IN THE SUPREME COURT OF TEXAS

NO. 03-0914

HYUNDAI MOTOR CO. AND HYUNDAI MOTOR AMERICA, INC., PETITIONERS,

v.

VICTOR MANUEL VASQUEZ AND BRENDA SUAREZ VASQUEZ, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ALYSSA AMBER VASQUEZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued February 15, 2006 and January 6, 2005

JUSTICE BLAND delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE BRISTER, JUSTICE WILLETT, and JUSTICE CAYCE joined.[1]

JUSTICE MEDINA filed a dissenting opinion, in which JUSTICE WAINWRIGHT and JUSTICE JOHNSON joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which JUSTICE JOHNSON joined.

In this case, we decide whether a trial court abuses its discretion in refusing to allow a voir dire question from counsel that previews relevant evidence and inquires of prospective jurors whether such evidence is outcome determinative. We hold that it does not. The court of appeals held that it does. Accordingly, we reverse and remand.

[1] The Honorable John Cayce, Chief Justice, Second District Court of Appeals, and the Honorable Jane Bland, Justice, First District Court of Appeals, sitting by commission of the Honorable Rick Perry, Governor of Texas, pursuant to TEX. GOV'T CODE § 22.005. CHIEF JUSTICE JEFFERSON and JUSTICE GREEN are recused.

I. Background

Four-year-old Amber Vasquez died in a low-speed neighborhood traffic collision, after the passenger-side airbag in her aunt's Hyundai Accent deployed with enough force to catch Amber's chin and break her neck. The driver of the other car had turned unexpectedly in front of the Hyundai, and the force of the collision threw Amber forward in her seat. It is undisputed that Amber was not buckled into her front-seat seat belt at the time of the accident.

Amber's parents, Victor and Brenda Vasquez, sued Hyundai Motor Company and Hyundai Motor America, Inc. (together "Hyundai"), contending that Hyundai had placed the airbag incorrectly, and that the airbag had deployed with too much force in this low-impact accident. Hyundai responded that the airbag that killed Amber was not defective because a child wearing a seat belt – as state law requires[2] – or sitting in the back seat – as the car's warnings cautioned – would not have been injured by its deployment.

In placing Amber unbuckled in the front seat, Amber's aunt, Valerie Suarez, disregarded airbag warnings on both sunvisors, a hangtag from the rearview mirror, a decal on the dashboard, and a notification in the owner's manual. Suarez ignored the warnings because she planned a short neighborhood trip and believed that the airbags would deploy only at higher speeds. Hyundai conceded that it knew some occupants would ignore the airbag warnings about placing children

[2] *See* TEX. TRANSP. CODE § 545.413(b)(2) ("A person commits an offense if the person . . . allows a child who is younger than 17 years of age and who is not required to be secured in a child passenger safety seat system . . . to ride in the vehicle without requiring the child to be secured by a safety belt, provided the child is occupying a seat that is equipped with a safety belt.").

unbuckled in the front seat,[3] but maintained the risk was outweighed by the benefits of the airbag to all others.[4] Hyundai named Suarez and the driver of the other car as responsible third parties.[5]

The trial judge dismissed two jury panels before seating the jury in the case from a third. During the first voir dire, Amber's counsel asked jurors[6] whether the fact that Amber was not wearing her seat belt would determine their verdict.[7] After numerous jurors indicated that the lack of a seat belt would determine their verdict, the trial court dismissed the jury panel. During the second voir

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[3] *See, e.g.*, Susan M. Mudgett, Comment, *Exploding Liability: Creating a Cause of Action for Defectively Designed Airbags Under the Restatement (Third) of Torts*, 78 OR. L. REV. 827, 842-43 (1999) (citing poll that found 80% of respondents thought it safe to have children under age 13 in the front seat).

[4] *See, e.g.*, Richard J. Bonnie & Bernard Guyer, *Injury as a Field of Public Health: Achievements and Controversies*, 30 J.L. MED. & ETHICS 267, 277 (2002) (noting that force of airbag deployment involves trade-offs between adults and children, and between belted and unbelted passengers); Lauren Pacelli, Note, *Asleep at the Wheel of Auto Safety? Recent Airbag Regulations by the National Highway Traffic Safety Administration*, 15 J. CONTEMP. HEALTH L. & POL'Y 739, 761-64 (1999).

[5] *See* TEX. CIV. PRAC. & REM. CODE § 33.004.

[6] We refer to persons assigned to a court but not yet selected on a jury as "jurors," as this term is generally the one used in court rules. *See* TEX. R. CIV. P. 223, 224, 226, 226a, 227-32, 235, & 248. For the same purpose, Texas statutes use the term "juror" sometimes, *see*, *e.g.*, TEX. EDUC. CODE § 22.006, TEX. GOV'T CODE §§ 24.014(b), 25.0102(i), 30.00007(b)(3), 30.00013(a), & 62.111; the term "prospective juror" sometimes, *see*, *e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.053, TEX. GOV'T CODE §§ 61.003, 62.002, 62.004-.006, 62.0111, 62.013, & 62.302; and sometimes both alternately, *see*, *e.g.*, TEX. GOV'T CODE §§ 62.015-.017, 62.019, 62.112 & 62.411.

[7] Plaintiffs' counsel asked:

> Now, what I specifically am looking for are those among you right now that will say, if [Amber] wasn't wearing a seat belt, then I don't care what the scientific evidence is. I don't care about the characteristics of this particular airbag and how it operated in this particular accident at this particular speed. As long as I know that she wasn't wearing an airbag – I mean a seat belt, that means that, you know, there's no way Hyundai can be responsible. If that is an attitude that you have about seat belts and about airbags, if that is an attitude that you have about accidents of this kind and the tragic results that flow from them, that's what I'm asking you about. Is there anyone here that regardless of what the evidence is, once you hear [Amber] wasn't wearing a seat belt your mind is made up?

dire, the trial judge questioned the jurors along similar lines,[8] with slightly fewer, but nonetheless significant, affirmative responses.[9] The court again dismissed the panel.

