

**Affirmed and Majority and Concurring Memorandum Opinions filed June 18, 2020.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-18-00059-CR**

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**IRWIN PENTLAND, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 427th District Court  
Travis County, Texas  
Trial Court Cause No. D-1-DC-17-904036**

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**CONCURRING MEMORANDUM OPINION**

I respectfully decline to join the majority opinion but concur in the court's judgment.

The trial court abused its discretion in admitting the demonstrative evidence at trial. The standard of review for admission of "similar weapons" is abuse of discretion. *Simmons v. State*, 622 S.W.2d 111, 114, (Tex. Crim. App. 1981).

Visual, real, or demonstrative evidence is admissible in a criminal trial if it tends to solve some issue in the case and is relevant. *Id.*, 622 S.W.2d at 113. “A weapon or instrumentality that is described as ‘like,’ ‘similar to,’ . . . or described by the use of comparable words or phrases as these, is admissible as an aid to the jury in interpreting and understanding the oral testimony adduced at trial.” *Id.* at 113–14. The only limitation to this rule is that if the weapon or instrumentality is not an exact replica, but is only “similar to” the original, then its admissibility is subject to the abuse of discretion rule, even when the original would have been admissible. *Id.* The test for admissibility of a weapon that is not an exact replica of the weapon actually used is as follows:

- (1) the original is not available;
- (2) if available, the original would be admissible;
- (3) it is relevant and material to an issue in controversy;
- (4) its probative value outweighs any inflammatory effect; and,
- (5) the jury is instructed that the object is not the object used in the commission of the crime, and is to be considered by the jury solely as evidence that demonstrates or illustrates what the object used in the offense looks like.

*Miskis v. State*, 756 S.W.2d 350, 352 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). Admission of an inexact replica is subject to an abuse of discretion review. *Simmons*, 622 S.W.2d at 114.

Here, the murder weapon was not recovered. Indeed, the State admits one of three firearms (a Thompson/Center single shot rifle, a Norinco .223 caliber AK, or an “AR-15 style rifle”) could have been used in the murder of the complainant. However, over the objection of defense counsel, the trial court admitted a weapon demonstrated to the jury that was *not* “similar to,” “like,” “much the same,” “pretty much the same,” “close,” or “the same but not the exact one.” *See Simmons*, 622 S.W.2d at 113–14. In fact, admittedly, the weapon used as a

demonstration at trial did not contain the component parts of the weapon allegedly used in the crime.

Arguing the necessity of admission, the State's position is the demonstration was necessary to prove "the intent to cause death" and "goes to show the fact that this crime was committed at all," but I do not find these arguments persuasive. The appellant's computer search of component parts of the gun, his research of how to make a silencer with an automobile oil filter, the admission of the threaded adapter and .300 blackout barrel that were purchased and delivered to appellant's mailbox, that appellant owned a rifle case and several components compatible with an AR-15, that decedent did not own a gun, together with the evidence of the theft by appellant, were sufficient evidence of the crime. Visuals sway a jury; that is why trial lawyers use them. To find that an AR-15 with a blackout barrel and silencer would not prejudice a jury is to defy reason. Showing the jury a weapon that did not contain the component parts of the weapon used in the crime was unnecessary, more prejudicial than probative, and certainly impressed the jury in some indelible way. Tex. R. Evid. 403; *Simmons*, 622 S.W.2d at 114 (noting it would be an abuse of discretion to admit an exhibit of a non-exact replica of a weapon "where, because of the distinguishing characteristics of the replica or the duplicate, when compared to that of the original weapon or instrumentality used in the commission of the crime, the probative value of the non-exact weapon or instrumentality will be very slight."). Although the use of the demonstrative evidence in this case does not rise to the level of the exhibition of a videotape of a hungry lion behind glass trying to consume a toddler as in *Milton v. State*, 572 S.W.3d 234, 242–44 (Tex. Crim. App. 2019), the demonstrative evidence used here was highly inflammatory.

Although I find it was error to admit the “not similar” weapon into evidence, the error was harmless because the evidence overwhelmingly established the defendant’s guilt, and no attempt was made to establish that the visual introduced into evidence was the weapon used to murder the complainant. *See Miskis*, 756 S.W.2d at 352–53. Accordingly, although I respectfully decline to join the majority opinion in regard to the admissibility of the demonstrative evidence of the weapon, I concur with the court’s judgment.

/s/ Margaret ‘Meg’ Poissant  
Justice

Panel consists of Justices Wise, Jewell, and Poissant. (Wise, J., majority memorandum opinion).