In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-16-00396-CR
07-16-00397-CR

RYAN JOHN KELLEY, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 31st District Court
Gray County, Texas
Trial Court No. 10058, Honorable Steven R. Emmert, Presiding

December 21, 2017

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant, Ryan John Kelley, was charged with assault on a family member, aggravated assault against a public servant, and attempted capital murder. He was convicted of aggravated assault against a public servant and attempted capital murder. In three points of error, appellant challenges the trial court's consolidation of the assault on a family member charge with the other charges, the denial of his Motion for Change

of Venue, and the order that his sentences be served consecutively. We affirm as reformed.

Factual and Procedural Background

In the early hours of January 6, 2015, Jennifer Bentley and her live-in boyfriend, appellant, got into an argument at their home in Pampa, Texas. A friend arrived and the three smoked methamphetamine. The friend left, appellant went to sleep, and Bentley began packing her daughters' bags and preparing to leave. When Bentley's two children woke, she and the children left for a friend's house.

Later that morning, some of Bentley's friends went to Bentley's house to get her things. The house was locked and their knocks went unanswered. They tried, unsuccessfully, to open a window and the back door. Then, the women heard a gunshot from inside the house. They ran back to their vehicle and called 911.

Pampa police sergeant Tobie Bias responded to the 911 dispatcher's call. Bias and another officer arrived at the house and spoke to Bentley's friends, who were still outside. The officers then approached the house, knocked on the front door, and announced their presence. They then "knocked and announced" at several of the house's windows. They received no response and heard no sounds from inside the house. By then, other officers had arrived on the scene. They determined they needed to enter the house to investigate the gunshot and check on the welfare of the house's occupants.

Officers kicked at the front door until they were able to open it. Sergeant Bias, Sergeant Houston Gass, and two other officers entered the house, continuing to vocally

announce “police.” The officers proceeded to check the house for occupants. As Sergeant Bias and Sergeant Gass approached the closed door of a back room, Sergeant Gass was shot in the face through the door. Sergeant Bias was struck with a pellet in his forearm.

The Amarillo Police Department SWAT team was called to assist. Eventually, appellant was shot in the left leg as he was exiting the house and he was arrested on the front porch.

Appellant was charged with attempted capital murder, aggravated assault against a public servant, and assault on a family member. The State filed a Motion to Consolidate the cases, which was granted over appellant’s objection and request for severance. Appellant also filed a Motion for Change of Venue.

The trial started on September 26, 2016. After the jury was sworn, the court denied appellant’s Motion for Change of Venue. Following a four-day trial, the jury found appellant guilty of the offenses of attempted capital murder and aggravated assault against a public servant, and not guilty of the offense of assault on a family member. The jury then sentenced appellant to 40 years and a $10,000 fine for attempted capital murder, and 10 years and a $5,000 fine for aggravated assault against a public servant. Upon announcing the judgment, the court ordered the sentences to run consecutively without request by the State.

Appellant timely appealed, raising three issues: first, he challenges the court’s grant of the State’s Motion to Consolidate the cases; second, he challenges the denial of

his Motion for Change of Venue; and third, he challenges the court's order that his sentences be served consecutively.

Analysis

Issue 1: Consolidation of the Cases

In his first issue, appellant contends that the trial court erred by consolidating for trial the assault on a family member charge with the aggravated assault against a public servant and attempted capital murder charges.

Section 3.02 of the Texas Penal Code provides that a defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode. TEX. PENAL CODE ANN. § 3.02(a) (West 2011). If the State properly joins two offenses pursuant to Section 3.02, the defendant has the right to sever the cases into different trials, provided he timely invokes that right. TEX. PENAL CODE ANN. § 3.04(a) (West 2011). A defendant's right to severance is absolute and the severance is mandatory when the defendant timely requests a severance under Section 3.04(a).

Here, the State filed a Motion to Consolidate all three offenses for trial. Appellant timely filed an objection in which he asserted his right, under Section 3.04, to sever the assault on a family member charge from the two other charges. The trial court granted the State's Motion to Consolidate over appellant's objection. The State concedes this was error, but maintains that the error was harmless. We agree.

Severance error is not a structural error and is subject to harm analysis under Texas Rule of Appellate Procedure 44.2(b). *Llamas v. State*, 12 S.W.3d 469, 470-71

(Tex. Crim. App. 2000). Errors that do not affect a substantial right must be disregarded. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If the error did not adversely affect the defendant's substantial rights, then it is harmless. TEX. R. APP. P. 44.2(b); *Werner v. State*, 412 S.W.3d 542, 547 (Tex. Crim. App. 2013).

We "assess harm after reviewing the entirety of the record, including the evidence, jury charge, closing arguments, voir dire, and any other relevant information." *Werner*, 412 S.W.3d at 547 (citing *Schutz v. State*, 63 S.W.3d 442, 444-45 (Tex. Crim. App. 2001)). The most important factor in determining whether a trial court's failure to grant severance was harmful is the overlap in evidence that would have been admissible had the trials been severed. *See id*. at 549.

Here, we begin by observing that very little of the four-day trial was devoted to the assault on a family member charge, the evidence related to that charge was intertwined with evidence related to the other charges, and the jury found appellant not guilty of that charge. The jury heard testimony from Bentley that appellant assaulted her and that, when Bentley left the house, appellant had a homemade gun strapped around his neck. The testimony of Bentley's friend focused on her visit to the house to get clothes for Bentley, which is when she heard a gunshot from inside the house. This evidence would have been admissible in a separate trial for aggravated assault against a public servant and attempted capital murder as "same transaction contextual evidence" to "show the circumstances surrounding the particular offense." *Worthy v. State*, 312 S.W.3d 34, 40-41 n.28 (Tex. Crim. App. 2010). Even if separate trials were held, the State would have

introduced the evidence about the events leading up to the 911 call and about appellant's homemade gun, which was used in the shooting of Sergeant Gass.

