Affirmed and Majority and Concurring and Dissenting Opinions filed January 31, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00702-CR

RANDALL VALENTINO GONZALES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 816,896

M A J O R I T Y O P I N I O N

Appellant entered a plea of not guilty to the offense of aggravated robbery. He was convicted and the court assessed punishment at twenty years' confinement in the Texas Department of Criminal Justice—Institutional Division. In two points of error, appellant alleges the trial court erred in admitting the arrest warrant and its supporting affidavit and the evidence was factually insufficient to support his conviction. We affirm.

At approximately 2:30 p.m. on April 21, 1999, the complainant was robbed at gunpoint after leaving the Buffalo Hardware store at the corner of Westheimer and Kirby.

The complainant testified that appellant approached him holding a large plastic garbage bag. Appellant showed the complainant a firearm inside the garbage bag and demanded the complainant's watch and wallet. The complainant gave appellant his watch and wallet, including three credit cards.

Later that same day, appellant used the complainant's credit card to purchase nutritional supplements from a General Nutrition Center (GNC) store in Greenspoint Mall. Mr. Hoffpauir, a clerk, remembered the transaction made with one of the complainant's cards and was able to identify appellant at a lineup. The same credit card was used at several other stores in the same mall, but none of the employees of those stores could identify the person who used the credit card.

The complainant described his assailant as well-built, and clean shaven, wearing a form-fitting shirt, a tan cap, and tennis shoes. When the complainant described the assailant to the police officer on the scene, he said the assailant was wearing blue jeans. At trial, the complainant corrected that description to say he was wearing khaki pants. Mr. Hoffpauir described the person who used the complainant's credit card at GNC as well-built, wearing a tight T-shirt, and clean-shaven.

At trial, appellant presented an alibi defense. The owner and receptionist of the salon testified that appellant did not wear jeans to work and that he was at the salon on April 21, 1999, except when he left to get take-out food for lunch. A customer of the salon testified that she entered the salon at approximately 1:00 and saw appellant at that time. She remembered appellant leaving to get lunch and also remembered that he had returned to the salon before she left at approximately 2:45 p.m. Two other customers testified that appellant was wearing long sideburns the day of the robbery.

In his first point of error, appellant contends the trial court erred in admitting the warrant and affidavit supporting his arrest. Appellant timely and clearly objected to the admission as hearsay and the trial court overruled his objection. If probable cause for the

arrest is not an issue, the recitals contained in an arrest warrant affidavit that are hearsay are not admissible. *Foster v. State*, 779 S.W.2d 845, 857-58 (Tex. Crim. App. 1989); *Ortiz v. State*, 999 S.W.2d 600, 607 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Here, probable cause was not contested; therefore, the trial court erred in admitting the hearsay statements in the arrest warrant and affidavit over appellant's objection.

We now consider whether the trial court's error is reversible. Because no constitutional error is involved when hearsay is improperly admitted, we look to whether a substantial right was violated. *See* TEX. R. APP. P. 44.2(b). A substantial right is violated when the error made the subject of the appellant's complaint 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 the error had no influence or only a slight influence on the verdict, it is harmless. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). If the reviewing court harbors "grave doubt" that an error did not affect the outcome, that court must treat the error as if it did. *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732 (1986). The United States Supreme Court has defined "grave doubt" to mean "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 994 (1995). If the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, i.e., as having a substantial and injurious effect or influence in determining the jury's verdict.

The admission of improper evidence is harmless if the same facts are proved by other proper testimony. *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) We therefore examine the warrant and affidavit to identify information that was properly admitted through other evidence.

The State points out that every declarant in the warrant packet testified at trial. Thus, many facts in the affidavit related by the complainant, Mr. Hoffpauir, and Officers Mar, Cook, and Steininger were properly admitted through live testimony. Appellant agrees that

most of the information found in the warrant and supporting affidavit was admitted through live testimony, with two exceptions: (1) Officer Mar's personal opinion that appellant was guilty of aggravated robbery, and (2) the notation on the "Police Warrant Notification Form" that the cause number of the offense charged was 816010.

