COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00331-CR

JUSTIN HENRY HUNSAKER APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1410505R

MEMORANDUM OPINION[1]

I. INTRODUCTION

After finding Appellant Justin Henry Hunsaker guilty of the offense of engaging in organized criminal activity, to-wit: murder, a jury assessed his punishment at thirty-seven years' confinement, and the trial court sentenced him accordingly. *See* Tex. Penal Code Ann. § 71.02(a)(1), (b) (West Supp. 2016). In

[1] *See* Tex. R. App. P. 47.4.

three issues, Hunsaker argues that the evidence is insufficient to support his conviction and that the trial court erred by allowing certain cell phone logs to be admitted into evidence. We will affirm.

II. Factual and Procedural Background

In the early morning hours of April 17, 2014, Hunsaker and a group of friends arrived at a home in Fort Worth to celebrate Justin Palmer's birthday. The males at the party included several members of the Aryan Brotherhood of Texas (ABT): Hunsaker, Charles Garrett, Nicholas Acree, and Nelson Borders.[2] The ABT is a white-supremacist gang operating both inside and outside of the prison system that engages in violent crime, the sale of narcotics, auto theft, prostitution, and gambling.

At some point during the party, Acree walked out of the room where the party was taking place because he had received a call on his cell phone. Acree then saw that Bryan Childers was also in the home. Childers was a member of the Aryan Circle, another white-supremacist gang. Acree and Childers had been engaged in a personal feud "for years." After seeing Childers, Acree walked back to the party and announced that he was going to kill Childers. Enraged by the presence of Childers, Acree shattered the screen of his cell phone.

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[2]Palmer was an "affiliate" or "associate" of the ABT, although he was not a full-fledged member.

The partygoers were instructed to turn off their cell phones and give them to Candace Whitten.[3] Hunsaker, along with the other partygoers, turned over his cell phone to Whitten. Whitten walked out of the house. She saw Childers sitting on a bucket, ostensibly waiting for a ride to work. Garrett walked out of the front door and announced, "Shit's about to get done ABT style." Hunsaker, Acree, and Borders entered the garage—which at this point was open—from inside of the house. Acree carried a gun. Acree yelled at Childers, and Childers turned around to see Acree pointing the gun at him. Childers tried to escape, but Garrett grabbed him by the back of his hoodie, drug him into the garage, and slammed the garage door shut.

Whitten testified at trial that when the garage door was shut, Hunsaker, Acree, Borders, Garrett, and Childers were in the garage. After the garage door was shut, Whitten heard a fight taking place. She heard "arguing, scuffling, and . . . [Childers] asking them to please stop and saying just sorry and stuff." Later that day, Whitten entered the garage and saw Childers's dead body.[4] She testified that there was "a lot of blood" on the ground and that an extension cord was wrapped around Childers's neck and hands.

Garrett told Whitten to take his car and pick up Hunsaker and Borders because they had "jump[ed] the back fence" and fled. Whitten picked up Acree—

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[3]It is unclear from the record who gave this instruction.

[4]Whitten testified that Childers did not have a pulse when she checked for it.

whom she saw walking along the interstate—and Borders, but she did not pick up Hunsaker because she saw him get into a white truck near the location where she picked up Borders. Per Garrett's instructions, Whitten then dropped Borders and Acree off at Garrett's residence, and she obtained a shovel and shop vac. She then picked up another ABT member, Terry Corbin, and drove to a store to purchase latex gloves. Whitten and Corbin returned to the house where the party had taken place, and they, along with Garrett, cleaned out Whitten's vehicle and placed cardboard on the floor of Whitten's vehicle.[5]

Whitten cleaned the garage, using bleach and muriatic acid to remove Childers's blood.[6] While cleaning the garage, Whitten noticed that Childers had a stab wound in the "back of [his] ribcage" that "had pierced [his] lungs." She also noticed that Childers had been "beat up." Childers's body was wrapped in blankets and placed in the back of Whitten's vehicle. Garrett and Corbin drove away in Whitten's vehicle.

