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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-1039

	Opinion Delivered June 1, 2011
RODNEY A. SCALES APPELLANT	APPEAL FROM THE DREW COUNTY CIRCUIT COURT [NO. CR-09-157-1]
V.	HONORABLE SAM POPE, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Chief Judge

Rodney Scales appeals his convictions of possessing a controlled substance with intent to deliver and felony fleeing. He was sentenced to a total of eighty-four years' imprisonment and a $5000 fine. On appeal, Scales argues that the trial court abused its discretion when it denied his request to exercise a peremptory challenge after the jury had been selected. We affirm.

During voir dire, the trial court and counsel for the State and Scales questioned the jury panel. No strikes for cause were submitted by the parties. Next, the parties exchanged peremptory-challenge lists. At the request of the trial court, counsel for both parties submitted their peremptory-challenge lists to the clerk.[1] The trial court then stated, "We've got thirteen

[1]The State's peremptory-challenge list submitted to the clerk included:
1 Lakesha Suber
34 Elizabeth Clemons

people who have been selected to serve as jurors. As the Clerk calls your name, please stand." After the names were called, the trial court invited them to have a seat in the jury box, and it excused the jurors whose names were not called.

As those thirteen jurors were being seated, counsel for Scales approached the bench and asked to see the State's peremptory-challenge list. Counsel for Scales reviewed the State's list and noticed that the "29" next to Cavaniss's name had been scratched out, and the number "50" added. Counsel advised the trial court that based on the list that was given to him by the State, he thought the State was striking juror "29," whose name was Mark Shanley and who the defense wanted to strike but did not strike because Shanley's number was on the State's list. The trial court responded, "Well, strikes have been made. I'm not going to let anybody go back —."

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37 Laura Ferguson
13 Michael Robbins
29 Christopher Cavaniss

Scales's strike list submitted to the clerk included:

2 Brady Hayden
6 Carl Hensley
16 Paul Smith
30 Venita Defir
31 Barbara Woods

Once both lists were in the possession of the clerk, it appears that the clerk discovered that Christopher Cavaniss was not juror "29" but rather juror "50." The record reflects that someone (presumably the clerk), scratched out "29" and wrote "50" beside Cavaniss's name. Based on those individuals who were struck by the parties pursuant to their peremptory challenges and who were excused by the trial court for other reasons not relevant to this appeal, the clerk compiled a list of twelve jurors and one alternate.

Counsel for Scales nevertheless asked the trial court to use another peremptory strike on juror "29," and the trial court denied the request. Counsel for Scales reminded the trial court that there was an alternate juror seated, but the trial court denied the request again, stating,

> The record will reflect that I let each of the attorneys make strikes. They brought their peremptory strikes up in writing. They were provided to the Court. I'll make these Court's Exhibit A and B for the purposes of this trial in order to show how they were made. Now, Mr. Gibson attempted to make one after that was done. I disallowed it. Just to make the record clear.

The trial court then asked counsel for each party whether they were satisfied with this jury, and counsel both stated, "yes." The jury was then sworn in. However, before the first recess, counsel for Scales approached the bench and argued that he should be entitled to use one of his remaining peremptory challenges on juror "29" Shanley. Counsel for Scales argued that "[t]he strikes made by the State were provided to me by name and number. And I, of course, went by the number. And after I made my strikes, the numbers were altered." The trial court responded, "No, sir. They weren't altered. You just assumed that you had the right number and your assumption happened to be wrong." The court stated that Scales's counsel made a mistake because he relied upon the numbers on the lists, not the names, and he had the correct names. Scales's counsel agreed that he had the names, but replied, "I just want to make the point that I went by the number instead of the name. Maybe that's an error." The trial court agreed, "Yeah. It was clearly a mistake."

Shanley was later voted foreman of the jury that convicted Scales. The only point Scales raises on appeal is that the trial court abused its discretion when it denied the request of his counsel to exercise a peremptory challenge on juror "29" Shanley after the jury was selected.

Arkansas Code Annotated section 16-33-303(b) (Repl. 1999) provides that in criminal proceedings a challenge to a juror (for cause or peremptory) must be taken before he is sworn in chief, but the court, for good cause, may permit it to be made at any time before the jury is completed. Whether a peremptory challenge may be exercised after the juror has been accepted by both sides is a matter directed to the sound discretion of the trial court. *Rorex v. State*, 31 Ark. App. 127, 129, 790 S.W.2d 180, 181 (1990) (citing *Daugherty v. State*, 3 Ark. App. 112, 623 S.W.2d 209 (1981)). We reverse only for abuse of that discretion. *Rorex*, 31 Ark. App. at 129, 790 S.W.2d at 181. Our standard of review is the same regardless of whether the court permits the challenge or declines to permit it. *Id.*, 790 S.W.2d at 181–82.

The evidence in this case demonstrates that the trial court followed the proper procedure in selecting the jury. The court questioned the potential jurors and found them qualified. Counsel for both parties also questioned the potential jurors. The trial court asked counsel for strikes for cause, and none were requested. Peremptory-challenge lists were exchanged between counsel and given to the clerk. After striking the names of the jurors on each peremptory-challenge list, the clerk read the list of the names of the twelve jurors and one alternate who were to be seated as the jury, and the trial court excused the remaining jurors.

Scales does not contest the propriety of the selection process. Rather, he maintains that the trial court, after the jury panel was selected and the remaining jurors were excused, abused its discretion when it rejected his request to exercise an additional peremptory challenge to strike juror "29" Shanley. He argues that he relied upon the juror's numbers on the State's list, which he claims were altered after the lists were submitted to the clerk. Because he was not advised of the change, he was not given the opportunity to amend his list to strike Shanley.

In *Allen v. State*, 70 Ark. 337, 342–43, 68 S.W. 28, 31 (1902), our supreme court held that after a juror has been accepted by both parties, the trial court may for "good cause" permit the request to use a peremptory challenge. In *Allen*, the supreme court affirmed the trial court's denial of the defendant's request to use a peremptory challenge on a juror after that juror had been accepted by both parties because the record failed to show any reason given for the challenge. 70 Ark. at 342–43, 68 S.W. at 31; *Jeffries v. State*, 255 Ark. 501, 502, 501 S.W.2d 600, 601 (1973) (holding that the trial court did not abuse its discretion in refusing to allow the appellant to use a peremptory challenge where it was shown that the trial court strictly followed statutory procedure).

In the case at bar, we hold that the trial court did not abuse its discretion in denying Scales's request to use a peremptory challenge after the jury was seated. The evidence fails to establish "good cause" supporting the request. Rather than relying upon the names of the listed jurors, counsel relied upon the numbers assigned to the jurors and mistakenly assumed

that those numbers were listed correctly. However, counsel had possession of the State's peremptory-challenge list, which did not include Shanley's name. Scales's counsel also had a copy of the trial court's jury list, which had the jurors numbered properly, and upon careful review, would have disclosed the fact that Cavaniss was not juror "29."

Assuming *arguendo* that the trial court abused its discretion by rejecting Scales's request to exercise a peremptory challenge on Shanley, our result would remain the same. We will not reverse for nonprejudicial errors in jury selection. *Dillard v. State*, 363 Ark. 491, 495, 215 S.W.3d 662, 665 (2005) (citing *State v. Vowell*, 276 Ark. 258, 634 S.W.2d 118 (1982)). Beyond stating the fact that Shanley was voted the jury foreman, Scales fails to demonstrate how having Shanley on the jury prejudiced the verdict. Without evidence of prejudice, we must affirm.

Affirmed.

PITTMAN and WYNNE, JJ., agree.