Affirmed and Memorandum Opinion filed November 2, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00732-CR

RODOLFO PAREDES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1067972

MEMORANDUM OPINION

Appellant Rodolfo Paredes was convicted of murder and sentenced to fifty years' confinement. In two issues, he challenges the sufficiency of the evidence and the trial court's denial of a motion to suppress. We affirm.

BACKGROUND

On the evening of May 6, 2006, three men were shot outside a Houston apartment complex. Henry Sierra suffered a single gunshot wound to the leg, and Guillermo Cisneros was shot in the back and buttocks; both men survived. Complainant Rocky Sanchez suffered fatal injuries. According to the medical examiner, Sanchez died from a bullet that entered beneath the right cheek and exited through the first cervical vertebra, causing laceration to a major artery that supplies blood to the brain. The medical examiner also found entrance wounds in Sanchez's buttocks and leg, including one bullet fragment lodged in Sanchez's right foot.

Based on interviews conducted shortly after the shooting, Officer Mike Miller of the Houston Police Department determined that multiple shooters were likely involved. Among them, he could specifically name appellant as a possible suspect. Officer Miller developed a photo spread with six pictures of similarly-featured individuals, including one of appellant, and presented it to Sierra and another witness, Jose Trevino. Both Sierra and Trevino identified appellant as one of three men they had seen at the shooting. Trevino also told Officer Miller that appellant was holding a gun seconds before the shooting began.

The police secured a warrant and arrested appellant on May 8, 2006. Appellant consented to a search of his apartment, where police discovered a 9-millimeter gun. Appellant identified the weapon as his own.

Appellant was taken to police headquarters, where he was advised of his *Miranda* rights and interrogated by Sergeant John Belk. During the interrogation, appellant stated that he loaned his 9-millimeter gun to a man he could only identify as "Cesar." Appellant claimed that Cesar needed the gun to "talk with some guys." Appellant also admitted to accompanying Cesar and one other man to the scene of the crime, but appellant denied

any further role in the shooting. Prior to trial, appellant moved to suppress a video recording of the interrogation, arguing that it was obtained in violation of his constitutional rights. The trial court denied appellant's motion and the recording was later published for the jury's consideration.

At trial, Sierra and Cisneros testified that they had joined the complainant in the parking lot of his apartment complex on the night of the shooting. Both witnesses identified appellant as one of three males who entered the parking lot at around 11:00 p.m. Sierra and Cisneros testified that they and the complainant were unarmed and that shots were fired at them from the direction of the three males. Because both men ran for cover, Sierra and Cisneros could not positively identify which of the three males was firing. However, Sierra did testify that appellant nodded his head just before the shooting began, as though giving a signal to the other men in his party. Cisneros also testified that he heard "a lot of gunfire" and believed there was more than one shooter.

Officer Miller testified, without objection, that Trevino had witnessed appellant with a gun. According to Sergeant Belk, both Sierra and Cisneros had also reported seeing appellant with a weapon. Mike Lyons, the State's firearms examiner, presented additional testimony regarding the multiple cartridge casings recovered from the scene. Based on their various markings, Lyons determined that the casings were fired from at least three separate weapons: two 9-millimeter guns and one .45-caliber gun. Lyons testified that at least seven of the casings were fired from the 9-millimeter gun found in appellant's apartment. Lyons could not, however, match the same gun to the bullet fragment recovered from the complainant's foot. The fragment had a grain weight higher than bullets manufactured for 9-millimeter guns; Lyons testified that the fragment was more consistent with a .45-caliber bullet instead.

After being instructed on the law of parties, the jury found appellant guilty of murder and sentenced him to fifty years in prison. Appellant now contends that the

evidence is factually insufficient to support his conviction. He also contends that the trial court erroneously denied his motion to suppress.

DISCUSSION

A. Evidentiary Sufficiency

In his first issue, appellant directs us to several passages from the record and contends the evidence was either too weak to support his conviction or against the great weight and preponderance of conflicting evidence. Appellant asks that we remand for a new trial on grounds of factual insufficiency, but since this case was submitted, the court of criminal appeals has abrogated our factual-sufficiency jurisdiction. *See Brooks v. State*, No. PD-0210-09, 2010 WL 3894613, at *14 (Tex. Crim. App. Oct. 6, 2010) (plurality opinion) (overruling *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)); *id.* at *22 (Cochran, J., concurring). Accordingly, we will not reach the merits of appellant's initial arguments. Because "the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense," we will instead construe appellant's first issue as a challenge to the legal sufficiency of the evidence. *Id.* at *1 (plurality opinion).