Later that day, police stopped Whitten's vehicle because it had an expired registration; Corbin was driving. The vehicle was impounded. Childers's body was not in the vehicle when it was impounded, and the officer who impounded the vehicle did not see any blood in it.

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[5]Whitten testified that she did not know how her vehicle arrived at the home where the party took place. She had been driving Garrett's vehicle when she picked up Acree, Borders, and Corbin.

[6]Police found traces of blood in the garage containing DNA consistent with that of an offspring of Childers's parents.

Robert Cypert, a friend of several ABT members, testified that in April 2014, Hunsaker called him and asked him to come to a dog-grooming shop where Hunsaker lived.[7] When he arrived at the shop, Cypert noticed the smell of air freshener and floor cleaner mixed with "something else."[8] Cypert noticed a white truck in the shop's parking lot that had "four or five" five-gallon buckets full of cement loaded into the back of it. Hunsaker borrowed some gas money from Cypert and drove the white truck to a gas station; Cypert followed in his vehicle. After they left the gas station, Cypert headed to an American Legion building, and he saw Hunsaker driving on an unimproved road leading toward the Trinity River. Cypert saw Hunsaker and the white truck at the American Legion building later that day, but the buckets were no longer in the truck.[9] Although police later searched the Trinity River for Childers's body, it was never found.

Hunsaker was indicted and tried for murder and engaging in organized criminal activity, to wit: murder. A jury found Hunsaker guilty of engaging in organized crime, to wit: murder, but not guilty of murder.

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[7]The record does not reveal the exact date in April that the phone call and visit between Cypert and Hunsaker took place.

[8]When asked whether this other odor reminded him of something that was dead, Cypert responded, "It could have been."

[9]Detective William Paine, the lead investigator into Childers's murder, testified at trial that he believed that Childers's body was "dismembered and disposed of."

III. Sufficiency of the Evidence

In his first issue, Hunsaker argues that the evidence is insufficient to support his conviction for engaging in organized criminal activity, to-wit: murder.

A. Standard of Review

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599. The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Jenkins*, 493 S.W.3d at 599.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary sufficiency review, we may not reevaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the

cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

B. The Law on Engaging in Organized Criminal Activity

The elements of engaging in organized criminal activity, to wit: murder, are: (1) a person; (2) with intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang; (3) commits or conspires to commit; and (4) murder. Tex. Penal Code Ann. § 71.02(a)(1); *Adi v. State*, 94 S.W.3d 124, 128 (Tex. App.—Corpus Christi 2002, pet. ref'd). To be convicted of engaging in organized criminal activity, the plain language of the penal code does not require that more than one person commit the underlying offense. *Curiel v. State*, 243 S.W.3d 10, 15 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (citing Tex. Penal Code Ann. § 71.02(a)). Rather, a person may be convicted of engaging in organized criminal activity by either individually committing the offense or by conspiring with others to commit the offense. *Id*.

A person commits the offense of murder if he "intentionally or knowingly causes the death of an individual." Tex. Penal Code Ann. § 19.02(b)(1) (West 2011). A person "conspires to commit" murder when he:

> agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them perform an overt act in pursuance of the agreement. An agreement constituting conspiring to commit may be inferred from the acts of the parties.

Tex. Penal Code Ann. § 71.01(b) (West 2011).

C. The Evidence is Sufficient to Support a Conviction for Engaging in Organized Criminal Activity, To-Wit: Murder

Here, evidence was presented at trial that Hunsaker was a member of the ABT.[10] Whitten testified that Hunsaker was a member of the ABT, and Officer Michael Valdez, a Fort Worth Police Officer assigned to deal with organized crimes and gangs, also testified that Hunsaker was a member of the ABT. Evidence was also presented at trial regarding the ABT's structure, leadership, symbols, and criminal activities to demonstrate that the ABT is a criminal street gang.[11]

Evidence was also presented that ABT-member Acree, after seeing Childers waiting outside of the house, walked back inside—where Hunsaker was present—and announced that he was going to kill Childers. After Acree announced that he was going to kill Childers, Hunsaker turned over his cell

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[10]In his brief, Hunsaker candidly admits that "[a]t the end of the evidence there was little doubt of his membership in the gang" and that "[t]here was . . . ample proof that [he] was a member of the ABT."

