Affirmed and Opinion filed December 13, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01276-CR

VAN MORRIS JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 99CR1365

O P I N I O N

Van Morris Johnson, the appellant, was initially indicted in 1996 for burglary of a habitation with intent to commit aggravated assault. The jury convicted him of aggravated assault as a lesser-included offense, and he was sentenced to thirty years in prison. The First Court of Appeals reversed, holding that aggravated assault is not a lesser-included offense of burglary of a habitation with intent to commit aggravated assault. Appellant was re-indicted on a charge of aggravated assault, and a second jury convicted him of that offense. A different sentencing judge assessed punishment at life in prison. On appeal, appellant argues the trial court erred by (1) failing to grant his motion to dismiss on the grounds of

Penal Code Section 3.02(c); (2) overruling his objection to the State's jury argument; and (3) assessing greater punishment on retrial. We affirm.

Appellant and the complainant, Rosetta Robertson, had been involved in a relationship for about four months. Several months after their relationship ended, appellant entered her apartment while she was away by digging through her living room wall with a knife. When Robertson returned, appellant surprised her, put a knife to her face and threatened to kill her. He then took her to the bedroom, hit her on the stomach and face, cut her face with the knife, and raped her. Appellant then bound Robertson's hands and legs with a telephone wire and threatened to take her to Houston, kill her, and throw her body in the bayou where her son could find her. Appellant kept her bound overnight. When appellant took a bath the next morning, Robertson escaped through the front door and ran to a convenience store to call the police.

Subsequent Prosecution of Offense Not Joined in Original Prosecution

Appellant argues that the trial court should have granted his motion to dismiss the aggravated assault indictment because Penal Code Section 3.02(c) prohibits a subsequent prosecution for aggravated assault when the assault charge was not joined in the original indictment. That section provides:

> If a judgment of guilt is reversed, set aside, or vacated, and a new trial ordered, the state may not prosecute in a single criminal action in the new trial any offense not joined in the former prosecution unless evidence to establish probable guilt for that offense was not known to the appropriate prosecuting official at the time the first prosecution commenced.
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> TEX. PEN. CODE ANN. § 3.02(c) (Vernon 1994).

Appellant argues this section prohibits a second trial on any charge other than charges consolidated in the first trial. We believe the appellant has taken Section 3.02(c) out of its context.

Chapter 3 of the Penal Code addresses joinder and severance of multiple prosecutions

in a single trial. Section 3.02(a) permits (but does not require) prosecutors to join several charges in a single action. TEX. PEN. CODE ANN. §3.02(a) (Vernon 1994); *Nelson v. State*, 864 S.W.2d 496, 498 (Tex. Crim. App. 1993). Section 3.02(c) limits the joinder of new charges to old ones "in a single criminal action." Read in this context, we believe section 3.02(c) addresses only joinder or consolidation of new charges, not changing or reducing the original charge to a different or lesser one.

It is true that in this case the appellant was re-indicted in 1999 for both burglary of a habitation and aggravated assault in separate indictments. But the trial court dismissed the former on double-jeopardy grounds more than a month before trial on the latter. The State proceeded to trial on a single indictment of aggravated assault. Because the trial court's dismissal ended any consolidation of the aggravated assault charge in a single criminal action with a previously-charged offense, we find that section 3.02(c) does not apply. We overrule appellant's first point of error.

Jury Argument Urging Theory Not Charged in Indictment

Appellant asserts in his second point of error that the trial court erred in overruling his objection to the State's jury argument. In his closing remarks, the prosecutor argued:

> [Prosecutor]: Mr. Kelly would have you believe that sexual assault is not something you can consider. Well, bodily injury is defined as physical pain. It doesn't matter how that physical pain is brought about. But it's physical pain and I submit to you that if you're being sexually assaulted, if you're being forced to have sex against your will with a knife to your throat, there will be physical pain. So, for Mr. Kelly to state that sexual assault is not relevant, because he's not charged with sexual assault or aggravated sexual assault is desperate. She did not want him to be forced upon her. He had a knife to her throat. You don't think she suffered some physical pain as a result of that?
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> MR. KELLY [DEFENSE COUNSEL]: Judge, I object to this line of argument. He's asking them to convict him for sexual assault and he's not charged–
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> [PROSECUTOR]: Judge, I'm asking them to convict him for aggravated assault with a deadly weapon, and I'm telling them that a sexual assault, if

they believe, equates to bodily injury which is defined as physical pain, then they can believe it was aggravated assault with a deadly weapon.

