Affirmed and Opinion filed April 4, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00043-CR

JUAN ESTEBAN HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 838,669

O P I N I O N

Appellant, Juan Esteban Hernandez, was charged by indictment with aggravated sexual assault of a child. A jury convicted appellant of the charged offense and assessed punishment at twenty-two years' confinement in the Texas Department of Criminal Justice, Institutional Division. On appeal, appellant asserts the trial court committed reversible error in denying his request for a severance and in denying his motion for a mistrial. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Complainant, T.F., testified she and a friend were offered a ride home from a party by Julio Solis and Willie Cervantes. Appellant and five others were in the automobile, including Jose Vasquez. The girls accepted the offer, and appellant's co-defendant, Ismael Roman, drove. Soon after getting into the car, the girls realized that Roman was not following their directions. Fearing that something bad was going to happen, they tried to jump out of the car. T.F.'s friend was able to get out, note the license plate number, run home, and call the police. Meanwhile, Roman drove to a dark remote area, where he and others sexually assaulted T.F.

Appellant was tried in a joint trial with Roman and Vasquez.[1] Appellant sought a severance, asserting that he was the only defendant who was not a member of a gang. The trial court denied appellant's request. No evidence regarding gang membership or affiliation was introduced at the guilt/innocence stage of trial. However, at the punishment stage, evidence was introduced that all but two of the actors were gang members. Appellant and Vasquez were not identified as being members of a gang, but Roman was.

II. DENIAL OF APPELLANT'S MOTION FOR SEVERANCE

Appellant asserts the trial court abused its discretion in denying his motion to sever because he was prejudiced by evidence that was admitted during the punishment phase regarding his co-defendant's gang membership. The evidence appellant complains of is as follows:

> Q. Are there people who are known as associates of gangs, people who are not actually gang members but are considered associates?
>
> A. Yes. But, in my opinion, if you will, an associate is more of a member than not. So I generally don't recognize the term

[1] It appears from the record that some of the other actors accepted plea bargain agreements offered by the State, and at least one actor was believed to have fled to Mexico in an effort to avoid facing charges.

> 'associate' because when you are–when you are recognized to be an associate. You're so close to the activity and to the lifestyle and to the involvement of things that you are virtually a member.
>
> Q. When you hear somebody refer to somebody else as being an associate, what—I know you have just given that description, but how would you define the associate other than somebody who is more of a member than not?
>
> A. Well, generally it's someone who generally holds the company of known and identified gang members.
>
> Q. Are those individuals who are associates of gangs, are they the leader types or are they followers?
>
> A. They are generally followers.

Article 36.09 of Texas Code of Criminal Procedure governs the law of severance. It reads in pertinent part:

> "Two or more defendants who are tried jointly or separately indicted or complained against for the same offense or any offense growing out of the same transaction may be, in the discretion of the court, tried jointly or separately . . . provided that . . . in cases in which, upon timely motion to sever, and evidence introduced thereon, it is made known to the court that there is a previous admissible conviction against one defendant or that a joint trial would be prejudicial to any defendant, the court shall order a severance . . . ."

TEX. CRIM. PROC. CODE ANN. art 36.09 (Vernon 1981).

Absent evidence of prejudice to one defendant in a joint trial, or evidence that one defendant has a prior admissible conviction, a motion for severance is left to the trial court's discretion. *Patterson v. State*, 783 S.W.2d 268, 270 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd) (citations omitted); *see also King v. State*, 17 S.W.3d 7, 17 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). When an accused is not entitled to a severance as a matter of right, the denial of the same by the trial court constitutes an abuse of discretion only when the movant satisfies the heavy burden of showing clear prejudice. *Patterson*, 783 S.W.2d at 270 (citations omitted). The mere allegation of prejudice is not enough to satisfy this burden. *Id*.

In this case, appellant fails to satisfy his burden of showing prejudice. Appellant claims a joint trial prejudiced him because evidence of his co-defendant's gang membership was admitted during the punishment phase of trial. Appellant suggests he was harmed because the evidence he acted as a primary party was weak. Although appellant's argument is not framed clearly, appellant appears to be suggesting the jury only found him guilty because of the evidence that one of his co-defendants, Roman, was a gang member. However, this evidence was only presented during the punishment phase of the trial, not the guilt/innocence phase. Appellant has not demonstrated how evidence of Roman's gang membership introduced at the punishment stage could have prejudiced him in the guilt/innocence stage.

Moreover, when the evidence regarding gang membership was introduced, the trial court instructed the jury that they could only consider the evidence in relation to Roman, not appellant. We presume the jury followed the trial court's limiting instruction. *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987). Thus, if the gang testimony prejudiced appellant, it was cured by instruction. Indeed, both of appellant's co-defendants received harsher sentences. Jose Vasquez and Ismael Roman were sentenced to twenty-five and thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division, respectively. Appellant, however, was sentenced to twenty-two years' confinement. This discrepancy in the jury's punishment assessment might be explained by looking at the relative roles each defendant played in the crime and their gang membership status. Appellant's co-defendants were both primary actors in this crime (they vaginally penetrated the victim), while the evidence showed appellant was guilty as a party (he did not penetrate the victim). Roman was identified as a gang member, while Vasquez and appellant were not. Because appellant has not demonstrated how he was prejudiced by the trial court's denial of his motion to sever, we overrule appellant's first point of error.

III. DENIAL OF APPELLANT'S MOTION FOR MISTRIAL

Although appellant sets out two points of error in his brief, his brief is devoid of any argument or authority regarding his second point of error. An appellant's brief must contain a clear and concise argument with appropriate citations to the authority and to the record. TEX. R. APP. P. 38.1(h). Because appellant does not comply with Texas Rules of Appellate Procedure, he has waived this issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed April 4, 2002.

Panel consists of Chief Justice Brister and Justices Anderson and Frost.

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