[11]The penal code defines a "criminal street gang" as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Tex. Penal Code Ann. § 71.01(d).

phone to Whitten. Hunsaker then accompanied Borders and an armed Acree into the garage. Hunsaker remained in the garage as Acree yelled at Childers and Childers tried to escape, and he remained when Garrett, who had moments earlier announced that "[s]hit's about to get done ABT style," pulled Childers into the garage and shut the garage door. Shortly thereafter, Whitten heard a fight taking place in the garage, and she later saw Childers's dead body in the garage. Whitten also learned that Hunsaker had "jump[ed] the back fence" and fled, indicating a consciousness of guilt. *See Bigby v. State*, 892 S.W.2d 864, 884 (Tex. Crim. App. 1994) ("Evidence of flight . . . shows a consciousness of guilt of the crime for which the defendant is on trial."); *Renfro v. State*, No. 02-05-00325-CR, 2006 WL 1452573, at *6 (Tex. App.—Fort Worth May 25, 2006, no pet.) (mem. op., not designated for publication) ("The fact that Appellant fled the scene indicates a consciousness of guilt, which may be one of the strongest indicators of guilt.").

Viewing this evidence in the light most favorable to the verdict, a rational juror could have found beyond a reasonable doubt that Hunsaker, as a member of a criminal street gang, conspired to commit Childers's murder. *See* Tex. Penal Code Ann. § 71.02(a)(1); *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Murray*, 457 S.W.3d at 448. A rational juror could have inferred, based on the acts of Hunsaker and the other ABT members, that Hunsaker and the other ABT members agreed to murder Childers and carried out overt acts pursuant to that agreement. *See* Tex. Penal Code Ann. § 71.01(b). A rational juror could have

found that Hunsaker performed overt acts pursuant to the agreement when he gave his cell phone to Whitten and accompanied Borders and an armed Acree into the garage after Acree had announced that he was going to kill Childers. *Id.* Thus, the evidence is sufficient to support Hunsaker's conviction for engaging in organized criminal activity, to wit: murder. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Murray*, 457 S.W.3d at 448. We overrule Hunsaker's first issue.[12]

IV. Hunsaker's Objection to Admission of Cell Phone Logs

In his second and third issues, Hunsaker argues that the trial court erred by admitting certain cell phone logs in the absence of proof that his cell phone was in his possession at the time of the calls and text messages reflected in the logs.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010), *cert. denied*, 563 U.S. 1037 (2011); *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). As long as the trial court's ruling falls within the zone of reasonable disagreement, we will affirm the trial court's

[12]In his brief, Hunsaker states that the jury's not-guilty verdict as to the murder charge creates an "inconsistency" with respect to the guilty verdict as to engaging in organized criminal activity, to wit: murder. But, as acknowledged by Hunsaker, "[t]he law is that this inconsistency does not require that the guilty verdict be overturned." *See United States v. Powell*, 469 U.S. 57, 68–69, 105 S. Ct. 471, 478–79 (1984); *Guthrie-Nail v. State*, 506 S.W.3d 1, 6 (Tex. Crim. App. 2015) ("[T]he law does not bar inconsistent verdicts.").

decision. *Martinez*, 327 S.W.3d at 736; *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003).

B. The Trial Court Did Not Abuse Its Discretion By Admitting the Cell Phone Logs

At trial, the State offered a call log showing the time and duration of calls to and from Garrett's cell phone on April 17 and 21, 2014, which included calls to and from Hunsaker. The State also offered a log of text messages sent from and received by Garrett's cell phone between April 17 and 22, 2014, which included texts to and from Hunsaker. Hunsaker objected to the introduction of these logs on relevancy grounds, arguing that there was no showing that he was the person who had made or received the calls and texts. The trial court overruled the objections and admitted the cell phone logs.

