AFFIRM; and Opinion Filed June 4, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00419-CR

CHARLES RUSSELL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1600789-V

MEMORANDUM OPINION

Before Justices Lang-Miers, Evans, and Schenck
Opinion by Justice Lang-Miers

Appellant Charles (a/k/a Carl) Russell was convicted of capital murder and sentenced to life imprisonment without the possibility of parole. In a single issue on appeal, appellant claims that the trial court abused its discretion by admitting five photographs of him holding a gun similar to one of the possible murder weapons. We affirm.

Background

On September 5, 2013 Tavares Tell, a/k/a "Black," and Kenny Garcia, were shot to death while sitting in a parked car at an east Dallas apartment complex in an apparent "drug deal gone

bad." Earlier that day, appellant and three accomplices – his brother Patrick Russell,[1] Dewen Kight, and Tevynn Boone – drove to Dallas in a borrowed red Nissan from Shreveport, Louisiana with the purported purpose of purchasing 9 ounces of cocaine for $8000 from Tell. All four accomplices were ultimately charged with the deaths of Tell and Garcia. Both Boone and Kight testified at trial for the prosecution.[2]

Setting Up the Drug Transaction

Russell had previously told Boone that he wanted a good price on some drugs. Boone had recently lived in the Dallas area where he had both sold drugs and purchased drugs from Tell, a low level drug dealer selling mainly marijuana and cocaine. Boone thought they could get a better product at a cheaper price in Dallas than in Shreveport. Boone anticipated getting a "cut" of either the drugs or the money once they returned to Shreveport. Appellant and his brother did not have drug connections in Dallas, so Boone offered to set up the drug deal on Russell's behalf. Transportation was an issue, but Boone told Russell that whenever they could get a ride to Dallas, Boone would call Tell and "make everything happen."

On September 5, Kight[3] arranged to borrow a friend's red Nissan. He told her that he was going to DeBerry, Texas with appellant and Russell and that he would be "right back."

---

[1] Appellant's brother, Patrick Russell, will be referred to in this opinion as Russell. He was also convicted of capital murder and sentenced to life imprisonment without the possibility of parole. *Russell v. State*, No. 05-17-00124-CR, 2018 WL 525559, at *1 (Tex. App. – Dallas Jan. 24, 2018, pet. ref'd) (not designated for publication).

[2] Boone testified in exchange for a plea bargain to reduce the charges against him from capital murder to murder; there was no specific agreement as to his sentence. Kight testified in exchange for a reduction in the charge against him to aggravated robbery and an agreement that he would enter an "open" plea of guilty with a sentencing suggestion from the State that his potential punishment be capped at 25 years' imprisonment.

[3] The trial testimony was that Boone and Kight did not know each other prior to these events, though both knew the Russell brothers.

The four accomplices left Shreveport in the afternoon, arriving in the Dallas area that evening around 6:45-7:00 p.m. They went to the Oats Creek Apartments in Mesquite, Texas, where Boone had previously lived and where they were supposed to meet Tell. When Boone called Tell to say that they had arrived, Tell said he was at his son's football game. They waited for about three hours before re-connecting with Tell. They made arrangements for the purchase but were going to have to follow Tell "to go get the rest of the drugs, because he didn't have all of it on him."

Boone admitted that he did not see $8000 in cash, or a large amount of money, in the vehicle. However, he had "done prior business with the Russell brothers" and "it never just crossed my mind to ask them . . . (about the money) . . . because we never did bad business with each other." Boone testified that he did not see any firearms in the car.

Kight testified that he saw Russell with a gun that "might have been" a Glock with an extended magazine. Kight swore that he did not see appellant with a gun at any time. He did not see a large amount of money in the car and did not know if Russell had the money for the drugs.

