Affirmed and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00675-CR

SHAWN MARK DELANO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 97CR1192

O P I N I O N

The State charged appellant, Shawn Mark Delano, with the felony offense of murder. A jury found appellant guilty of the lesser included offense of manslaughter. After finding both enhancement paragraphs to be true, the trial judge assessed appellant's punishment at 65 years confinement. In five points of error, appellant contends that the trial court erred by (1) granting the State's motion to amend the indictment after trial began, (2) denying him an additional ten days to prepare, (3) admitting inadmissible hearsay evidence, and (4) finding that sufficient evidence supported the first enhancement paragraph. Appellant also argues that a material variance exists between the indictment and the trial court's judgment. We affirm.

Because appellant does not challenge the sufficiency of the evidence, only a brief recitation of the facts is necessary. Appellant Delano, Dustin Delgado, and several other individuals were involved in a fight. Appellant stabbed Delgado, who later died as a result of these injuries. Appellant claimed that he acted in self-defense.

In his first and second points of error, appellant contends that the trial court committed reversible error by granting the State's motion to amend the indictment and by denying him an additional ten days to prepare for trial.

The prosecutor moved to amend both enhancement paragraphs in the indictment before testimony was taken in the punishment phase. The enhancement paragraphs contained errors in the cause numbers of appellant's prior burglary convictions. Appellant's trial counsel objected to the State's motion; he argued that an amendment to the indictment violated Article 28.10 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. Art. 28.10 (Vernon Supp. 1999). Appellant's counsel asked the court to disallow the requested amendment, but if the court allowed the amendment he asked for an additional ten days to prepare. The court granted the State's motion to amend the indictment and denied appellant's request for an additional ten days to prepare. The indictment, however, was never physically amended.

The State has the power to amend an indictment after the trial has started only if the defendant does not object to the amendment. *See* TEX. CODE CRIM. PROC. ANN. Art. 28.10(b) (Vernon Supp. 1999); *Sodipo v. State*, 815 S.W.2d 551, 556 (Tex. Crim. App. 1990). But, a court order granting the State's "motion to amend" does not constitute an amendment. An amendment does not become effective until the indictment is physically altered to reflect the approved change by methods such as "handwriting, typing, interlining, [or] striking out." *Ward v. State*, 829 S.W.2d 787, 793 (Tex. Crim. App. 1992); *Duncan v. State*, 850 S.W.2d 813, 815 (Tex. App.–Houston [14th Dist.] 1993, no pet. h.).

The indictment was never amended; therefore we find that appellant's points of error are without merit. We overrule appellant's first and second points of error.

In his third point of error, appellant argues that the trial court erred by admitting one of appellant's penitentiary packets and two offense reports.

During the punishment phase, the State offered one of appellant's penitentiary packets into evidence. The fingerprints in the packet were not useable, so the State offered two arrest reports. The arrest reports contained the same docket number listed in the penitentiary packet and included appellant's useable fingerprints. Appellant objected to the arrest reports on the grounds that they were hearsay and were not properly authenticated. He objected to the penitentiary packet by renewing his previous objection on his motion to amend the indictment. The trial judge overruled all of appellant's objections.

On appeal, appellant contends that all three of the State's exhibits were not properly authenticated and contained hearsay. Appellant did not make these objections when the State offered the penitentiary packet. An error presented on appeal must comport with the objection raised at trial; otherwise the issue is not properly preserved for our review. *See Butler v. State*, 872 S.W.2d 227, 237 (Tex. Crim. App. 1994); *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990). Thus, appellant waived his objection to the admission of the penitentiary packet.

The offense reports, however, were inadmissible hearsay evidence. Police offense reports are hearsay and are specifically inadmissible under TEX. R. EVID. 803 (8)(B). *See Gaitan v. State*, 905 S.W.2d 703, 708 (Tex. App.–Houston [14th Dist.] 1995, pet. ref'd). The State does not argue that the reports fall within any exception to the hearsay rule, but only contends that the reports were properly authenticated. Because the reports constituted inadmissible hearsay evidence, we find that the trial court abused its discretion by admitting them.