Before the third voir dire, the trial judge discussed with counsel her concern that the previous jury panels had misunderstood the inquiry about placing a child in the front seat without a buckled seat belt to be one about the weight they could give to particular evidence in the case rather than whether they could fairly consider all of the evidence presented.[10] As a result, during the third general voir dire, in response to counsel's request to ask general questions "about belting, seat belting, and seat belting habits much akin to what I did the last time I did general voir dire," the trial court responded, "I am going to let you ask those questions." Thereafter, the trial court allowed counsel to ask "general questions about belting" and to inquire about jurors' personal seat belt habits, but she did not allow disclosure that Amber was not wearing one at the time of the accident.[11] Counsel asked questions about whether the jurors buckled their seat belts on short trips, before leaving the garage, before exiting a driveway, and before leaving a parking spot. At the conclusion of the third voir dire,

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[8] Specifically, the trial court told the second jury panel that "Amber was not wearing her seat belt," and asked the jurors to raise their hand if they would "decide this case . . . based on that one fact alone."

[9] During the first voir dire, 29 out of 48 jurors indicated that the fact that Amber was not wearing a seat belt would preclude them from considering any other evidence presented. During the second panel, 18 of the 52 jurors responded affirmatively to the trial court's inquiry.

[10] As the trial court stated, "The problem with that is is I was automatically excluding some people who may have understood my questions -- either of the questions on the seat belt or on the sympathy -- merely trying to be persuading them to set aside the idea that they might be giving weight or not being allowed to give weight to the evidence, and that was not the purpose of my question."

[11] The trial court stated, "I will let you explore the belting issue," but noted "I want just general questions." The trial court further ordered that any inquiries about whether jurors ensured their children are belted could be done on an individual basis, but as we later discuss, the court changed its ruling on individual voir dire when presented with counsel's question.

the trial court excused 3 of the first 28 jurors for cause and seated a 12 member jury and one alternate.

The jury heard evidence for three weeks and returned a verdict in favor of Hyundai. It found no design defect and assessed liability for Amber's death to the two drivers (75 percent to Suarez, and 25 percent to the other driver). The trial court rendered a take-nothing judgment.

The Vasquezes appealed, contending the trial court erred in disallowing voir dire inquiry into whether the jurors would be "predisposed, regardless of the evidence," against the Vasquezes because "there is no seat belt in use," to a point that "[the jurors] could not be fair and impartial." Hyundai responded that the proposed voir dire inquiry is improper in that it asks jurors about the weight they would place on a particular piece of relevant evidence, and thus the trial court properly refused to allow it. A panel of the Fourth Court of Appeals affirmed the trial court's judgment. Upon rehearing en banc, however, the court of appeals reversed, holding that the trial court had abused its discretion in disallowing the inquiry because the proposed question focuses "on the ability of the jurors to be fair."[12] This Court granted Hyundai's petition for review.[13]

II. The Purpose of Voir Dire

[12] 119 S.W.3d 848, 856 (Tex. App.-San Antonio 2003) (en banc).

[13] 48 Tex. Sup. Ct. J. 45 (Oct. 15, 2004).

The Bill of Rights in the Texas Constitution guarantees litigants a right to trial by a fair and impartial jury[14] and authorizes the Legislature to pass laws "to maintain its purity and efficiency."[15] The Legislature thus has authority to pass laws establishing those qualified to serve, consistent with the right to a jury trial.[16] To that end, the Legislature has established general juror qualifications relating to age, citizenship, literacy, sanity, and moral character.[17] The Legislature also has established bases for juror disqualification, including those relating to witnesses, relatives, and interested parties.[18] Among these bases, the Legislature has disqualified from jury service anyone who "has a bias or prejudice in favor of or against a party in the case."[19]

Voir dire examination protects the right to an impartial jury by exposing possible improper juror biases that form the basis for statutory disqualification.[20] Thus, the primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath.[21]

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[14] *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989).

[15] TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.").

[16] *See Central & M.R. Co. v. Morris*, 3 S.W. 457, 462 (Tex. 1887) (statute requiring court instead of jury adjudication of plaintiff's damages after defendant's default held unconstitutional).

[17] TEX. GOV'T CODE § 62.102.

[18] TEX. GOV'T CODE § 62.105.

[19] *Id.* § 62.105(4).

[20] *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).

[21] *See Morgan v. Illinois*, 504 U.S. 719, 734-35 (1992).

In addition, this Court recognizes that trial courts should allow "broad latitude" to counsel "to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised."[22] "A peremptory challenge, commonly referred to as a 'strike,' is defined by rule 232 as one 'made to a juror without assigning any reason therefor.'"[23] Peremptory challenges allow parties to reject jurors they perceive to be unsympathetic to their position.[24] The long-established practice of voir dire inquiry for use in exercising peremptory challenges acknowledges the subjectivity inherent in jury selection– voir dire does not lend itself to formulaic management. As one authority has observed:

> [T]he scope of the voir dire examination quite obviously can not be bounded by inflexible rules of thumb, for of all the delicate psychological factors inherent in a jury trial perhaps none is more essentially subjective and hence less submissive to dogmatic limitations.[25]

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[22] *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989).

[23] *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 917 (Tex. 1979) (quoting TEX. R. CIV. P. 232).

[24] *Id.* at 919; *see also Swain v. Alabama*, 380 U.S. 202, 220 (1965) (noting that "[w]hile challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' upon a juror's 'habits and associations,' or upon the feeling that 'the bare questioning (a juror's) indifference may sometimes provoke resentment.'") (citations omitted), *overruled in part by Batson v. Kentucky*, 476 U.S. 79, 100 n.25 (1986).

[25] 4 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE, § 21:19 at 116 (2d ed. 2001); *see generally* 8 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 120.02 (2005).