Circumstances Leading to the Shootings

On the night of the shooting, as Tell was preparing to do the drug deal with appellant and his accomplices, Tell's roommate, Chris Mutz, noticed that Tell was acting "a little odd" and appeared nervous. He said "something just wasn't feeling right." Mutz told him "if it doesn't feel right, you know, don't go." Before Tell left the house to go to the drug deal, he ingested cocaine. Mutz testified that Tell kept a .9 millimeter Glock pistol with a 30 round clip or magazine. While Mutz did not see Tell leave with the Glock, he checked the next day and the firearm was missing from the place where Tell kept it in the home they shared.

The four accomplices met up with Tell on Interstate 635. Boone, who was now driving the borrowed car, followed Tell on the freeway, exiting on East Grand. The accomplices continued to follow Tell until he pulled over to the side of the road. Boone got out the car and went to Tell's car; Tell asked Boone if everything was all right and Boone assured Tell that "my people all right, they good." Tell asked Boone if they wanted to continue to follow him or have Russell get in Tell's car. Russell got in Tell's car and, with Boone continuing to drive the borrowed Nissan, they continued to follow Tell to an apartment complex. At one point, another person, subsequently identified as Garcia, got in the back seat of Tell's car. Boone had never seen Garcia before. Garcia's brother testified that Garcia kept a Glock firearm and was both using and selling drugs.

The Shootings

Once at the apartment complex, Tell backed his vehicle into a parking spot; Boone followed, parking about one or two spots away from Tell. At some point Tell rolled down the window to get Boone's attention; he indicated that he wanted appellant to come to his car. Appellant, who had been in the back driver's seat of the Nissan "smoking drugs" and talking with Kight, got out of the car and walked over to Tell's car.[4] Boone occupied himself by texting on Instagram on his phone.

Appellant walked to the rear of the passenger side of the car. About thirty seconds later Boone heard gunfire; it was first one shot then a series of shots. Kight also heard a single gunshot, followed by two "spurts" of gunfire. Kight testified that he saw Russell, who was on the passenger side of the car, shoot "a lot of times." Boone put his head down and started the car. He was pulling the car around when he saw appellant running away from Tell's car holding his side. Kight saw

[4] Kight insisted in his testimony that appellant did not have anything in his hand; he stated "I would have seen a gun."

appellant run behind some other cars and wait for the shooting to stop. Kight opened the door for him and appellant got in the car; he was bleeding. Shortly thereafter, Russell ran to the car and jumped in; they drove off.

At that time, Boone noticed only that Russell was carrying a bundled up white t-shirt which he threw in the backseat. Kight, however, testified that Russell had three guns, one in his waistband and two in his arms, along with a white t-shirt and some drugs.

Flight from the Scene

Boone was going to take appellant to a hospital, but did not want to take him to one close to the apartments because, if questions were asked, he thought they all would probably go to jail. Instead, he drove from East Dallas to Jupiter and 635; he knew there was a Baylor hospital off the George Bush turnpike. Appellant was in pain; Kight was not sure he would make it, certainly not to Shreveport. Instead of taking appellant to a hospital, Boone dropped off appellant and Kight at a gas station at Jupiter and Interstate 635. Kight and Russell pulled appellant out of the car; Kight volunteered to stay with appellant. Kight, who had left his phone in the Nissan, went into the store and told the clerk to call 911.

Boone drove Russell back to Shreveport; they rode primarily in silence. Once in Shreveport, Boone saw what looked like two black guns with extensions in the rolled up white t-shirt that was in the backseat of the vehicle. Boone did not know what became of those guns. Boone was arrested on November 8, 2013; he claimed that, in the ensuing months, he did not have any contact with Russell.

Boone testified that neither a robbery nor a shooting were ever intended. The only thing that was intended was a drug deal. He did not know what happened that resulted in the shootings.

Kight also testified that the intention was to go to Dallas to do a drug deal, even though he had previously told the trial prosecutors that the intention from the "get go" was to commit a robbery.

