

Affirmed and Opinion filed November 9, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00097-CR

DERRICK GRAHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 762,017**

OPINION ON REMAND

Appellant was convicted as a party of capital murder and punishment was assessed at life imprisonment. On appeal to this court, appellant asserted that the trial court erred in denying his motion to sever and his motion to suppress. This court affirmed appellant's conviction in an unpublished opinion delivered on August 12, 1999. *See Graham v. State*, No. 14-98-00097-CR; (Tex. App.—Houston [14th Dist.] August 12, 2000). Subsequently, on June 7, 2000, the Court of Criminal Appeals found this court erred in concluding that appellant's indictment alleged only one offense and that the trial court erred

in failing to sever the cases on appellant's request. The Court of Criminal Appeals remanded for this court to conduct a harm analysis.

Appellant was charged as a party with the felony offense of capital murder. *See* TEX. PENAL CODE ANN. §§ 7.01 and 19.03 (Vernon 1994). The indictment arose out of appellant's alleged participation in a drug-related robbery during which three individuals were killed. Specifically, the State sought to present the jury with a single, three-paragraph indictment alleging that appellant committed capital murder by (1) causing the death of Heimar Prado Hurtado and the death of Danny Giraldo during the same criminal transaction; (2) causing the death of Hurtado while in the course of robbing him; and (3) causing the death of Jesus Garcia-Castro while in the course of robbing him.

Prior to trial, appellant sought a severance pursuant to Texas Penal Code section 3.04(a), alleging the indictment charged at least two distinct capital murder offenses. The State maintained the indictment did not consolidate two or more offenses within the meaning of section 3.04(a), but alleged different theories for committing one capital murder. The Court of Criminal Appeals found that the indictment charged more than one offense and remanded the case to this court for a harm analysis. *See Graham v. State*, 19 S.W.3d 851 (Tex. Crim. App. 2000).

The Court of Criminal Appeals has recently held that the failure to sever offenses is subject to harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. Under Rule 44.2(b) an error affects a substantial right of the defendant when the error has 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). A criminal conviction will not be reversed for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). To judge the likelihood that harm occurred, appellate courts must consider everything in the record including all the evidence admitted at trial, the closing arguments, and any comments made by the jurors during voir dire. *See Llamas v. State*, 12 S.W.3d 469, 471 (Tex. Crim. App. 2000). In *Llamas*, the court held:

The rule allowing severance rests upon two legitimate concerns: (1) that the jury may convict a “bad man” who deserves to be punished—not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged.

Id. at 471-72.

The record reveals that three adults and one child were ambushed, two weeks before Christmas, 1995. Three, including the child, died from multiple gun shot wounds. Appellant gave homicide detectives two statements with regard to the offenses. Appellant denied being the shooter, but admitted participation in a scheme to rob his cohort’s victims, repay a drug debt, and then steal the money back. The crime escalated to murder when appellant’s associate, Chris, emptied his semi-automatic weapon into the victims.

In conducting our harm analysis, we must review the entire record to determine if appellant was harmed by the fact that he was tried for three murders and a robbery as opposed to one murder and a robbery or two murders in the same transaction. Appellant argues in his brief that he was harmed by the admission of autopsy reports and autopsy photographs of all three victims. He claims further harm by virtue of the fact that the jury was informed that he had been indicted for the capital murder of all three victims.

The State, in its brief, argues that the failure to sever the offenses is harmless because all of the evidence concerning the three murders would have been heard by the jury as same transaction contextual evidence. Same transaction contextual evidence is admissible as an exception under Texas Rule of Evidence 404(b) where such evidence is necessary to the jury’s understanding of the offense. *See Rogers v. State*, 853 S.W.2d 29 (Tex. Crim. App. 1993).

Same transaction contextual evidence is deemed admissible as a so-called exception to the propensity rule where “several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others.” The reason for its admissibility “is simply because in narrating the one it is impracticable to avoid describing the other, and not because the other has any evidential purpose.” Necessity, then, seems to be one of the reasons behind admitting evidence of the accused’s acts, words and conduct at the time of the commission of the offense.

Id. at 33. (internal citations omitted).

Here, the evidence of all three murders would have been admissible even if the offenses had been severed. The evidence of each murder was so intertwined with the evidence of the other murders that the jury's understanding of the offense would have been obscured without it.

Appellant claims, however, that all of the autopsy photographs would not have been admissible if the offenses had been severed. A photograph is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. The admission of photographs into evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *See Moreno v. State*, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993). While Appellant did not object to the admission of the photographs at the time of the initial trial, we will assume on separate trials he would make appropriate objections. However, evidence of all three murders was admissible as same transaction contextual evidence. *See Rogers v. State*, 853 S.W.2d at 33. Further, the admission of the autopsy photographs was within the discretion of the trial judge. *See Moreno*, 858 S.W.2d at 463. Even if the trial court were to narrow the number of autopsy photographs under TEX. R. EVID. 403, the overwhelming and numbing evidence of the multiple slayings and senseless murder of an innocent child minimizes the prejudicial effect, if any, of a few more pictures.

Appellant further claims the jury would not have been informed that appellant had been indicted for the extraneous offenses. The fact that a jury may be informed appellant had been indicted for the "extraneous offenses" does not per se enhance the likelihood that the jury would infer guilt on the charged crime because of the concomitant crimes committed. The trial judge necessarily would admonish the jury panel during voir dire examination that they should "understand an indictment is absolutely no finding of guilt at all." In any event the actual evidence of a cold blooded murder undoubtedly has a more chilling effect on a jury than the mere mention of an indictment followed by an instruction that it is not evidence.

After examining the record as a whole, we find the failure to sever the offenses did not have a substantial influence on the jury's verdict for the following reasons: First, the evidence admitted at trial

could have been virtually the same whether the offenses were severed or joined. The admission of the autopsy photographs was subject to the trial court's discretion and would at best have only reduced the number of photos had the offenses been severed. Second, the appellant gains little, if any, by the exclusion of the mere recital of other indictments. And third, the potential harm of the trial court error had slight effect, if any, on the jury, given the evidence of extraneous offenses combined with the properly admitted evidence of appellant's statement, in which he confessed to participating in a scheme to rob the victims. Therefore, the error in failing to sever the offenses did not affect appellant's substantial rights.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Justices Amidei, Edelman and Wittig.

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