Peremptory strikes are not intended, however, to permit a party to "select" a favorable jury.[26] Counsel's latitude in voir dire, while broad, is constrained by reasonable trial court control.[27] Such control is necessary because, "[t]hough the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body."[28] Thus, the exercise of jury strikes is not solely a private endeavor: "[W]hen private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance."[29]

III. Voir Dire Inquiry Regarding Facts in a Case

Voir dire inquiry into potential juror bias and prejudice thus is proper to determine whether jurors are disqualified by statute[30] and to seek information that allows counsel to intelligently exercise their peremptory strikes. Because the statute does not define "bias" or "prejudice," we defined them in *Compton v. Henrie*, using their ordinary meanings:[31]

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[26] *Patterson Dental*, 592 S.W.2d at 919 (noting that, in cases with multiple parties, if the number of peremptory strikes allowed to one side is grossly disproportionate, it permits the side with the greater number to actually construct the jury).

[27] *See Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92 (Tex. 2005); *see also Falter v. United States*, 23 F.2d 420, 426 (2d Cir. 1928) (L. Hand, J.) (upholding trial court voir dire without counsel examination because "[t]he length and particularity of the examination of jurors had become a scandal, and required some effective control").

[28] *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (holding that, in civil cases, private parties may not base their peremptory challenges on a juror's race).

[29] *Id.* at 628.

[30] TEX. GOV'T CODE § 62.105(4).

[31] TEX. GOV'T CODE § 312.002; *Cities of Austin, Dallas, Ft. Worth & Hereford v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002); *Owens Corning v. Carter*, 997 S.W.2d 560, 577 (Tex. 1999).

> Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined, for it means prejudgment, and consequently embraces bias; the converse is not true.[32]

Other sources confirm that "bias" generally relates to inclinations, while "prejudice" is associated with prejudgment.[33] Although it expressly prohibits only bias or prejudice concerning parties, we recognized in *Compton* that the statute extends to bias or prejudice concerning types of cases.[34] A juror who is prejudiced against all medical malpractice claims, for example, is necessarily prejudiced "against a party in the case," even if they have never met.[35]

Although a juror may be statutorily disqualified because of a bias or prejudice against a type of claim or a general inability to follow the court's instructions regarding the law, this Court has refused to hold that statements that reflect a juror's judgment about the facts of a case as presented, rather than an external unfair bias or prejudice, amount to a disqualifying bias. In *Cortez v. HCCI-San Antonio, Inc.*, an attorney summarized the evidence during voir dire, and then inquired of the jurors whether either party was "starting out ahead."[36] The Court held that such inquiries are

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[32] 364 S.W.2d 179, 182 (Tex. 1963).

[33] *See, e.g.*, BLACK'S LAW DICTIONARY 171, 1218 (8th ed. 2004) (defining bias as "[i]nclination; prejudice; predilection," and defining prejudice as "[a] preconceived judgment formed without a factual basis; a strong bias"); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 147, 928 (10th ed. 1993) (defining bias as "an inclination of temperament or outlook; *especially*: a highly personal and unreasoned distortion of judgment," and defining prejudice as "(1): preconceived judgment or opinion (2): an adverse opinion or leaning formed without just grounds or before sufficient knowledge").

[34] *Compton*, 364 S.W.2d at 182 (citing *Houston & T. C. Ry. Co. v. Terrell*, 7 S.W. 670, 672 (Tex. 1888) and *Couts v. Neer*, 9 S.W. 40, 41 (Tex. 1888)).

[35] TEX. GOV'T CODE § 62.105(4).

[36] *Cortez*, *159* S.W.3d 87, 94 (Tex. 2005).

improper, and that a trial court should not disqualify a juror based on an answer to an inquiry that seeks "an opinion about the evidence."[37]

Cortez thus adopted the general rule that it is improper to ask prospective jurors what their verdict would be if certain facts were proved.[38] Fair and impartial jurors reach a verdict based on the evidence,[39] and not on bias or prejudice.[40] Voir dire inquiries to jurors should address the latter, not their opinions about the former. *Cortez* involved a general summary of all the evidence, and thus we did not review whether a voir dire question addressed to the weight a juror would give a relevant piece of the evidence could be objectionable. Such an inquiry, however, raises similar concerns.

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[37] *Id.*; *see also* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1095 (1995) ("[T]he parties have a right to an impartial jury . . . . They do not, however, have a right to a sympathetic jury of their own creation . . . ."); Julie A. Wright, *Challenges for Cause Due to Bias or Prejudice: The Blind Leading the Blind Down the Road of Disqualification*, 46 BAYLOR L. REV. 825, 828 (1994) ("[S]ome of the juror responses which are used to form bases of challenges are not indications of actual bias, but are instead, answers to inappropriate weight of evidence questions.").

[38] Annotation, *Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case*, 99 A.L.R.2d 7, 20 (1965); *see, e.g.*, OKLA. STAT. tit. XII, ch. 2, app., Rule 6 (2005); *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 258 (5th Cir. 1985); *DeLaCruz v. Atchison, T. & S. F. Ry. Co.*, 405 F.2d 459, 462 (5th Cir. 1968); *Sherman v. William M. Ryan & Sons*, 13 A.2d 134, 135-36 (Conn. 1940); *Telligman v. Monumental Props., Inc.*, 323 S.E.2d 888, 889 (Ga. App. 1984); *Woolen v. Wire*, 11 N.E. 236, 237 (Ind. 1887); *Grover v. Boise Cascade Corp.*, 860 A.2d 851, 858 (Me. 2004); *Barnes v. Marshall*, 467 S.W.2d 70, 76 (Mo. 1971); *Hill v. Turley*, 710 P.2d 50, 56 (Mont. 1985); *Pence v. Pence*, 174 S.E.2d 860, 861 (N.C. App. 1970); *Patterson v. Corliss*, 298 A.2d 586, 590 (N.H. 1972); *Thornsbury v. Thornsbury*, 131 S.E.2d 713, 721 (W. Va. 1963); *see also* Janeen Kerper, *The Art and Ethics of Jury Selection*, 24 AM. J. TRIAL ADVOC. 1, 8 (2000) ("Counsel may object [during voir dire] if the questioning . . . constitutes an improper attempt to precondition the jury . . . .").