Police Response and Investigation

Two women who both lived either at or near the apartment complex heard the gunshots and called 911. One woman saw a young man wearing a white t-shirt and dark pants; he was bending over and said he was shot. Both women described the gunfire as sporadic, with pauses between groups of shots.

Dallas Police Sergeant Glen Hurst and his partner responded to the shooting call at the apartment complex at approximately 11:03 p.m. Hurst noticed a black sedan in the parking lot. An African-American male in the driver's seat of that vehicle, later identified as Tell, appeared deceased; he had suffered multiple gunshot wounds. Hurst noticed a firearm in the vehicle and there were shells "all over the place." Dallas Fire and Rescue were working on a second shooting victim, later identified as Garcia, and were ready to transport that person.

Dallas homicide detective Esteban Montenegro responded to the crime scene at the apartment complex shortly after 11:00 p.m. Garcia had already been transported to Baylor Hospital.

Tell's body was still in the driver's seat, which was reclined back. His phone was on him, he had been shot multiple times, and he was covered in blood. It was apparent to Montenegro that there had been a big gun battle, because there were fired casings "all the way around the car" and live rounds on the ground.

Subsequent investigation revealed that at least three firearms were utilized in the gun battle. A gun was not found on Tell's body. A mechanically functional Glock .9 millimeter firearm was

found on the right rear floorboard of the vehicle near where Garcia had been sitting;[5] there were eight unfired bullets and one in the chamber in this gun. Six cartridge cases were fired by this gun. Nine cartridge cases were all fired from the same gun, but not from the recovered Glock. Eight more cartridge cases were fired from the same gun, but not from the recovered Glock or from the gun which had fired the nine cartridge cases.

It was later determined that Tell suffered twelve different gunshot wounds while Garcia had eight different gunshot wounds. Cause of death for both Tell and Garcia was multiple gunshot wounds.

Both Tell and Garcia tested positive for gunshot residue. These results indicated that they either fired a firearm, were in the vicinity of the firearm when it was fired, or that they handled a firearm or firearm component that was previously fired or had gunshot residue on it. None of Tell's wounds had any stippling, which could mean either that there was something interposed between Tell and the gun, or that the gunshots were fired at a distance of more than three feet. Only one of Garcia's wounds had very sparse stippling, indicating a close proximity to the gun which shot him.

No drugs or alcohol were found in Garcia's body. Tell's toxicology test results were positive for cocaine, cocaine metabolites, and marijuana. The levels of cocaine metabolites were consistent with use in the hours prior to his death.

The front driver's seat where Tell's body was found had cocaine residue. A piece of what ultimately proved to be rock cocaine weighing 42.30 grams was found under Tell's body. Cocaine in an amount of approximately 28.2 grams was found in Garcia's pocket at the hospital. The police

[5] The police hypothesized that Garcia brought this Glock to the transaction.

believed these amounts, which totaled almost 70 grams, were indicative of a drug transaction. In the lead detective's opinion, it would take a lot of money to buy this large amount of drugs.

Tell's car was processed for both fingerprints and DNA. Some of the fingerprints from Tell's car were identified as Russell's. Specifically, his prints were found on the outside front right passenger door, the exterior roof front passenger side, the outside rear passenger door, the outside passenger door and the outside.

A firearm spring that could have belonged to a Glock was found approximately thirty to forty feet away from the vehicle where Kight saw appellant standing after the shooting began. The detective testified that the spring could have been ejected from a firearm if the gun jammed as a result of someone pulling the trigger many times.

Investigation at the Gas Station

Garland Police Officer Kevin Mock responded to a call at the 7-Eleven on LBJ and South Jupiter in Garland, Texas, at approximately 11:00 p.m. As he pulled into the parking lot of the store a young black male, Kight,[6] waved him down. Kight said his friend had been shot. Mock saw another young black male, subsequently identified as appellant, laying on the ground in a parking stall just in front of the door to the 7-Eleven. Mock "figured it was a gunshot wound to his…left abdomen." Appellant was wearing a white t-shirt which was soaked with blood.

