneous objection is nevertheless consistent with *Trout* and *Menard* that Motions for New Trial provide a separate, free standing method of error preservation for violations of Art. 36.22:

> We perceive no reason that a defendant should not be deemed to have forfeited the protections of Article 36.22 in the event that he becomes aware of its breach during the course of the trial but fails to call the transgression to the trial court's attention so that the error may be rectified or, barring that, so that the defendant can make a timely record for appeal.

Trinidad II, 312 S.W.3d at 29 (emphasis added).

This is a distinct statutory error asserted in this case and not derivative of the Opinion's finding that Trial Counsel procedurally defaulted claims related to the presence of a thirteenth juror deliberating and voting on the verdict in violation of

Article V, Section 13 of the Texas Constitution and Art. 33.01 and Art. 33.011 of the Texas Code of Criminal Procedure. This Court should reach the merits of Appellant's juror misconduct claim and find the presence of the thirteenth juror constituted harmful juror misconduct under Art 36.22 TEX. CODE CRIM. PRO.

THEREFORE, Appellant requests:

1. Granting of Appellant's Motion for Rehearing;
2. Reversal and remand to the Trial Court with instructions;
3. General relief.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded to counsel of record listed below on the 20th day of June, 2019:

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