Having found that the trial court erred in failing to sustain appellant's hearsay objection, we must now examine whether the error was harmless. *See* TEX. R. APP. P. 44.2. Under Texas Rule of Appellate Procedure 44.2, we must determine whether the error is constitutional. If constitutional, we must reverse unless we determine beyond a reasonable doubt that the error did not contribute to appellant's conviction or punishment. *See* TEX. R. APP. P. 44.2(a). Otherwise, we apply Rule 44.2(b) and disregard the error if it does not affect appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App.1998) (op. on reh'g), *cert. denied*, --- U.S. ----, 119 S.Ct. 1466, 143 L.Ed.2d 550 (1999).

The Court of Criminal Appeals treats a violation of the evidentiary rules that results in the erroneous admission of evidence as non-constitutional error. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App.1998). Thus, Rule 44.2(a) is inapplicable and we will disregard the error unless it affected appellant's substantial rights. *See* 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. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App.1997) (*citing Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)).

The arrest reports did not include specific facts about appellant's underlying felony offense for burglary. The reports only listed general information about appellant and the arrest. The offenses listed in the reports were merely cumulative of properly admitted evidence from the penitentiary packets. The State did not need to introduce either report to link the defendant to the burglary; the penitentiary packet included a picture of appellant, which would have been sufficient. *See Yeager v. State*, 737 S.W.2d 948, 952 (Tex. App.–Fort Worth 1987, no pet.). We are unable to conclude that the admission of these reports had a substantial and injurious effect or influence on the jury's verdict. Accordingly, we find that the error was harmless and overrule appellant's third point of error.

In his fourth point of error, appellant contends that the evidence in the punishment phase was insufficient to support the court's finding that the first enhancement paragraph was true. As in the third point of error, appellant argues that the penitentiary packet should not have been admitted; if the packet was excluded, then there would be no evidence to support the court's finding. We previously found that appellant failed to preserve error as to the admission of the penitentiary packet. The packet was admitted and constitutes sufficient evidence to support the court's finding. We overrule appellant's fourth point of error.

In his fifth point of error, appellant contends that there was a fatal variance between the indictment and the trial court's judgment. Because the State never amended the indictment, the cause numbers in the enhancement paragraphs in the indictment differ from those found in the judgment. The first enhancement paragraph in the indictment alleges that appellant was convicted, prior to the primary offense, of Burglary of a Building in the 23rd Judicial District of Brazoria County, Texas in cause number 10,372 on October

18, 1989. The judgment reflects what the State actually proved: appellant was convicted of Burglary of a Building in the 23rd Judicial District of Brazoria County, Texas in cause number 19, 372 on October 18, 1989. Appellant argues that this variance constitutes reversible error.

Generally, a variance between the indictment and evidence at trial is fatal to a conviction. *See Stevens v. State*, 891 S.W.2d 649, 650 (Tex. Crim. App. 1995). Due process guarantees the defendant notice of the charges and is violated when an indictment alleges one offense, but the State proves another. *Id*. But not every variance is material. *Id*. For a variance to be material, it must mislead the defendant to his prejudice."The object of the doctrine of variance between allegations of an indictment is to avoid surprise, and for such variance to be material it must be such as to mislead the party to his prejudice." *Id., quoting Plessinger v. State*, 536 S.W.2d 380 (Tex. Crim. App. 1976).

The variance in this case is not material. Appellant does not contend he was surprised to learn that one number was changed in the cause number. Nor does appellant explain how his due process rights were violated or how he was prejudiced. The transpositional error in the cause number did not prevent appellant from finding the record in the prior conviction and presenting a defense. We find that the variance was not material. *See Human v. State*, 749 S.W.2d 832, 837-839 (Tex. Crim. App. 1988); *Cole v. State*, 611 S.W.2d 79 (Tex. Crim. App. 1981); *Williams v. State*, 980 S.W.2d 222, 226 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd). We overrule appellant's fifth point of error.

We affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed May 25, 2000.
Panel consists of Justices Sears, Cannon and Draughn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon and Joe L. Draughn sitting by assignment.