In a legal-sufficiency review, we examine all of the evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 433 U.S. 307, 319 (1979). Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence and substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight to be given their testimony, any conflicts or inconsistencies in the evidence are resolved in

favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Our review includes both properly and improperly admitted evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id.*

The jury charge authorized appellant's conviction on two theories of murder; namely, for being the principal or a party to the offense. A person is criminally responsible as a party if, acting with the intent to promote or assist the commission of another's offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. TEX. PENAL CODE § 7.02(a)(2) (Vernon 2003). Because the jury could convict appellant under alternative theories, we will uphold the verdict if the evidence is sufficient under either one. *Sorto v. State*, 173 S.W.3d 469, 472 (Tex. Crim. App. 2005).

By our review, the record contains ample evidentiary support to sustain appellant's conviction under the law of parties. "In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985). Appellant admitted that he was present at the shooting. In the interrogation video, he stated that he accompanied Cesar and one other man to the parking lot after loaning Cesar a gun. While presence alone is not enough to support a conviction, the evidence was such that the jury could have reasonably concluded appellant played more than just a passive role in the shooting. *See Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987) ("[M]ere presence at the scene of the crime is insufficient to prove that a person is a party to the crime . . . ."). For example, Cisneros testified that he heard "a lot of gunfire," as though more than one person was shooting.

Officer Miller and Sergeant Belk both testified that several witnesses had seen appellant carrying a gun before the shooting began. Mike Lyons testified that at least three guns had been discharged, and at least seven of the recovered cartridge casings had been fired from the 9-millimeter gun found in appellant's apartment. Even if another person were responsible for those shots, Sierra testified that appellant gave a head nod just before the shooting started, as if signaling to the other men in his party to begin firing. The jury could have concluded that appellant's gesturing was evidence of "an understanding and common design" to commit murder, and thus, that appellant aided or assisted another party in the offense. *See* TEX. PENAL CODE §§ 6.03(b), 19.02(b); *Cordova*, 398 S.W.2d at 111.

Viewing all of the evidence in the light most favorable to the verdict, we conclude that the evidence was sufficient to convict appellant under the law of parties. Despite appellant's correct observation that the State failed to prove he fired the fatal shot, the jury did not require direct evidence that appellant killed the complainant. *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992). Therefore, we do not consider whether the evidence was also sufficient to convict appellant as a principal. *See Sorto*, 173 S.W.3d at 472. Appellant's first issue is overruled.

B. Motion to Suppress

In his second issue, appellant challenges the trial court's denial of his motion to suppress. The focus of appellant's motion was the video recording of his custodial interrogation with Sergeant Belk. Under article 38.22 of the Code of Criminal Procedure, an electronic recording of an interrogation may not be introduced into evidence unless the accused is warned of his *Miranda* rights and unless he knowingly, intelligently, and voluntarily waives those rights. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a) (Vernon 2005); *Miranda v. Arizona*, 384 U.S. 436, 444, 474–75 (1966). Appellant argues that the trial court should have suppressed the recording because he invoked his right to silence at

the beginning of the interview and he did not otherwise waive his Fifth Amendment rights.

When determining whether evidence should have been suppressed, we review the trial court's ruling for an abuse of discretion. *Long v. State*, 823 S.W.2d 259, 277 (Tex. Crim. App. 1991). A trial court abuses its discretion if it acts unreasonably, arbitrarily, or without reference to any guiding rules and principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1991). If supported by the record, the trial court's ruling will not be overturned. *Amador v. State*, 275 S.W.3d 872, 878–79 (Tex. Crim. App. 2009). The trial court is the sole trier of fact at a suppression hearing, and so we afford almost total deference to its express or implied determinations of historical fact, especially when those findings turn on the credibility and demeanor of witnesses. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). When the trial court has not made specific findings of fact, as in this case, we review the evidence in the light most favorable to the trial court's ruling. *Neal v. State*, 256 S.W.3d 264, 281 (Tex. Crim. App. 2008). Furthermore, we review de novo the trial court's application of law to any facts not based on an evaluation of credibility and demeanor. *Id.*

1. Whether Appellant Invoked His Fifth Amendment Rights

Appellant contends he attempted to cut off questioning at the beginning of the interview, thereby making unlawful the entirety of his custodial interrogation. *See Miranda*, 384 U.S. at 473–74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."). In his brief, appellant argues that he invoked his right to remain silent by telling Sergeant Belk, the interrogating officer, "Hey man. I don't want to give nothing about nothing." Appellant misstates what was actually communicated. Upon our review of the recording, the interrogation started more precisely as follows:

Sgt. Belk: Well, let's, uh, start from the beginning and we'll talk about what happened and see who all these people are.

Appellant: Hey man. . . . (sigh) I don't want to give nothing involved in that [expletive]. You know, I didn't do nothing.