Moreover, defendant does not argue how his defensive strategy might have been different had the charges been severed. *See Werner*, 412 S.W.3d at 548 n.35 (considering lack of evidence regarding defensive strategy in considering whether appellant had shown harm in denial of severance).

We find that the trial court's failure to sever the charges, though erroneous, did not adversely affect appellant's substantial rights. Therefore, the error was harmless and must be disregarded. TEX. R. APP. P. 44.2(b). We overrule appellant's first issue.

Issue 2: Motion to Change Venue

In his second issue, appellant asserts that the trial court erred when it denied his Motion for Change of Venue.

Before trial, appellant filed a Motion for Change of Venue, accompanied by supporting affidavits pursuant to Article 31.03 of the Texas Code of Criminal Procedure. In their affidavits, appellant and the two other affiants averred that it was not possible for appellant to obtain a fair and impartial trial in Gray County. No controverting affidavits were filed by the State. Appellant did not request a hearing on the motion. The trial court did not rule on appellant's motion until voir dire was completed. The trial court denied the motion based on the successful qualification of the jury panel.

Where a motion for change of venue is proper on its face, the defendant is entitled to a change of venue as a matter of law unless the State properly challenges the

defendant's motion. *Lundstrom v. State*, 742 S.W.2d 279, 283 (Tex. Crim. App. 1986). Because the State did not contest appellant's motion, appellant was entitled to a change of venue and the trial court's ruling constituted error. *Hussey v. State*, 590 S.W.2d 505, 506 (Tex. Crim. App. 1979); *see also Taylor v. State*, 93 S.W.3d 487, 497-98 (Tex. App.—Texarkana 2002, pet. ref'd) (trial court erred in denying motion to change venue based solely on successful qualification of jury panel).

Appellant's right to a fair trial by an impartial jury is of constitutional dimension. *Silva v. State*, 64 S.W.3d 430, 433 (Tex. App.—San Antonio 2001, no pet.). If the record reveals constitutional error that is subject to harmless error review, we must reverse a judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a); *see Silva*, 64 S.W.3d at 433-34.

Faced with a similar error—the improper denial of a motion to change venue—in *Taylor v. State*, our sister court in Texarkana reversed the defendant's conviction and remanded the case for change of venue and a new trial. *Taylor*, 93 S.W.3d at 510. *Taylor* involved the trial of a schoolteacher in a rural community for possession of child pornography. *Id.* at 494. The record reflected that "numerous" jurors were excused for cause, "most" members of the jury knew the defendant and had knowledge of his alleged crimes, and the State had to cut its peremptory strikes from ten to six in order to be able to empanel a jury from the venire. *Id.* at 498. Under those facts, the appellate court declined to conclude beyond a reasonable doubt that the error in denying the motion to change venue did not contribute either to the conviction or punishment, and the case was remanded. *Id.*

In the instant case, the record reveals that, during voir dire, the court heard responses from prospective jurors concerning their knowledge of the case and their ability to be fair and impartial. Of the venire members, just over half (40 of 72) reported that they had heard of the case through news coverage, social media, or personal relationships with people involved. Only a handful of those indicated that they had formed an unalterable opinion about the case or that they could not be fair for some other reason, and those individuals did not serve on the jury. Here, the potential jurors' responses did not indicate that pretrial publicity or small-town gossip had so permeated the community that it was impossible to seat a fair and impartial jury in Gray County.

Thus, we find that the trial court's error in failing to grant appellant's Motion for Change of Venue did not contribute to appellant's conviction or punishment. Accordingly, we overrule appellant's second issue.

Issue 3: Order of Consecutive Sentences

In his third issue, appellant urges that the trial court erred when it ordered that his sentence for aggravated assault against a public servant and his sentence for attempted capital murder run consecutively.

The trial court's authority to run sentences consecutively is limited by Section 3.03 of the Texas Penal Code, which provides that sentences for offenses arising out of the same criminal episode must be served concurrently, with few exceptions. *See* TEX. PENAL CODE ANN. § 3.03 (West Supp. 2017). Inasmuch as no exception to concurrent sentencing found in Section 3.03 applies to the offenses for which appellant was convicted, the sentences must run concurrently. *Id.* The State has conceded this issue.

Furthermore, when sentences are ordered to run concurrently, the judgment should not reflect a cumulated fine. *See State v. Crook*, 248 S.W.3d 172, 177 (Tex. Crim. App. 2008) (holding the concurrent sentence provision of the Penal Code applies to the entire sentence, including fines); *Habib v. State*, 431 S.W.3d 737, 742 (Tex. App.—Amarillo 2014, pet. ref'd) (deleting cumulated fine from the second judgment).

"[A]n unlawful cumulation order is remedied by reforming the judgment to set aside the order." *Beedy v. State*, 250 S.W.3d 107, 113 (Tex. Crim. App. 2008). Accordingly, we reform the trial court's judgment to delete the cumulation order.

Conclusion

The judgment of the trial court is reformed to delete the cumulation order as to the term of confinement and the fine. We affirm the judgment as reformed.

Judy C. Parker
Justice

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