Mock administered first aid and tried to get some information, but appellant would not answer his questions. However, when the ambulance arrived, appellant, who was still lying in the

[6] Kight originally gave officers a false name of Dewen Davis. A Louisiana State identification card in the name of Dewen Vann Kight was later found in a grassy area "behind a kind of a bush line that decorated the bush line that 7-Eleven has right out front of the gas pumps." The officer who found this card surmised that it had been discarded on purpose.

ground "started yelling, Hey, I'm hurt. This hurts. I'm shot." Mock concluded that appellant "just didn't want to answer any of my questions" since he would talk to the paramedics.

Mock talked to the store clerk who told him that a red, four door vehicle had pulled up close to the intersection in the parking lot. A black male, who the clerk identified as Kight, jumped out of the back, opened the passenger side door, and pulled appellant out of the car. The red vehicle then took off, made a u-turn, and went south back into Dallas on Jupiter. Kight then dragged appellant to the front door of the store, which was where Mock had encountered him.

Mock tried to talk to Kight, who appeared extremely nervous. His initial story was he had seen someone dump appellant and he was just being a Good Samaritan. Mock noticed that Kight's story was not adding up and was in conflict with the clerk's version of event.

Garland Police Officer Robert Reedus arrived as a back-up officer about the same time as the ambulance. Reedus tried to talk to Kight in an effort to see if he knew anything about what had happened. Kight was "very erratic in his movements, was nearly jumping up and down, shaking, nervous, pointing in all directions, speaking a hundred miles an hour." In describing how he came to be at the 7-Eleven, Kight explained that he was simply walking in the area as a red vehicle had come northbound on Jupiter passing the overpass and pulling over into the 7-Eleven. Kight said he observed a person get out of the driver's seat and begin to take appellant, who appeared to have a gunshot wound, outside of the vehicle and drag him into the parking lot. Kight said this was something that he found odd and strange; he helped pull appellant out of the vehicle. Kight said that the person who had originally stopped got back in the vehicle and left him and appellant there alone. Kight never admitted being in the red car.

Implicating Appellant in the Shootings

While Montenegro was working the shooting scene at the apartment complex, a call came out that the Garland police had reported a gunshot victim and a witness at the parking lot of a 7-Eleven on Shiloh and LBJ. It was reported that a small red car that had dropped off the gunshot victim along with another man, Kight. The shooting victim had already been transported to the hospital. Montenegro learned that Kight being held by the Garland police.

Montenegro went to the 7-Eleven where he was able to make contact with Kight, who relayed a number of facts to the detective, which ultimately led him to interview appellant in the hospital.

Interview of Appellant

At the hospital, Montenegro first ascertained that appellant was not under the influence of any medication which would hamper him from speaking with the detective. Although appellant was not in custody or under arrest in the hospital, Montenegro read appellant his *Miranda* rights.[7] He recorded the interview.[8] Montenegro did not initially ask appellant about the murders, but rather asked how he got shot.

Appellant told Montenegro he was in Dallas because he wanted to do some mall shopping to buy some clothing for college. Montenegro found this inconsistent, as appellant had earlier said that he dropped out of high school in the 10th grade. Appellant told Montenegro that he was walking down the street and saw two guys arguing near a gray Mustang or GTO. He did not pay

---

[7] *See Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966). Appellant was also advised under TEX. CODE CRIM. PROC. art. 38.22 § 2. After Montenegro ascertained that appellant was able to read and write, he gave appellant a card with his rights printed on it to follow while his rights were read to him.

[8] A video tape of this interview was admitted into evidence.

attention because he did not want to attract attention to himself; he just kept walking, then randomly got shot.

