

Affirmed and Opinion filed July 26, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00893-CR

MATTHEW ANTHONY GONZALES, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 718,885**

OPINION

A jury convicted appellant, Matthew Anthony Gonzales, of aggravated robbery and sentenced him to sixteen years' imprisonment. In two points of error, he complains that the trial court erred in admitting victim impact testimony during the guilt/innocence phase of his trial and that he received ineffective assistance of counsel. We affirm.

I. Background

In the evening of March 26, 1996, Vito Hernandez, Jr., seeing a trailer full of watermelons in front of the home of Porfirio and Belia Gonzales, knocked on their door and asked whether the watermelons were for sale. Hernandez bought a watermelon from

Porfirio and then left. Later that evening, Irene—the daughter of Porfirio and Belia—was washing dishes while her parents slept in their bedroom. From another part of the house, Irene heard someone break in to the house. The noise also awoke Belia. Irene slipped out of the house undetected and went to a neighbor’s house to call 911 as appellant went to Porfirio and Belia’s bedroom. Meanwhile, appellant, armed with a shotgun, demanded that Belia and Porfirio give him money.¹ When Belia first told appellant they did not have any money, appellant told Porfirio that, unless Belia gave him money, appellant would kill her. Porfirio and Belia continued to deny that they had any money. Apparently now convinced of that fact, appellant then demanded the keys to the truck with the trailer of watermelons. Before leaving, appellant stated that, if he were given the wrong keys, he would come back to kill them. Appellant and Hernandez drove off in Porfirio’s truck with the watermelons.

At about the same time, a taxicab arrived at a neighbor’s house to drop off a fare. Porfirio tried to hale the cab to follow his truck, but the cabdriver, aware that something was wrong, refused. Porfirio then commandeered the cab and pursued appellant and Hernandez himself. Perhaps not surprisingly, given the great weight of the trailer’s contents, Porfirio quickly caught up with the truck. As he did, someone from inside the truck fired a gun at the taxicab and at least one bullet struck the cab. Porfirio was not injured. The pickup drove down a dead-end street, and appellant and Hernandez then jumped out of the truck and fled on foot. They were apprehended a few minutes later after the police found them both hiding in a dumpster. At the time of his arrest, appellant was carrying the shotgun he used inside the Gonzales residence.

II. Victim Impact Testimony

In his first point of error, appellant claims that the trial court, over timely objection, erred by allowing victim impact testimony during the guilt/innocence phase of the trial. Specifically, appellant complains of the following testimony from Belia during the State’s case-in-chief.

¹ Porfirio and Belia are apparently unrelated to appellant.

PROSECUTOR: How long did you live there after this happened?

THE WITNESS: About another month.

PROSECUTOR: And where -- did you move at that point?

THE WITNESS: Yes, we did.

PROSECUTOR: Why?

THE DEFENSE: Objection, Your Honor, there's no relevance.

THE COURT: Overruled. She may answer it.

PROSECUTOR: Go ahead.

THE WITNESS: I couldn't sleep there anymore.

PROSECUTOR: Why is that?

THE WITNESS: Well, the second night after that happened --

THE DEFENSE: Objection, Your Honor, calling for a self-serving statement.

THE COURT: Overruled.

THE WITNESS: The second night after that happened, I wasn't able to stay there. We had to go to a hotel. So we couldn't afford to stay in a hotel every night. So we went back home. I couldn't sleep at night. I stayed up most of the night looking out the window.

An objection stating one legal basis may not be used to support a different legal basis on appeal. *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990). Accordingly, appellant has not preserved error with respect to the "self-serving" objection. Moreover, a party waives error regarding improperly admitted evidence if that same evidence is admitted elsewhere without objection. *Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993); *Saldivar v. State*, 980 S.W.2d 475, 494 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). In the State's case-in-chief, Porfirio testified that the couple did not stay at the house on the night following the robbery because "my wife did not want to go back there," and that they broke their lease with the landlord "considering what had

happened.” Appellant did not object to this testimony. Appellant’s first point of error is overruled.

III. Ineffective Assistance of Counsel

In his second point of error, appellant claims he received ineffective assistance of counsel in derogation of his Sixth Amendment right. Specifically, he complains that an actual conflict of interest arose from his lawyer’s joint representation of himself and Hernandez. As evidence of this alleged conflict, appellant points to the closing arguments at punishment, where his lawyer argued that Hernandez was less culpable than appellant because Hernandez never entered the bedroom or threatened to kill anyone, and Hernandez did not shoot at Porfirio as Porfirio chased appellant and Hernandez in the taxicab.

We start with the proposition that multiple representation is not a *per se* violation of the constitutional guarantees of effective assistance of counsel. *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978); *Ex parte Alaniz*, 583 S.W.2d 380, 385 (Tex. Crim. App. 1979). Where, as with the situation here, the defendant executes a waiver of an attorney’s joint representation of himself and another and makes no objection prior to appeal concerning the conflicting representation, he must demonstrate that an *actual* conflict of interest adversely affected his lawyer’s performance in order to succeed in establishing a violation of his Sixth Amendment rights. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *Monreal v. State*, 923 S.W.2d 61, 64 (Tex. App.—San Antonio 1996), *aff’d*, 947 S.W.2d 559 (Tex. Crim. App. 1997). An actual conflict of interest exists when “one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing.” *Gonzales v. State*, 605 S.W.2d 278, 282 (Tex. Crim. App. 1980) (quoting *Ex parte Alaniz*, 583 S.W.2d at 381 n.3 quoting *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975)); *Kegler v. State*, 16 S.W.3d 908, 912–13 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The burden of demonstrating an actual conflict of interest is on the defendant.

Cuyler, 446 U.S. at 348.

There is nothing in the record supporting appellant's contention that Hernandez stood to benefit significantly to the detriment of appellant because of counsel's closing remarks. As one court recently recognized, legally both men are responsible to the same extent, even if one may be less culpable morally. *Howard v. State*, 966 S.W.2d 821, 827 (Tex. App.—Austin 1998, pet. ref'd). However, even if one co-defendant is less morally culpable than the other, and counsel points this out to the jury, no actual conflict of interest is shown because counsel's remarks would not necessarily cause the jury to assess a harsher punishment against the other. *Id.*

This Court recently addressed this precise issue. In *Kegler v. State*, an attorney represented two brothers in the punishment phase of an aggravated robbery case. During closing arguments, their lawyer summarized the evidence, including a brief mention of the fact that one of the brothers, Kedric, stayed in the car during the robbery. 16 S.W.3d at 913. The other brother, Terry, and another accomplice, walked over to the bus stop and robbed two victims. On appeal, Terry argued that he received ineffective assistance of counsel because their lawyer "emphasized" Kedric's lesser role in the offense.² *Id.* at 914. This Court held that "the trial court did not necessarily assess a harsher punishment against Terry merely because defense counsel pointed out that Kedric stayed in the car, did not know anyone had been shot, and would have felt differently had [Terry] been 'on the scene and had a gun.'" *Id.*

In conclusion, counsel's argument to the jury does not in itself prove that an actual conflict of interest existed. Appellant's second point of error is overruled.

² Ironically, Kedric argued on appeal that he was denied effective assistance of counsel because his lawyer should have argued more "vigorously" the fact that he stayed in the car. *Id.* at 912.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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