Affirmed and Opinion filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00128-CR

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KENNY GONZALES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 753,382

O P I N I O N

Kenny Gonzales (Appellant) was indicted for capital murder. *See* TEX. PENAL CODE ANN. § 19.03 (Vernon 1994). The State did not seek the death penalty. Appellant pled not guilty and was tried by a jury. The jury returned a verdict of guilty, and Appellant was sentenced by the trial court to a term of life imprisonment in the Institutional Division of the Texas Department of Criminal Justice. *See* TEX. PENAL CODE ANN. § 12.31 (Vernon 1994). On appeal to this Court, Appellant assigns two points of trial court error, contending that his conviction should be reversed because (1) the trial court tried him and his co-defendant at the

same time, employing two separate juries, and (2) the trial court overruled his objection to testimony by the victim's brother concerning the psychological effect the murder had on him. We affirm.

Appellant does not challenge the sufficiency of the evidence to support his conviction. Thus, a review of the facts in this opinion is not necessary and would serve no useful purpose in resolving the issues raised in this appeal.

In his first point of error, Appellant maintains that "the trial court committed reversible erred by conducting separate trials of two defendants simultaneously with two juries." He contends that because the Code of Criminal Procedure does not authorize such a procedure, it is "illegal," requiring a reversal of his conviction.

Prior to the commencement of the trial, we note the following colloquy between the trial judge, Appellant, and Appellant's trial counsel:

> THE COURT: Before the jury's brought out, so the record's perfectly clear, the Court has selected two juries to try these two cases separately but at the same time they'll be present in the courtroom in this procedure that the Court has implemented in these two matters.[1] Is that agreeable to the State?

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[1] We also note the following statements made by Judge Ted Poe to the prospective jurors during voir dire:

> Now, this case has a little different twist. And I'll tell you this. Then I'm through, I promise. There is another defendant charged with this offense of capital murder. His name is Cedric Santoscoy, charged with this offense, capital murder. *And by agreement of all the lawyers, that case and this case, with my consent, we're going to try both of those defendants, this defendant, Kenny Gonzalez, Cedric Santoscoy, together*. But there will be two juries. Twelve of you will be the jury for Kenny Gonzalez. This afternoon we're going to pick a jury for Cedric Santoscoy. Then we'll have two juries to hear these two cases together. There's a lot of reasons for it. It may become apparent during the trial but, mainly, most of the witnesses will be referring to both cases but there may be times when some witnesses refer to one case and some witnesses to the other case. So, we'll have two juries that hear these two cases together.

(continued...)

MS. SIEGLER: It is.

THE COURT: Mr. Rodriguez?

MR. RODRIGUEZ [Appellant's trial counsel]: It is, if I may interject one caveat. I would encourage the jury -- Court that when the jury is taken out of the courtroom that the Court instruct them they're not to derive any conclusions or anything of that sort or speculate as to why they're taken out and couldn't listen to the evidence.[2]

THE COURT: All right. And Kenny Gonzales [Appellant], is that agreeable to you?

THE DEFENDANT, GONZALEZ [Appellant]: Yes, sir.

The record clearly reflects that Appellant requested this unusual procedure. Therefore, he may not now complain on appeal that the trial court's acquiescence to his request was reversible error. This is because, assuming, without deciding, that the trial court erred in this case, we are unable to reverse a trial court's ruling upon invited error by a defendant. "In appellate practice, the principle of 'invited error' is that if, during the progress of a cause, a party requests or moves the court to make a ruling which is actually erroneous, and the court

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[1] (...continued)

> We made all the arrangements to do that. As far as we know, that's never been done in Harris County or anywhere else, have two defendants, hear two cases at the same time.
>
> So, like I said, *the lawyers have not only agreed but requested* we do it this way. I've agreed, and we'll work it out that way.

(emphasis added).

[2] While the majority of testimony pertained to both defendants' cases, when testimony from a witness related to only one defendant, at the request of trial counsel, the trial court would excuse one jury or the other from the courtroom.

does so, that party cannot take advantage of the error on appeal or review." BLACK'S LAW DICTIONARY 543 (6th ed. 1990).

The Court of Criminal Appeals has applied invited error when the defendant has "invited" the court to do something, the court has then done the act, and thereafter the defendant complains of the court's action. *See Kelley v. State*, 823 S.W.2d 300, 302 (Tex.Crim.App. 1992) (defendant requested a name change, trial court changed indictment to reflect name change, when defendant complained the name change was error, the court held any objection was waived); *Capistran v. State*, 759 S.W.2d 121, 124 (Tex.Crim.App. 1988) (defendant requested the trial proceed on the evidence presented during an earlier trial, trial court did so, and then defendant complained on appeal the trial court erred in receiving evidence without appellant's written consent, court held objection waived); *Livingston v. State*, 739 S.W.2d 311, 341 (Tex.Crim.App. 1987) (defendant requested a charge, the court gave the charge requested, when defendant complained the charge was error, court held error was invited.); *Murphy v. State*, 640 S.W.2d 297, 299-300 (Tex.Crim.App. 1982) (court held defendant was estopped from complaining about the legality of a search when he elected to prevent any disputed fact issue from coming before jury); *Cadd v. State*, 587 S.W.2d 736, 741 (Tex.Crim.App. 1979) (court held defendant in no position to complain about the charge given because the defendant requested the charge); *Holmes v. State*, 140 Tex. Crim. 619, 146 S.W.2d 400, 403 (1940) (defendant objected to the wording of the charge, the wording was taken out, then defendant complained the wording was not in the charge, the court held defendant invited error and could not complain).

This rule is dispositive of the case at bar. Appellant was a "moving factor" in causing the trial judge to empanel two juries to simultaneously determine guilt in his case and in his co-defendant's case. *See Ex parte Guerrero*, 521 S.W.2d 613, 615 (Tex.Crim.App. 1975); *Moneyhun v. State*, 161 Tex. Crim. 19, 20, 274 S.W.2d 546, 547 (1955). Consequently,

Appellant may not now avail himself of the very error, if any, he initiated. *See id*. Point of error overruled.[3]

In his second point of error, Appellant contends that the trial court erred by overruling his objection "to testimony by a witness as to the damage caused to the witness by the shooting in the case at bar."

During direct examination by the State, the prosecutor asked the victim's brother the following:

Q. At some point in time after the death of your brother did you see a doctor?

A. Yes, sir.

Q. What type of doctor?

MR. RODRIGUEZ: Judge, I'm going to object to the relevancy of this, Your Honor.

THE COURT: It's overruled.

Assuming, without deciding, that the trial court erred in permitting the complained of testimony, the remaining evidence in the record is overwhelming of Appellant's guilt. Thus, in evaluating the probable impact of the error, if any, in light of the existence of the other evidence, we find beyond a reasonable doubt that such error, if any, made no contribution to Appellant's conviction or to his punishment. *See Johnson v. State*, 803 S.W.2d 272, 285 (Tex.Crim.App. 1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1078 (1991); *see also* TEX. R. APP. P. 44.2. Point of error overruled.

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[3] Notably, Appellant makes no attempt in his first point of error to show how he was harmed or unfairly prejudiced. Appellant merely avers in his brief that "the procedure utilized was illegal."

The judgment is affirmed.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

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