Montenegro suspected that appellant had some serious involvement in the double murder at the apartment complex. Montenegro confronted appellant with what he had learned from Kight, telling appellant that he knew "what happened." Montenegro told appellant that he knew he had been involved in a "drug deal gone bad," and that, if the "other guys" had gotten the "jump" on appellant and his accomplices, he might have a self-defense claim. Montenegro told appellant that he was there to hear his side of the story. Appellant told Montenegro that he did not know what the detective was talking about and that he wanted his lawyer. Montenegro ended the interview by giving appellant his card, telling him that he was a prisoner, and also telling him that he was going to be charged with capital murder.

Cell Phone

Montenegro got a warrant for appellant's cell phone, which had been recovered from him on the way to hospital, and did a "cellphone dump." Triangulation of appellant's telephone with various cell towers proved that appellant was in Dallas at the time of the murders. Additionally, five photographs of appellant with a Glock firearm and an extended magazine were recovered from the phone. Montenegro believed that a Glock, or something similar to a Glock, had been involved in the gun battle at the apartment complex based on the number and type of shell casings found. He thought it possible that an extended magazine may have been used, which increases the firearm's capacity for bullets.

The Red Nissan

A few days after the murders, Montenegro received a call from a woman in Louisiana, who informed him that she had read about the Dallas offense involving a red car. She believed that the

offense happened in her car and volunteered to come to Dallas and talk to him. During that interview, she gave Montenegro consent to process the vehicle. The vehicle was processed using a chemical – BLUESTAR luminal – that reacts with the presence of blood; the test results were positive for indications of blood. Montenegro believed the car may have been cleaned after the shootings, though the car owner denied cleaning it. The car owner also told the detective that Russell was the person who had returned the car to her in Shreveport.

Charging All Parties with Capital Murder

Based on his investigation, Montenegro charged all four men – appellant, Russell, Kight and Boone – with capital murder. Montenegro knew that Kight had borrowed the car which brought the men to Dallas and provided the transportation. Boone was the narcotics connection because he knew the local area and the local drug dealers; specifically, he knew Tell and he had his phone number. Russell was the "strong-arm of the whole operation;" he and appellant had the weapon or weapons and, in his opinion, were both the gunmen.

Allegations

Appellant claims that the trial court abused its discretion by admitting five photographs of him holding a gun similar to one of the possible weapons used in the shootings. The photographs were obtained from a "dump" of his cell phone conducted pursuant to a warrant. Specifically, appellant claims that the probative value of the photographs, admitted as State's Exhibits 45-49, was outweighed by the potential for unfair prejudice because the gun in the photographs could not be definitively tied to the shootings. The State responds that the trial court could have reasonably determined that the photographs were relevant to show appellant's identity as one of the shooters and that the probative value of the photographs outweighed any danger of unfair prejudice to

appellant. In the alternative, the State responds that any error was harmless in light of the other evidence of appellant's guilt.

Offer of Evidence, Objections, and Trial Court's Rulings

The State offered State's Exhibits 45-49 outside the presence of the jury:

> They are relevant to the case in that the firearm at issue is a Glock-styled firearm. . . [T]here has actually been testimony regarding the voluminous amount of shell casings at the crime scene.
>
> This picture shows the defendant with an extended-mag Glock-styled firearm. Thereby, these pictures, which were recovered from the defendant's phone under search warrant, connect him to the crime. … [T]hey're not to prove character, it is to prove something else besides character. It is a nexus between him and this crime scene.

The defense began its objections by attempting to distinguish three cases purportedly relied on by the State.[9] The defense then specifically objected as follows:

> Number one, self-defense has not even been raised, except by the State in their opening statement. It hadn't been raised by anybody at this side of the table.
>
> Number two, there's no causal connection between those pictures and this incident at all. It's time-stamped days and weeks prior, even by the State's own admission.
>
> And if they are only using it just to show the experience with Glocks and things such as that, they've already started doing that with their crime scene experts. I think the jury's getting a full picture of that. This is merely to inflame the jury and actually put a gun in his hand which they do not have a witness to do. And I would say they are highly irrelevant and extremely prejudicial and should be kept out. All of them.