With regard to Officer Mar's personal opinion that appellant was guilty, appellant complains of the following language:

> I, H. Mar, a peace officer employed by the Houston Police Department, assigned to the Robbery Division, do solemnly swear that I have reason to believe and do believe that Randall Valentino Gonzales, . . . did on or about April 21, 1999, in Harris County, Texas, commit the offense of Aggravated Robbery.

Although Officer Mar's opinion of appellant's guilt was improperly admitted, we find it could have only slightly affected the jury, if at all. When a police officer testifies about his investigation and arrest of a defendant, the jury's necessary conclusion would be that the police officer had reason to believe and did believe that the defendant committed the offense.

With regard to the incorrect cause number listed on the warrant notification form, appellant claims that error informed the jury that appellant had been charged with a separate extraneous offense. The warrant notification form, however, does not affirmatively show that appellant had been charged with another offense. It merely misstates the cause number for the offense charged in this case.

Appellant further claims this error is exacerbated by the fact that, during voir dire, the trial judge mistakenly read to the jury from a separate indictment against appellant. The record reflects that when the trial judge read the charge against appellant, he began as follows: "The allegation is that on or [about] April the 11th in Harris County, Texas, the defendant did then and there while –". At this point, defense counsel asked to approach the bench. After a bench conference, which was not recorded, the trial judge resumed reading the indictment, this time reading the correct date of April 21, 1999. The record does not

reveal that the jury could have inferred from the trial judge's mistake that appellant was charged with another offense. At most, the jury could infer that the trial judge read the wrong date and was corrected by defense counsel.

We do not find the improper admission of the arrest warrant and the affidavit had a substantial and injurious effect or influence in determining the jury's verdict. Therefore, the error in admitting the warrant and affidavit was harmless. Appellant's first point of error is overruled.

In his second point of error, appellant claims the evidence was factually insufficient to support his conviction. Evidence at trial is factually insufficient to sustain conviction if "a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination." *Johnson v. State,* 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually insufficient if: (1) it is so weak as to render the result clearly wrong and manifestly unjust, or (2) the adverse finding is against the great weight and preponderance of the available evidence. *Id.* In our review, we must be careful not to intrude on the jury's role as the sole judge of the credibility of the witnesses or the weight to be given their testimony. *Id*. at 9.

The only disputed element in this case was the identity of the perpetrator. The State's evidence, as we detailed above, consisted of two witness identifications. Evidence for the defense consisted of testimony from several alibi witnesses. The jury, by its verdict, chose between the conflicting witness testimony offered by the defense and the State. The jury, by its verdict, also chose to disregard the significant inconsistencies in the identifications given by the State's witnesses. Lacking physical evidence connecting appellant to the crime charged, the evaluation of eyewitness credibility and demeanor was crucial in determining the appropriate verdict. *See Johnson*, 23 S.W.3d at 8. Under these circumstances, we defer more readily to the jury's verdict in conducting our factual sufficiency review. *Id.* ("The degree of deference a reviewing court provides must be proportionate with the facts it can accurately glean from the trial record"). We therefore hold the verdict is not so against the

great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We overrule appellant's second point of error.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed January 31, 2002.

Panel consists of Justices Yates, Edelman, and Wittig.[1] (Wittig, J. concurring and dissenting).

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.

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CONCURRING AND DISSENTING OPINION

I concur with the majority opinion on the factual sufficiency issue, with grave reservations. As I discuss by dissent to the evidentiary issue, I seriously question the jury's rejection of independent testimony indicating the innocence of appellant.[1] I recognize, along with the majority, that the jury can disregard eye witnesses and evidence placing appellant at work, and instead believe a police officer whose description is opposed by every other

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[1] The harmful admission of the arrest warrant could explain this aberrational rejection of the preponderance of evidence favoring appellant.

witness–including the state's only corroborating witness. No physical evidence links the defendant to the crime charged. Police investigation totally by-passed hard pictorial evidence of the true culprit, and instead relied wholly and completely upon inconsistent eye witness testimony of one interested and one disinterested person.