[39] BLACK'S LAW DICTIONARY 873 (8th ed. 2004) (defining an "impartial jury" as one that "bases its verdict on competent legal evidence"); *see also Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998) (holding that juror's answers "do not establish bias; in fact, they are consistent with a juror's duty to be bound by the evidence in a particular case in reaching his verdict").

[40] *See* TEX. R. CIV. P. 226a, sec. III ("Do not let bias, prejudice or sympathy play any part in your deliberations.").

First, an inquiry about the weight jurors will give relevant evidence should not become a proxy for inquiries into jurors' attitudes, because the former is a determination that falls within their province as jurors.[41] Just as excluding jurors who weigh summarized facts in a particular way infringes upon the right to trial by a fair and impartial jury, so too does excluding jurors who reveal whether they would give specific evidence great or little weight.[42] In both cases, questions that attempt to elicit such information can represent an effort to skew the jury by pre-testing their opinions about relevant evidence. And, when all of the parties to the case engage in such questioning, the effort is aimed at guessing the verdict, not at seating a fair jury.

Second, inquiring whether jurors can be fair after isolating a relevant fact confuses jurors as much as an inquiry that previews all the facts. Lawyers properly instruct jurors that voir dire is *not* evidence, yet jurors must answer whether they can fairly listen to all of the evidence based only upon the facts that counsel have revealed. In responding, jurors are unable to consider other relevant facts that might alter their responses, rendering their responses unreliable. This confusion may explain in part why jurors' voir dire reactions to the evidence have not been proven to be predictors of jury verdicts: experience tells that, whatever jurors' stated opinions about particular evidence may be at the outset, they can shift upon hearing other evidence.[43]

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[41] *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005).

[42] *See Cortez*, 159 S.W.3d at 94.

[43] *See* Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 720 (1991) (publishing results of study concluding that "Attorneys disagree substantially about what information to rely on and which jurors to select, and consistently produce low levels of accuracy in forecasting juror verdict preference prejudices."). The commentator further observes, "[p]erhaps more importantly, even the heightened power of prediction of statistical models also demonstrates comparatively low levels of success in forecasting juror verdict preferences." *Id.*

Third, previewing jurors' votes piecemeal is not consistent with the jurisprudence of our sister court.[44] In *Standefer v. State*, the Court of Criminal Appeals held it improper to ask jurors whether they would presume guilt if one fact was proved and no others.[45] Our sister court consistently has observed that

> [Q]uestions that are not intended to discover bias against the law or prejudice for or against the defendant, but rather seek only to determine how jurors would respond to the anticipated evidence and commit them to a specific verdict based on that evidence are not proper.[46]

As the statutory standards for bias or prejudice in civil and criminal cases are the same,[47] voir dire standards should remain consistent.

Finally, the Court's decision in *Babcock v. Northwest Memorial Hospital* does not dictate that a trial judge must accept questions that seek to assess jurors' opinions about the weight they will place on particular evidence. In that case, we held that counsel could question jurors about bias or prejudice resulting from a societal influence outside the case - namely, tort reform.[48] In contrast, a

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[44] *See Cortez*, 159 S.W.3d at 91-94 (noting similar tests in criminal voir dire cases concerning rehabilitation of jurors, limitations on scope of questioning, and standards for preserving error in denial of challenges for cause); *see also Davenport v. Garcia*, 834 S.W.2d 4, 14 (Tex. 1992) ("We give thoughtful consideration to [the Court of Criminal Appeals'] analysis in part to avoid conflicting methods of constitutional interpretation in our unusual system of bifurcated highest courts of appeal.").

[45] 59 S.W.3d 177, 183 (Tex. Crim. App. 2001) (holding it was improper to ask jurors "[w]ould you presume someone guilty if he or she refused a breath test on their refusal alone?").

[46] *Sanchez v. State*, 165 S.W. 3d 707, 712 (Tex. Crim. App. 2005).

[47] The Texas Code of Criminal Procedure provisions concerning bias or prejudice mirror those applicable to civil trials. *See* TEX. CRIM. PROC. CODE art. 35.16(a)(9); *Smith v. State*, 907 S.W.2d 522, 530 (Tex. Crim. App. 1995) (holding that "bias or prejudice in favor of or against the defendant" in article 35.16(a)(9) includes bias for or against the State, as bias against one would constitute bias in favor of the other).

[48] 767 S.W.2d 705, 706 (Tex. 1989).

question that asks jurors to judge the weight to be given an operative fact will not reveal whether jurors have potential external biases or prejudices that improperly skew their view of case facts.

Statements during voir dire are not evidence, but given its broad scope in Texas civil cases, it is not unusual for jurors to hear the salient facts of the case during the voir dire. If the voir dire includes a preview of the evidence, we hold that a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts.[49] If the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not disqualifying, because while such responses reveal a fact-specific opinion, one cannot conclude they reveal an improper subject-matter bias.

IV. Trial Court Discretion

One of the primary rules of voir dire in Texas civil cases has long been that trial courts have broad discretion in conducting it.[50] Until the court of appeals' decision in this case, neither this Court, nor any intermediate appellate court, had held that a trial court abuses its discretion in excluding a voir dire question that incorporates isolated facts in a case.[51] In two instances, this Court has refused

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[49] *See Cortez*, 159 S.W.3d at 94 ("Such attempts to preview a veniremember's likely vote are not permitted.").