The State responded as follows:

> Judge, under 404(b) we have, we are bringing forth evidence that is showing motive, intent, preparation, plan, knowledge. He's holding an extended-mag Glock in this photograph. Two weeks later he's implicated in a capital murder involving

[9] The defense referred to two of these cases by name – *Lopez v. State* and *Quesada v. State* – but did not provide full citations to the trial court. The third case was not named or otherwise identified.

> multiple shell casings. I believe these, the photographs, are relevant. We have met that threshold. The jury should be able to determine whether or not these photographs are relevant.
>
> They are on the defendant's own person. She says that they're inflaming, they are highly prejudicial. It is the defendant's own cellphone. It is his photographs. They are not demonstrative. These are actually the defendant holding the firearm. Furthermore, there's only one firearm recovered at the scene.
>
> The . . . diagram, which has already been admitted, there are two other firearms which left the scene. This may, in fact, be the murder weapon. We don't know.
>
> So, Your Honor, we believe these are relevant. We believe the jury should be able to make the determination as to whether or not they give these photographs weight or not.

The trial court found that the photographs were relevant under TEX. R. EVID. 403. The trial court overruled the defense objections, but granted a running objection to the defense.

The defense asked for a finding on the record as to why the photographs are "not more prejudicial than probative." The defense also continued to argue as follows:

> Also, Judge, if they can't even say that it is a murder weapon or is a weapon that was used, that, again, goes to the fact that it's not relevant and it's . . . more prejudicial than probative. They're just trying to put him with a gun. They don't care if it matches. They just want to put him with a gun.

The trial court reiterated that the objection was overruled.[10]

[10] While the trial court did not make the specific finding requested by the defense, absent an explicit refusal to conduct a Rule 403 balancing test, we presume the trial court conducted the proper test when it overruled the Rule 403 objection. *See Williams v. State*, 958 S.W.2d 186, 195–96 (Tex. Crim. App. 1997); *Brooks v. State*, Nos. 05-16-00182-CR & 05-16-00183-CR, 2017 WL 4785331, at *11 (Tex. App.—Dallas Oct. 24, 2017, no pet.) (not designated for publication).

Depiction of Gun in Photographs

During his testimony before the jury, Montenegro testified that State's Exhibits 45-49 were photographs that he was able to download from appellant's cell phone. The person in the photographs was appellant.[11] Montenegro described the photographs as follows:

> State's Exhibit 45: The photograph depicted appellant "holding a gun to the mirror." Based on the detective's training and experience, the gun appeared to be a "Glock-styled firearm with an extended magazine."
>
> State's Exhibit 46: The photograph depicted "[t]he same thing. A two-tone gun with an extended magazine on his chest."
>
> State's Exhibit 47: The photograph depicted "[t]he same thing. A firearm with – on his left hand with an extended magazine."
>
> State's Exhibit 48: The photograph depicted "[t]he same thing. The handgun's similar to a Glock, on his left hand."
>
> State's Exhibit 49: The photograph depicted "a gun pointing at the mirror with his right hand."

Montenegro was aware that the photographs were not taken on the day of the offense, but a couple of weeks earlier. Montenegro believed that the Glock-styled firearm depicted in these photographs was related to this offense, though he could not testify with certainty that the firearm in the photographs had anything to do with this offense.

During their testimony later at trial, Boone and Kight identified appellant in all of those photographs and agreed that the photographs showed appellant with an extended-magazine, Glock-style firearm.

---

[11] The trial court admitted the photographs over the defense's renewed objections that the photographs were irrelevant and inadmissible under TEX. R. EVID. 404.

Standard of Review

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). The trial court does not abuse its discretion unless its decision to admit or exclude the evidence lies outside the zone of reasonable disagreement. *Id.*; *see also De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). We will uphold a trial court's evidentiary ruling if it was correct on any theory of law applicable to the case. *See De La Paz*, 279 S.W.3d at 344.