Is the wrong man in the penitentiary? Only two totally inconsistent state's witnesses (aided by the inadmissible arrest warrant) linked appellant to the crime:

A. Description of robber by Pacini: 5'6" to 5'7", 160 pounds; "**not possible**" – he weighed **210 pounds**.

B. Description of robber by Hoffpauir: 5'9" to 6'0", **210 pounds**.

Impeached by the state's own witness, Pacini first claimed the "210 pound" assailant wore blue jeans, then changed at trial to "blue-khakis."

The state's witnesses swore appellant had **no facial hair**. Defense witnesses testified to Elvis **side burns and facial hair** on day of robbery.

The erroneously submitted warrant and attached affidavit contained at least three items affecting the substantial rights[2] of appellant, that were *not otherwise admitted* in evidence: (1) a patently inadmissible opinion of guilt by a police officer; (2) reference to an extraneous offense – the cause number of another offense was listed in the affidavit; and (3) corroboration of the impeached state's witness Pacini.

A police officer's opinion testimony of guilt to a jury is highly prejudicial, particularly in light of the conflicting evidence. Further, while introducing the inadmissable warrant packet, the prosecutor asked a series of questions buttressing Officer Mar's decision to make an arrest. The obvious and only effect of this questioning was to emphasize and stamp credibility on the facts and opinions contained in the warrant packet and bolster the state's ephemeral case. Admission of hearsay testimony can be reversible error if offered

[2] Tex. R. Evid.103(a); Tex. R. App. 44.2(b).

to bolster the testimony of one of the witnesses over that of the defendant. *See Urick v. State*, 662 S.W.2d 348, 350 (Tex. Crim. App. 1983); *Garrett v. State*, 641 S.W.2d 232, 236 (Tex. Crim. App. 1981).

Of course, an opinion by a police officer as to guilt is harmful. *See Boyde v. State*, 513 S.W.2d 588, 590 (Tex. Crim. App. 1974). Of course, the introduction of an extraneous offense inference is harmful. *See* TEX. R. EVID. 404(b), 608(b).

Finally, the erroneously admitted affidavit states that, after viewing the photo spread, Mr. Pacini told Officer Steininger "he could identify the defendant if he saw him again in person." Mr. Pacini's identification[3] at trial was not only impeached but also was weak by comparison to the unabashed identification in the inadmissible warrant. At trial, Mr. Pacini said he in fact did not remember asking Officer Steininger to see the defendant in person.

The state's case straddles a scale between weak and non-existent. There is no physical evidence against appellant. The several purchases made with the credit cards were likely video taped at the stores but none of this dispositive evidence was procured or made available at the trial. The descriptions of the assailant/customer given by the State's two witnesses were inconsistent with each other in key respects. The feeble and impeached state's witnesses were totally contradicted by the testimony of defense witnesses. By contrast to the two state witnesses, the alibi witnesses for appellant and their descriptions were both internally consistent, and demonstrably more accurate. A customer at the store substantiated appellant's alibi. This was at best a swearing match highlighted by inconsistent testimony by the state's witnesses which was directly contradicted by several witnesses. There was more evidence appellant was at work than there was credible evidence he committed a crime. The erroneous admission of the hearsay police opinion of guilt directly contradicting both appellant's testimony and other defense witnesses can only be

[3] The majority opinion notes the line-up identification by the witness but fails to note Pacini had already been shown photos of appellant by the investigating officer.

viewed as egregious harm approaching fundamental error. The State's case was ripe with possibilities but void of probabilities.

In such a close case, to turn one's head harms not only appellant, but also the jurisprudence of this State. All appellate courts do in blessing the rankest of hearsay as harmless error is invite further deterioration of the rules of evidence and undermine our very legal processes.

In such a close case, I "cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1945)). I would reverse this conviction based on the harmful admission of the warrant packet over a timely hearsay objection. We can afford to retry this close case without rank hearsay. We cannot afford the continuous and deliberate deterioration of the rules of evidence and its insidious effect upon the rule of law.

/s/ Don Wittig
Senior Justice

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