Only relevant evidence is admissible. Tex. R. Evid. 402. Evidence has no relevance if it is not authentically what its proponent claims it to be. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Tex. R. Evid. 901(a). In a jury trial, "it is the jury's role ultimately to determine whether an item of evidence is indeed what its proponent claims; the trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic." *Butler v. State*, 459 S.W.3d 595, 600 (Tex.

Crim. App. 2015). This has been described as a "liberal standard of admissibility." *Id.* (quoting Cathy Cochran, Texas Rules of Evidence Handbook 922 (7th ed. 2007–08)). The proponent of the evidence "does not need to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be." *Campbell v. State*, 382 S.W.3d 545, 552 (Tex. App.—Austin 2012, no pet.) (internal quotation omitted). In fact, in performing its gatekeeping function, a trial court "need not be persuaded that the proffered evidence is authentic." *Id.* (citing *Tienda*, 358 S.W.3d at 638). Rather, "the ultimate question of whether an item of evidence is what the proponent claims is a question for the fact finder." *Id.*

At trial, the State presented evidence that Hunsaker owned a cell phone that sent and received calls and text messages to and from Garrett on the day of the party and in the days that followed. While Hunsaker turned his cell phone over to Whitten during the April 17, 2014 party, the record supports an inference that Hunsaker and the others who had given their cell phones to Whitten retrieved them that day. Hunsaker's cell phone sent a text message to Garrett's cell phone at 12:27 a.m. on April 18, 2014, stating "U good bro," and Acree called Garrett's cell phone at 8:02 p.m. on April 17. The text messages sent between Garrett's cell phone and Hunsaker's cell phone in the days following the party indicate a close relationship between the authors of the messages, consistent

with Garrett and Hunsaker's relationship as fellow members of the ABT.[13] *See Butler*, 459 S.W.3d at 603 ("When considering the admissibility of text messages . . . courts must be especially cognizant that such matters may sometimes be authenticated by distinctive characteristics found within the writings themselves and by comparative reference from those characteristics to other circumstances shown to exist by the evidence presented at trial.").

Based on this evidence, we hold that the trial court did not abuse its discretion in admitting the evidence of the phone calls and text messages.[14] *See Tienda*, 358 S.W.3d at 638; *Martinez*, 327 S.W.3d at 736; *Campbell*, 382 S.W.3d at 552; *see also Butler*, 459 S.W.3d at 601 ("The association of a cell-phone

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[13]Garrett's cell phone sent the text message "Love you bubba" to Hunsaker's cell phone on April 19, 2014, and Hunsaker's cell phone soon sent the message back "Love you more." On April 20, 2014, Hunsaker's cell phone sent the message "Please call I need your direction of travel before my jerny [sic] of a righteous man." Garrett's cell phone responded with, "Do what your [sic] most comfortable with live [sic] you bro."

[14]Even if the trial court abused its discretion by admitting the cell phone logs, any error would be harmless because it did not affect Hunsaker's substantial rights. *See* Tex. R. App. P. 44.2(b). A substantial right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict. *Rich v. State*, 160 S.W.3d 575, 577 (Tex. Crim. App. 2005). Hunsaker argues that he was harmed by the admission of the cell phone logs because they implied a connection between Garrett and himself. But the evidence established a connection between Garrett and Hunsaker apart from the cell phone logs. Both were members of the ABT, they were partying together on the morning of April 17, 2014, and they were together in the garage with Childers before his murder. Further, evidence that Garrett and Hunsaker exchanged phone calls on April 17 and 21, 2014, came into evidence through the admission of a PowerPoint slide without objection. Thus, any error in the admission of the cell phone logs was harmless. *See* Tex. R. App. P. 44.2(b).

number with a particular individual might suggest that the owner or user of that number may be the sender of a text message. Indeed, the suggestion may be quite strong. . . . [C]ell phones tend to be personal and user-specific."). We overrule Hunsaker's second and third issues.

V. CONCLUSION

Having overruled Hunsaker's three issues, we affirm the trial court's judgment.

PER CURIAM

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: September 14, 2017