[50] *Cortez*, 159 S.W.3d at 92; *Babcock*, 767 S.W.2d at 709; *see also Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997) (applying abuse-of-discretion standard in reviewing whether peremptory strike was discriminatory); *Compton*, 364 S.W.2d 179, 182 (Tex. 1963) (applying abuse-of-discretion standard in reviewing whether juror was disqualified).

[51] *See, e.g.*, *Greenman v. City of Ft. Worth*, 308 S.W.2d 553, 554 (Tex. App.–Fort Worth 1957, writ ref'd n.r.e.) (trial court did not abuse its discretion in excluding voir dire question in condemnation case asking whether jurors had any objection to awarding particular dollar amounts because of the large amount of money involved); *Lassiter v. Bouche*, 41 S.W.2d 88, 90 (Tex. Civ. App.–Dallas 1931, writ ref'd) (affirming trial court's decision to exclude question about whether any prejudice existed against the use of an oral agreement to dispute the terms of a written contract as an improper commitment question); *Campbell v. Campbell*, 215 S.W. 134, 136-37 (Tex. Civ. App.–Dallas 1919, writ ref'd) (trial court did not abuse its discretion in disallowing: "Would the fact that the testator in making his will left out . . . one or more members of his family influence you in finding a verdict in this case?").

the writ from appellate decisions upholding trial courts that rejected such inquiries.[52] For good reason: an attorney's question is easier to parse in the courtroom than it is in an appellate record. In this case, for example, when a juror specifically asked whether questions about prejudice should take into account evidence already disclosed by counsel, the response was ambiguous:

> PROSPECTIVE JUROR NO. 7: I don't understand that question. Does that mean like that by what we have heard so far we haven't made a judgment?
>
> [PLAINTIFFS' COUNSEL]: Yeah. I don't want -- Is there anyone here who has already made up their mind? Let me ask that question real, real loud again. Is there anybody here that thinks that they have already made up their mind on this case right now before you have heard any evidence whatsoever?

Without being present in the courtroom, one cannot tell whether jurors might have understood this response to be "Yes" or "No."

The only intermediate court of appeals case to reverse a trial court's decision held it an abuse of discretion to *allow* the question. *Parker v. Schrimsher*, 172 S.W. 165, 170 (Tex. Civ. App.–Amarillo 1914, writ ref'd) ("[W]ould you let the fact that Schrimsher executed the mortgage or mortgages to the bank influence you in determining whether or not the property in controversy was a homestead of himself and family at the time he executed the mortgage?").

[52] Both *Campbell* and *Lassiter* are writ refused cases, and in both, the appellate courts held that counsel may not seek responses that commit jurors to a particular view of the evidence before it is presented. *See Lassiter*, 41 S.W.2d at 90; *Campbell*, 215 S.W. at 137. Decided in 1931, *Lassiter* carries the imprimatur of Texas Supreme Court precedent. *See* TEXAS RULES OF FORM (Texas Law Review Ass'n et al. eds., 10th ed. 2005) (In cases after 1927, "writ refused" denotes that the "[j]udgment of the court of civil appeals is correct," with "[s]uch cases hav[ing] equal precedential value with the Texas Supreme Court's own opinions."). The Court refused the writ in *Campbell* in 1919, an amorphous time in our writ practice. At least two cases of that era interpret the refusal of a writ to mean the court of appeals' opinion is binding precedent, but later the Court noted that writ refusals during that era signified an agreement with the judgment of the court of appeals, but not adoption of the opinion. *Compare Binford v. Harris County*, 261 S.W. 535, 537 (Tex. Civ. App.–Galveston 1924, writ ref'd) ("The . . . decision, rendered in 1918 by this court, with writ of error refused by the Supreme Court [, is] the law of the state until changed . . . ."); *Urban v. Bagby*, 286 S.W. 519, 523 (Tex. Civ. App.–Galveston 1926), *aff'd on other grounds*, 291 S.W. 537 (Tex. Comm'n App. 1927, judgm't adopted) ("The opinion in the case cited was approved by the Supreme Court by a refusal to grant a writ of error.") *with Ulbricht v. Friedsam*, 325 S.W.2d 669, 674 (Tex. 1959) ("While the refusal of a writ of error in 1917 did not mean what it does now, it meant that the Supreme Court was satisfied with the correctness of the judgment rendered."). *See generally*, Ted Z. Robertson and James W. Paulsen, *Rethinking the Texas Writ of Error System*, 17 TEX. TECH. L. REV. 1, 10-20 (1986).

It can be a close question whether a juror's response indicates a prejudice due to personal animus or bias, rather than a fair judgment of the previewed evidence.[53] Similarly, it can be a close question whether a voir dire inquiry focuses on the former or the latter, as the question presented for a ruling in this case reflects. Determining whether jurors' answers assume or ignore the evidence disclosed to them turns on the courtroom context, and perhaps the looks on their faces. So, too, does the import of counsel's questions, and whether as phrased they seek external information or a preview of a potential verdict. The trial judge is in a better position to evaluate the reasonableness of both aspects – the question and the answer.

We observed in *Cortez* that trial judges have discretion to clarify whether a juror's response is the result of confusion, misunderstanding, or mistake.[54] Similarly, the trial judge must have discretion to exclude questions that seek to gauge the weight a juror will place on specific evidence. In *Cortez*, we held improper both (1) a juror's disqualification based on answers that previewed the juror's vote, and (2) the actual questions that sought the same.[55] Depending on the circumstances, a trial judge may choose to hear jurors' responses before deciding whether an inquiry pries into potential prejudices or potential verdicts, but if the question reaches for the latter, a trial court does not abuse its discretion in refusing to allow it. If the trial court allows a question that seeks a juror's

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[53] *See* John T. Bibb, Comment, *Voir Dire: What Constitutes an Impermissible Attempt to Commit a Prospective Juror to a Particular Result*, 48 BAYLOR L. REV. 857, 874 (1996) (noting that jurors will "likely understand questions as to whether the juror would consider, be prejudiced by, or be influenced by, certain evidence to mean the same thing"); *see also Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 373 (Tex. 2000) (noting that a juror may have misunderstood a voir dire question).