Sergeant Belk then advised appellant that (1) he had the right to remain silent; (2) anything he said could be used as evidence against him at trial; (3) he had a right to counsel during questioning; (4) the State would appoint counsel if he were unable to employ one himself; and (5) he could terminate the interview at any time. Sergeant Belk asked appellant five times if he understood his rights, once after each warning. In each instance, appellant responded in the affirmative.

An interrogating officer has no obligation to end his questioning unless the suspect unambiguously invokes his Fifth Amendment rights. *Ramos v. State*, 245 S.W.3d 410, 418 (Tex. Crim. App. 2008). Moreover, the officer is not required to clarify any ambiguous remarks. *Id.* A suspect in custody need not, however, invoke his rights formally or with any particular phraseology; any comment or action by the suspect that can reasonably be construed as a desire to invoke his rights is sufficient to end the interrogation. *Watson v. State*, 762 S.W.2d 591, 598 (Tex. Crim. App. 1988). In this case, the trial court concluded that appellant fell short of clearly invoking his rights. Given the context of appellant's comment, we cannot find an abuse of discretion. Because appellant's objection to being "involved in that [expletive]" was given with a contemporaneous profession of innocence, his comment simply indicates a desire to be excluded as a murder suspect—not an intent to terminate the interview. Indeed, when appellant further elaborated on his version of the shooting, he reasserted his innocence with similar phrasing: "I was not. . . . First, you know, I didn't kill nobody. I didn't use no gun. I just don't want to get none of that [expletive], you know?" Viewing the evidence in the light most favorable to the trial court's ruling, we cannot conclude that the trial court acted unreasonably or arbitrarily.

2. Whether Appellant Waived His Fifth Amendment Rights

After advising appellant of his *Miranda* warnings, Sergeant Belk made the following request:

> Okay, now that I've read you your rights and you understand all your rights, are you willing to waive those rights and tell me just exactly what happened out there on Saturday night about Cesar and his friend and how you weren't involved in the shooting, but you were there? Just tell me the whole story about what happened.

Although appellant answered with his own account of the shooting, appellant argues that he could not have waived his rights because Sergeant Belk's request was "convoluted" and appellant did not explicitly agree to waiver.

Appellant's argument is without merit. The test for waiver turns on neither the tidiness of the interlocutor's request nor the explicitness of the suspect's response. *Joseph v. State*, 309 S.W.3d 20, 25 (Tex. Crim. App. 2010); *see also North Carolina v. Butler*, 441 U.S. 369, 373 (1979) ("[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."). A defendant only waives his rights if the totality of the circumstances reveals that the waiver was voluntary and made in full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Joseph*, 309 S.W.3d at 25. By our review, appellant knowingly, intelligently, and voluntarily waived his rights.

The recording does not suggest that appellant's statements were in any way coerced. Sergeant Belk was calm throughout the duration of the interrogation, making no threats. At the hearing on the motion to suppress, Sergeant Belk testified that he did not promise any deal in return for appellant's cooperation. Sergeant Belk also mentioned that appellant was allowed to eat and use the restroom during the interrogation. At no time during the approximately thirty-five minute interrogation did appellant make any request

for an attorney or that the interview be stopped. Instead, appellant offered his own version of the incident, insisting repeatedly that he was present at the shooting but not the killer. As such, the record supports a finding that "the waiver resulted from a free and deliberate choice without intimidation, coercion, or deception." *Id.* at 26.

The recording also shows that appellant was fully aware of the nature and consequences of his waived rights. Sergeant Belk read five warnings to appellant. When asked if he understood each of them, appellant responded affirmatively either by nodding his head or by giving a verbal statement such as "Yes, sir," or "Mm-hmm." During the suppression hearing, Sergeant Belk testified that appellant did not appear to be under the duress of any type of drugs or alcohol. We find no reason to question the trial court's exercise of discretion.

Based on the totality of the circumstances, we conclude that the record supports the trial court's finding that appellant waived his rights in accordance with *Miranda* and article 38.22. Therefore, the trial court did not err by denying appellant's motion to suppress and by admitting the videotaped statement into evidence.[1] Appellant's second issue is overruled.

CONCLUSION

In two issues, appellant claimed that the evidence was factually insufficient and that his motion to suppress was improperly denied. Because of *Brooks*, we examined the evidence under a legal-sufficiency standard instead, and viewing all the evidence in the light most favorable to the verdict, we concluded the record contained enough evidentiary support to permit a reasonable jury to convict appellant as a party to murder. We also determined that appellant's interrogation was conducted within the strict limits of

[1] Because we find no error in the admission of the videotaped interrogation, we do not reach the merits of appellant's arguments that he suffered harm.

Miranda and article 38.22; therefore, the trial court did not abuse its discretion in denying the motion to suppress. With both of appellant's issues overruled, we accordingly affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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