COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LEONEL HERNANDEZ,		§	No. 08-19-00152-CR
	Appellant,	§	Appeal from the
v.		§	168th Judicial District Court
THE STATE OF TEXAS,		§	of El Paso County, Texas
	Appellee.	§	(TC#20160D03827)

DISSENTING OPINION

I respectfully dissent from this Court's judgment reversing Appellant Leonel Hernandez' conviction for murder based on the State's use of a specific instance of untruthfulness to cross-examine Appellant's blood spatter expert, Louis Akin. Although defense counsel objected, the trial court allowed the State to ask a single question of Akin as follows:

> Q. [By the State]: So, Mr. Akin, isn't it true that in the Phillip H. March case, the Supreme Court of Missouri, the highest court in that state, it came to the conclusion that Mr. Akin willfully and deliberately testified falsely about a material fact and that an improper verdict was occasioned by the perjured testimony?
>
> A. [By Akin]: Yes.

Immediately following this answer, the State passed the witness. On redirect, Appellant's counsel then asked several questions of Akin following up on the same topic. Akin responded that he had been hired by Colonel Lamb, a military judge of the United States Army, to provide a crime scene reconstruction of the Fort Hood shooting that resulted in more than forty soldiers being shot.

On recross, when the State questioned whether Akin disagreed with the Missouri Supreme Court, the trial court ordered the State to move on, and thus, Akin did not answer that question. No other evidence of the March case was heard by the jury or admitted as an exhibit at trial.

Here, the Court concludes that the State erred in questioning Akin about a specific instance of conduct that impermissibly attacked his character for truthfulness, and otherwise did not show bias. Due to that evidentiary error, the majority properly considered the resulting harm as required by the Texas Rules of Appellate Procedure. *See* TEX.R.APP.P. 44.2(b). The majority ultimately describes that the "attack directly went to the credibility of Akin, who was the sole proponent of the claim that it would be physically impossible for Appellant to have been the shooter," and the complained of testimony affected Appellant's substantial rights. Parting ways with the Court, I disagree. Instead, I would conclude that error, if any, in permitting the State to question Akin on the March case was harmless.

The Texas Rules of Appellate Procedure provide that "[a]ny other error [other that constitutional error], defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b); *see also Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007). A substantial right is violated when the complained of error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If an appellate court can determine the error did not influence the jury, or had but a slight effect, we cannot overturn the conviction. *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018).

Here, I would conclude that any effect in allowing the State to ask a single question was so slight of an error, if any, that it was harmless. The jury heard testimony from Palacios that she was in the apartment at the time of the shooting, heard gun shots, witnessed Appellant holding the gun,

and witnessed Madrigal on the floor. Evidence was also admitted that Appellant kept a gun in his truck. Afterwards, Appellant directed the detectives to the location of the gun, and cell phone evidence placed him in the vicinity of the location where the gun was found. Text message evidence showed that Palacios had texted others after the shooting wherein she stated that Appellant had shot Madrigal. Additional text messages between Appellant and Palacios showed that Appellant was jealous and possessive of Palacios when it came to her contact with Madrigal.

Focusing on the nature and extent of the complained-of evidence, the State only minimally questioned Akin about the March case by confirming the finding entered by the Supreme Court of Missouri. Defense counsel then redirected with further questioning on the same topic, permitting Akin to clarify the circumstances such that he described that he had been hired by a military judge on a high-profile murder case. The State did mention the complained-of evidence during its closing argument arguing that the jury should not credit Akin's testimony. In total, however, the State's mention of Akin's specific conduct on the March case was brief when viewed in context with the entirety of the argument. Also, the information about the March case was not the only evidence the State used to call Akin's credibility and reliability into question. The State argued that Akin's testimony should not be credited based on deficiencies in his methods. The State's closing argument focused on summarizing all the evidence that established Appellant's guilt. Lastly, the jury charge instructed the jury that it determined the credibility of witnesses and decided on the weight to give the evidence.

Here, I cannot agree that error, if any, in permitting a single question about a specific incident of conduct so influenced the jury in its verdict when the jury was free to accept or reject Akin's theory with or without knowledge of the March case. *Hernandez v. State*, 897 S.W.2d 488, 490 (Tex. App.—Tyler 1995, no pet.) (finding harmless error when the trial court admitted in error

evidence of Appellant's witness's deferred probation in a prior case because the evidence had no effect on the jury's verdict when the evidence otherwise supported the conviction); *see also Goodman v. State*, 66 S.W.3d 283, 287 (Tex. Crim. App. 2001) (it is the jury, not the reviewing court, that accepts or rejects alternative hypotheses); *Keck v. State*, No. 14-07-00933-CR, 2009 WL 3003257, at *4 (Tex. App.—Houston [14th Dist.] Apr. 2, 2009, no pet.) (mem op., not designated for publication) (finding evidence was sufficient to support a conviction even considering a defense expert's testimony of an alternative theory that another person committed the theft as courts may presume the jury resolved conflicts in the evidence in favor of the verdict).

The complained of evidence did not prevent Appellant from putting on his defensive case and presenting his defensive theories. Based on this record, I disagree that the complained-of question affected Appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). I would conclude that any error was harmless. Respectfully, I dissent.

GINA M. PALAFOX, Justice

May 31, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

(Do Not Publish)