MR. KELLY: He's charged with cutting her with a knife or threatening her with a knife.

[PROSECUTOR]: And causing bodily injury while using or exhibiting a deadly weapon, your Honor.

THE COURT: Overruled.

The indictment charged appellant in two separate paragraphs with (1) causing bodily injury to Robertson by cutting and stabbing Robertson with a knife and using or exhibiting a deadly weapon, namely a knife, and (2) threatening Robertson with imminent bodily injury and using a deadly weapon, a knife. Appellant's complaint on appeal is that the trial court's act of overruling his objection improperly authorized the jury to convict appellant of aggravated assault based on a different manner and means than was pled in the indictment. He argues that the prosecutor's argument urged the jury to convict appellant for causing Robertson bodily injury by sexually assaulting her rather than by causing her bodily injury by cutting and stabbing her with a knife. When the court overruled his objection, he argues that the court "expanded the written charge" and authorized conviction for a different manner and means than was alleged in the indictment.

Appellant does not argue that the charge, which tracked the indictment, was improper. His complaint is that the decision to overrule his objection was erroneous because it was not among the four areas of permissible jury argument. *See Rocha v. State*, 16 S.W.3d 1, 21 (Tex. Crim. App. 2000). Although it is error for the State to present a statement of the law that is contrary to that presented in the charge to the jury,[1] in this case we do not decide whether the prosecutor's argument and trial court's ruling were in error as any such error is harmless.

Erroneous rulings related to jury argument are generally treated as non-constitutional

[1] *Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990)

error. *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). We must disregard any error that does not affect substantial rights. *See* TEX. R. APP. P. 44.2(b). In other words, "[a] criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). The following three factors are used to analyze the harm associated with improper jury argument: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Martinez*, 17 S.W.3d at 692-93; *Mosley*, 983 S.W.2d at 259.

Although the judge took no measures to cure any error, the prosecutor's comments were part of a larger, legitimate argument emphasizing the relevance of the sexual assault and the burglary to the circumstances of the entire offense. The rape was clearly admissible without a limiting instruction as same-transaction contextual evidence. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Taking appellant's murderous threats in their full context, we believe it is highly unlikely the jury needed to rely on the sexual assault to find appellant caused bodily injury. Robertson's testimony recounts how appellant cut her face with the knife, and the State introduced a photo of Robertson's face showing the cut. It is extremely unlikely the jury would have returned a different verdict but for the prosecutor's comment.

We find that even if we were to assume that the argument was improper and the court erred in overruling the objection, the record provides fair assurance that the argument did not influence the jury or had only a slight effect. *See Johnson*, 967 S.W.2d at 417. We overrule appellant's second point of error.

Longer Sentence on Retrial

In his final point, appellant claims the trial court acted vindictively in assessing a harsher sentence following retrial. He points to no evidence in the record to support his claim of vindictiveness, relying solely on the presumption first adopted in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969). That presumption applies only when the circumstances indicate a need to guard against vindictiveness in the resentencing process. *Chaffin v. Stynchcombe*, 412 U.S. 17, 25, 93 S. Ct. 1977, 1982 (1973).

In this case, a different judge presided in the second trial, and appellant chose to be sentenced by her. When the party passing sentence changes, vindictiveness is not the only logical deduction from an increase in punishment. *Texas v. McCullough*, 475 U.S. 134, 140, 106 S. Ct. 976, 979-80 (1986). Because a new judge decided the second sentence, the *North Carolina v. Pearce* presumption does not apply. *See Jackson v. State*, 766 S.W.2d 518, 521 (Tex. Crim. App. 1988).

We overrule appellant's third point of error and affirm the judgment of the trial court.

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Scott Brister
Chief Justice

Judgment rendered and Opinion filed December 13, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).