[54] *Cortez*, 159 S.W.3d at 92.

[55] *Id.* at 94 (stating that "attempts to preview a veniremember's likely vote are not permitted," and that "[a] statement that one party is ahead cannot disqualify if the veniremember's answer merely indicates an opinion about the evidence").

view about the weight to give relevant evidence, then the juror's response, without more, is not disqualifying.

Permitting disclosures about the evidence the jury will hear during the case increases the potential for discovering external biases, but inquiries to jurors after doing so should not spill over into attempts to preview the verdict based on the facts as represented to the jurors. Balancing these competing concerns depends on the facts in a case and on the inquiries posited to the jury. The trial judge is in a better position to achieve the proper balance.

V. The Question

The Vasquezes contend the trial court erred in refusing to allow the following inquiry to the jurors:

> THE COURT: What is the type of question you need to ask other than what has already been asked about their own individual use of seat belts or not seat belts?
>
> [PLAINTIFFS' COUNSEL]: Your Honor, I need to know whether or not they would be predisposed regardless of the evidence to -- Their preconceived notion is that if there is no seat belt in use, no matter what else the evidence is, that they could not be fair and impartial.
>
> THE COURT: And that's the type of question you are asking to ask?
>
> [PLAINTIFFS' COUNSEL]: That's the kind of question I need to ask . . . .

After Hyundai's objection that the question would "pretest these jurors about the facts of this case," the trial judge stated:

> THE COURT: All right. I'm going to sustain the objection. We are not going to go any further into seat belts. . . .

The court of appeals held that the trial court abused its discretion in excluding the inquiry, agreeing with the Vasquezes that the proposed question "clearly focuses on the ability of the jurors

to be fair,"[56] because, upon learning that Amber was not wearing a seat belt, jurors should not be so biased that they could not consider the remaining evidence in the case. Here, however, the trial court reasonably could have determined that the question seeks to gauge the jurors' verdicts and therefore we disagree with the court of appeals.

First, the question isolates a single fact material to the case: that Amber did not wear a seat belt. Hyundai's defense at trial rested in part on a theory that its airbags would not have harmed a child wearing a seat belt, as required by law, or sitting in the back seat. Assuming that placing an unbelted child in the front seat is relevant, admissible evidence, reasonable jurors could base their verdict on that fact alone.[57] By isolating this fact, the question seeks to identify those jurors who agree that the one fact overcomes all others. As reasonable jurors, however, it is within their province to so conclude.[58] The question thus asks the jurors' opinion about the strength of this evidence, and does not cull out any external bias or prejudice.

Jurors should not base their verdicts on matters that are irrelevant, inadmissible, or unfairly prejudicial, and counsel is entitled to frame voir dire inquiries that ensure that the seated jury will not do so. In those cases in which prejudicial evidence cannot be excluded,[59] a party is entitled to a

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[56] 119 S.W.3d 848, 856 (Tex. App.–San Antonio 2003) (en banc).

[57] The Vasquezes contended in the court of appeals that evidence regarding Amber's lack of a buckled seat belt should have been excluded. The trial court allowed the jury to hear the evidence. In a footnote, the court of appeals held that the evidence is admissible, and thus concluded it was a relevant subject for voir dire inquiry. 119 S.W. 3d at 851 n.2. We assume for the purposes of this discussion that the lack of a buckled seat belt is admissible evidence, and thus seat belt use generally was a relevant topic for voir dire examination.

[58] *See Campbell*, 215 S.W. 134, 137 (Tex. Civ. App.–Dallas 1919, writ ref'd) (holding that "[a] juror that will not be influenced by any material fact, properly admitted . . . is an uncommon person. All material and admissible facts ought and are presumed to influence the juror, notwithstanding some will outweigh and exercise greater influence than others.").

[59] *See, e.g.*, TEX. R. EVID. 411 (allowing evidence of liability insurance when offered for "proof of agency, ownership, or control" or "bias or prejudice of a witness").

limiting instruction,[60] and to inquire whether jurors can follow it. Here, however, both the trial court and the court of appeals concluded that evidence of the lack of a buckled seat belt was relevant and admissible; thus, the trial court could have determined that the inquiry focused upon the weight jurors would give specific evidence.

Second, incorporating phrases associated with an inquiry into whether the jurors hold a preconceived bias does not alter the basic substance of this question. Although the proposed question refers to predispositions and preconceived notions, both concepts properly relate to opinions jurors hold *before* entering the courtroom and hearing the relevant facts. Here, the question includes a relevant fact; thus, responses to it encompass more than *pre*dispositions or *pre*conceived notions. In this case, the jurors' judgments about the fact that Amber did not wear a seat belt at the time of this accident are not separable from their potential verdict. The proposed inquiry asks about these judgments, not about any separate unfair prejudice against a party or a claim jurors may have held before hearing the facts of the case.

The Vasquezes maintain that, even if the proposed question is a commitment question, it nonetheless is proper because the only commitment the question seeks is to have jurors consider all of the evidence, as the law requires.[61] The phrases "regardless of the evidence" and "no matter what else the evidence is" included in this question, however, do not transform its substance into a commitment to listen to the evidence, because the question itself isolates one relevant piece and its impact on juror decision-making. Asking whether jurors will ignore all of the relevant facts, or all of the relevant facts *but one* are two very different questions — an affirmative answer to the former

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[60] *See* TEX. R. EVID. 105(a).

[61] *See* TEX. R. CIV. P. 226a, sec. II (Admonitory Instructions to Jury Panel and Jury).

reflects bias or prejudice, but an affirmative answer to the latter, without more, reflects that jurors think a presented fact is most important, based upon what they have been told by counsel.