The Photographs Were Admissible

Relevant evidence is always admissible unless specifically prohibited. TEX. R. EVID. 402. Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action. TEX. R. EVID. 401. A trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403.

When undertaking a Rule 403 analysis, a trial court must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). We reverse a trial court's balancing

determination "rarely and only after a clear abuse of discretion." *Montgomery v. State*, 810 S.W.2d 372, 392 (Tex. Crim. App. 1990).

In this case, the photographs were highly probative and important to the State's case. "Probative value" means more than simply relevance; it "refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Gigliobianco*, 210 S.W.3d at 641. At least three guns had been used in these shootings; two were never recovered. Kight saw Russell put two guns wrapped in a t-shirt into the back seat of the red Nissan, which was driven back to Shreveport. Boone saw those guns once he and Russell arrived in Shreveport. Only six of the recovered cartridges were identified as having been fired from the Glock found on the rear floorboard of the car; that gun was most probably fired by Garcia. With respect to the other shell casings identified as having been fired by two different guns, the firearms examiner testified as follows:

> Based on the caliber of those fired bullets and the type of rifling that it had, they could have been fired by a Bersa brand firearm, a Glock, a Heckler & Koch, and a Kahr Arms type firearm. All of those firearms have the same general rifling characteristics, meaning they have the same type of rifling, the same direction of twist, the same caliber as those fired bullets. And that's not an all-inconclusive list. There may be other firearms out there that I don't know about.

The trial court could have concluded the State needed the photographs because they showed appellant with a weapon capable of being used as one of the murder weapons, as well as his comfort in handling that firearm. *Moss v. State*, 75 S.W.3d 132, 141 (Tex. App.—San Antonio 2002, pet. ref'd) (admitting evidence of weapons and ammunition showed that the defendant, who was charged with aggravated robbery, had access to various weapons, one of which he could have used to commit the robbery in question); *Lopez v. State*, No. 01-06-01079-CR, 2008 WL 1904022, at *10 (Tex. App.—Houston [1st Dist.] May 1, 2008, pet. ref'd) (not designated for publication)

(finding that a photograph of the defendant at a firing range holding a handgun was relevant to provide a link between the defendant, the cell phone from which the photograph was recovered, and the handgun that was used, but was never recovered by police, in the murder for which the defendant was on trial). The first and second prongs of the Rule 403 analysis were met.

With respect to the third factor, the trial court could have concluded that the photographs did not have a tendency to "suggest a decision on an improper basis." The photographs of a Glock-style firearm related to the offense charged. These photographs were taken from appellant's cell phone and appellant was identified in these photographs not only by the detective who interviewed him but also by two of his accomplices. Appellant's connection to the firearm in the photographs was clear and unequivocal. Further, nothing in the record indicates that admitting the photographs was so inherently inflammatory that it would tend to elicit an emotional response and impress a jury in some irrational and indelible way. *See Quesada v. State*, No. 04–04–00438–CR, 2006 WL 1993762, at *4 (Tex. App.—San Antonio July 19, 2006, pet. ref'd) (not designated for publication) (evidence of shell casings found in the defendant's bedroom that matched the murder weapon did not amount to evidence that would impress the jury in some irrational and indelible way because spent shell casings were merely evidence of a discharged firearm).

The fourth and sixth factors concern the tendency of the evidence to confuse or distract the jury from the main issues and the amount of time consumed by the presentation of the evidence. *See Gigliobianco*, 210 S.W.3d at 641. The main issue in this case was whether appellant was one of the shooters at the apartment complex; the photographs were germane to that issue and there was little to no risk of distracting the jury from that issue. Also, admission of the photographs did not take an inordinate amount of time to develop or present, nor were the photographs repetitive of evidence that had already been admitted. *See Carter v. State*, No. 05-14-00822-CR, 2016 WL

4044922, at *2 (Tex. App.—Dallas July 26, 2016, no pet.) (not designated for publication) (evidence of a cartridge casing that was found in the driveway of the defendant's ex-girlfriend's home that matched casings found at a murder scene at another location was not so prejudicial as to be inadmissible).