The emphasis of the question is not ameliorated by asking in it whether jurors could be fair and impartial. "Called as they are from all walks of life, many [jurors] may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges."[62] In *Cortez*, we held that fair jurors do not leave their knowledge and experience behind, but nonetheless must approach the evidence with an open mind.[63] However, if an inquiry suggests that, to be "fair," jurors must not decide the case based on a relevant fact, then a trial court reasonably could conclude that the question seeks a response that reveals nothing about a juror's potential fairness, but instead attempts to guess about his potential verdict.

The Vasquezes rely upon several intermediate appellate court decisions to contend that the proposed question is in the form of a permissible commitment question. In those cases, however, the courts of appeals deferred to the trial courts' discretion in allowing the questions; none of them reversed a trial court for excluding a question.[64] We disagree that trial courts *must* allow such

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[62] *McDonough*, 464 U.S. 548, 555 (1984).

[63] *Cortez*, 159 S.W.3d 87, 93 (Tex. 2005).

[64] *See, e.g.*, *City Transp. Co. v. Sisson*, 365 S.W.2d 216, 219 (Tex. Civ. App.–Dallas 1963, no writ) (affirming trial court decision to allow inquiry into whether plaintiffs' use of narcotics, if introduced into evidence, would bias jurors against the party); *Rothermel v. Duncan*, 365 S.W.2d 398, 402 (Tex. Civ. App.–Beaumont 1963) (error not preserved as to trial court's decision to allow inquiry into whether jurors would "take into consideration the fact that the witnesses to the disputed will were, at the time of its execution, in the employ of appellant"), *rev'd on other grounds*, 369 S.W.2d 917 (Tex. 1963); *Airline Motor Coaches v. Bennett*, 184 S.W.2d 524, 528 (Tex. Civ. App.–Beaumont 1944) (affirming trial court's decision to allow: "Would the mere presence of a quart of rum . . . in [the] car prejudice you at all in this case?"), *rev'd on other grounds*, 187 S.W.2d 982 (Tex. 1945).

questions. They do not present a basis for juror disqualification, as the appellate courts that have upheld trial courts' rejection of them have observed.[65]

The substance of a question, not its form, determines whether it probes for prejudices or previews a probable verdict.[66] The trial court in this case reasonably could have concluded that the substance of the proposed question did not present a basis for disqualifying a juror for cause, and instead sought to test the weight jurors would place on the relevant fact that Amber was not wearing a seat belt at the time of the accident. Thus, the trial judge did not abuse her discretion in refusing to allow it.

VI. Further Questions

At the conclusion of the general questioning of the panel, the trial judge asked counsel to state the additional questions he sought to ask the jurors about seat belts. The Vasquezes proffered the above question. In sustaining Hyundai's objection, however, the trial judge also ruled: "We are not going to go any further into seat belts."[67] In so ruling, the trial judge reversed an earlier decision to allow further follow up about seat belt usage during the time allotted to counsel to question jurors individually at the bench. In sustaining an objection to an improper voir dire question, a trial court should not foreclose *all* inquiry about a relevant topic. The Vasquezes' complaint as to this part of the trial court's ruling, however, is not preserved.

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[65] *See Lassiter*, 41 S.W.2d 88, 90 (Tex. Civ. App.–Dallas 1931, writ ref'd) ("Counsel should not be permitted, by questions to a prospective juror, to commit such juror, in advance of the evidence, as to the weight he would give any certain evidence."); *Campbell*, 215 S.W. 134, 137 (Tex. Civ. App.–Dallas 1919, writ ref'd) ("To require [a juror] to say that he will or that he will not let a given material fact influence him in reaching a conclusion, if chosen, is simply to commit him against that material fact in advance . . . . [This] would be improper.").

[66] *See Cortez*, 159 S.W.3d 87, 93 (Tex. 2005).

[67] The trial court also ruled that Hyundai could not ask questions about "sympathy."

A trial court may not foreclose a proper line of questioning, presuming that the actual questions posed are proper.[68] In some instances, an area of inquiry may be proper, but not the particular question asked. In such circumstances, a trial court may exercise its discretion to reject the form of the question.[69] If it is necessary to discuss the facts in the case to probe for potential biases, counsel must frame corresponding inquiries to avoid jury confusion and ensure that the question does not seek to preview the verdict. When the trial court determines that a proffered question's substance is confusing or seeks to elicit a pre-commitment from the jury, counsel should propose a different question or specific area of inquiry to preserve error on the desired line of inquiry; absent such an effort, the trial court is not required to formulate the question.

Thus, to preserve a complaint that a trial court improperly restricted voir dire, a party must timely alert the trial court as to the specific manner in which it intends to pursue the inquiry.[70] Such a requirement provides the trial court with an opportunity to cure any error, obviating the need for later appellate review, and further allows an appellate court to examine the trial court's decision in context to determine whether error exists, and if so, whether harm resulted.[71] In *Babcock*, we held that litigants need not present a list of each intended voir dire question, but parties must nonetheless "adequately apprise[] the trial court of the nature of their inquiry."[72] A timely, specific presentation

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[68] *See Barajas v. State*, 93 S.W. 3d 36, 38 (Tex. Crim. App. 2002) (holding that trial court abused its discretion in preventing "a proper question about a proper area of inquiry"). *See also Cortez*, 159 S.W. 3d 87, 92 (Tex. 2005) ("[T]rial judges must not be too hasty in cutting off examination that may yet prove fruitful.").

[69] *Id.*

[70] TEX. R. APP. P. 33.1; *Babcock*, 767 S.W.2d 705, 707-08 (Tex. 1989).

[71] TEX. R. APP. P. 33.1 .

[72] 767 S.W.2d at 706-07 (holding that error was preserved by counsel's statement "that the Court has precluded me from asking questions as to whether the jury has heard or read about, not necessarily the insurance crisis, but the liability crisis and the lawsuit crisis"). In *Babcock*, the party seeking to ask additional voir dire questions

to the trial court of the manner of an inquiry is important because it is difficult to evaluate after a trial whether the trial court's denial of an inquiry caused a biased juror to be seated on the jury or to evaluate what additional information a party could have adduced for the exercise of peremptory strikes.[73] Thus, the Court traditionally has adhered strictly to the principle that voir dire objections must be timely and plainly presented.[74]

Here, in response to the trial judge's request that counsel specify the type of additional inquiry he would ask, counsel framed one inquiry. The proposed question is virtually the same inquiry that the trial court perceived had caused confusion during the second voir dire. That the trial court did not allow a similarly confusing question does not mean, though, that the trial court would have rejected a different approach had counsel proposed it. For example, the trial court could not have denied a question that asked if any juror had a bias against product liability lawsuits that would prevent them from considering the Vasquezes' specific claims. Such a bias, if firmly held, would disqualify any prospective juror who confessed such a belief. Not all questions or areas of inquiry involving the facts of a case will impermissibly attempt to pre-test the weight jurors will give those facts. But absent counsel proposing a different method of inquiry that would avoid continued confusion or pre-commitment, the breadth of the trial court's ruling is untested. Counsel does not

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tendered the questions to the trial court, but the trial court refused to accept them. *Id.*

[73] *See McDonough*, 464 U.S. 548, 555 (1984) (holding that, in a civil case in which a juror failed to provide information in response to a voir dire question, counsel must show that juror's motive for withholding it affected his impartiality, in part because: "A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from [the] juror on voir dire examination.").

[74] *See, e.g.*, *Hallett v. Houston Nw. Med. Ctr.*, 689 S.W.2d 888, 889-90 (Tex. 1985) (holding that error was waived in trial court's failure to excuse a juror for cause by not informing court before exercise of peremptory challenges that counsel lacked sufficient peremptory challenges to remove all objectionable jurors).

have to present a list of questions to preserve error, but after the trial court's ruling sustaining Hyundai's objection to the one presented, it was incumbent on the Vasquezes to request alternative approaches to avoid the problems the trial court was addressing by its ruling. Moreover, the fact that counsel asked other general seat belt questions during the first voir dire does not shed light on the extent of the trial court's ruling in the third, when counsel already had asked some general seat belt questions and did not refer to the first two voir dires, or any question in them, in response to the trial judge's request for the type of additional questions counsel sought to ask – much less seek a ruling on other types of questions counsel previously had asked without objection.[75] In determining whether error was preserved, the question is not, as the dissents contend, whether the trial court knew the substantive area of inquiry about which counsel wanted to ask. The trial court knew counsel wanted to further inquire in some manner about seat belts. But the trial court determined that the way in which counsel posed the inquiry confused the jury and elicited pre-commitment, a call that the dissents agree fell within its discretion. Counsel's continued pursuit of the same inquiry did not preserve error on other inquiries that might have been proper had counsel posed them. We cannot infer, as the dissents suggest, from the fact that the trial judge *allowed* other questions in the first voir dire that she would *not* have allowed other questions in the third, had counsel presented them in response to her request for the type of questions counsel sought to ask.

[75] As we have noted, during the third general voir dire, counsel referred to questions "about belting, seat belting, and seat belting habits much akin to" the first voir dire. The trial court responded, "I am going to let you ask those questions." Upon further questioning at the individual voir dire, counsel did not seek to ask other questions from the first voir dire, and did not refer to it. In the second voir dire, the trial court and the parties ceased efforts to select a jury after the trial court gave preliminary instructions to the jury and asked the single seat belt question counsel preserved for review in the third voir dire. Thus, no other questions or areas of inquiry from the second voir dire exist, save the question we have addressed.

The Vasquezes carried their objection to the trial court's ruling throughout the remainder of individual voir dire, but they did not frame additional inquiries or convey to the trial court that the thrust of any remaining questions would be different from the single one presented for a ruling.[76] We do not know whether the trial court would have allowed other sorts of inquiries had counsel presented their substance. We therefore hold that the record does not present a sufficient basis for review of the trial court's ruling foreclosing further inquiry into seat belts.

* * *

The Texas Constitution guarantees a trial by a fair and impartial jury, and our courts use voir dire to achieve that goal. Voir dire inquiries that explore external biases and unfair prejudices further the effort, but those that test jurors' possible verdicts based on case-specific relevant evidence detract from it. The distinction between the two in some cases is a fine one. Thus, we vest trial judges with the discretion to decide whether an inquiry constitutes the former or the latter; as appellate courts, we should defer to their judgment.[77] We hold that the trial court did not abuse its discretion. We therefore reverse the judgment of the court of appeals and remand the case to that court to consider the Vasquezes' remaining issues on appeal.

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[76] After the trial court had ruled on the parties' challenges for cause, the Vasquezes renewed their objection that the court improperly had restricted the voir dire, but did not frame further seat belt inquiries for a ruling. If the complaint on appeal is that a trial judge has not allowed sufficient questions about a particular subject matter, then a party should detail its areas of inquiry before challenging the juror for cause, allowing the trial judge an opportunity to cure the problem. *Cf. Hallett*, 689 S.W.2d at 889 (noting that, "[a]bsent such notice to the trial court, [a party] waive[s] any error committed by the court in its refusal to discharge those jurors who were challenged for cause").

[77] *Malone*, 977 S.W.2d 562, 564 (Tex. 1998) ("If prejudice is not established as a matter of law, the trial court makes a factual determination as to whether the venire member should be disqualified."); *Swap Shop v. Fortune*, 365 S.W.2d 151, 154 (Tex. 1963) (deferring to trial court's decision to overrule a motion for mistrial which alleged a juror was biased because "[t]he trial court had the opportunity of observing the juror as he testified and was in better position than an appellate court to evaluate the juror's sincerity and his capacity for fairness and impartiality").

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Jane Bland
Justice

OPINION DELIVERED: March 10, 2006.