The record does not reflect that the photographs would have any tendency to be given undue weight by the jury. The photographs would not have misled the jury or created a prejudicial effect. Appellant's entire defense at trial was that there was no evidence to connect him to the shooting. The photographs showing appellant with a firearm that could have been one of the possible weapons used in the shooting bore directly on the main issue of the case, *i.e.*, appellant's involvement in the shootings. As the prosecutor argued to the trial court, the photographs of appellant holding a Glock-style firearm with an extended magazine helped to provide a nexus between appellant and the shootings. *See Carter*, 2016 WL 4044922, at *2; *Quesada*, 2006 WL 1993762, at *4. The fifth factor is satisfied.

For all of these reasons, we conclude the trial court did not abuse its discretion when it overruled appellant's objections to the admission of the photographs. *See* TEX. R. EVID. 403; *Gigliobianco*, 210 S.W.3d at 641–42.

Any Error is Harmless

Even if we were to conclude that the trial court erred by admitting the photographs, that error would be harmless. Because appellant complains about the admission of evidence, the proper standard of review is for non-constitutional error as provided in Rule 44.2(b), which requires that any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. TEX. R. APP. P. 44.2(b); *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). A substantial right is affected when the error had a "substantial and injurious" effect or

influence in determining the jury's verdict or when the error leaves one in grave doubt about whether it had such an effect. *Id*. A substantial right is not affected, and error will be deemed harmless, if, after reviewing the entire record, the appellate court determines that the error did not influence, or had only a slight influence, on the trial outcome. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). Under Rule 44.2(b), unless the error had a substantial and injurious effect or influence in determining the verdict, the error will not constitute reversible error. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). When conducting a harm analysis under Rule 44.2(b), everything in the record, including evidence of a defendant's guilt, is a factor to be considered. *Motilla,* 78 S.W.3d at 357.

In this case, review of the record shows that the State introduced substantial evidence of guilt. Indeed, appellant does not challenge the sufficiency of the evidence.

The testimony of both Boone and Kight placed appellant close to Tell's car when the shooting started. The evidence supports a finding that appellant and Russell fired the two guns that killed Tell and Garcia. No evidence suggests that either Boone or Kight fired a gun. Before the gunfire began, appellant exited the Nissan and approached Tell's car, as Russell sat in that car with the Tell and Garcia. The gunfire began immediately after appellant exited the Nissan and approached Tell's car. There was testimony that an extended magazine on a Glock could account for the voluminous amount of shell casings found at the scene. Kight testified that he saw Russell fire a gun into Tell's vehicle "a lot of times." A recovered gun spring, which possibly belonged to a Glock, was found where Kight said he saw appellant standing in the parking lot. Both Kight and Boone saw two firearms in Russell's possession after the shootings. Boone specifically saw two black firearms with "extensions on them."

Ballistics evidence established that there were at least three guns involved in this shooting. The evidence supports an inference that one gun belonged to Garcia; it was still in Tell's vehicle when the police arrived, on the floorboard close to where Garcia was sitting, and six bullets were determined to have been fired from that gun. The other two guns could have belonged to appellant and Russell, to appellant and Tell, or to Tell and Russell. The jury could have reasonably inferred from this evidence that one of the guns used was the Glock with the extended magazine that appears in the photographs taken from appellant's cell phone.

Viewing all of the evidence in the light most favorable to the prosecution, the jury had ample evidence from which it could rationally find each element of the offense was proven beyond a reasonable doubt. Any error in admitting the photographs of appellant holding a Glock-style firearm was harmless.

Conclusion

We overrule appellant's sole issue and affirm.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)

170419F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHARLES RUSSELL, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas
No. 05-17-00419-CR V.	Trial Court Cause No. F-1600789-V.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Evans and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 4th day of June, 2018.