Opinion filed February 15, 2018

In The

Eleventh Court of Appeals

No. 11-16-00049-CR

ESTEBAN CEPEDA CARMONA, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court Cause No. 19905-B

M E M O R A N D U M O P I N I O N

The jury convicted Esteban Cepeda Carmona, Jr. of murder and assessed his punishment at confinement for life in the Institutional Division of the Texas Department of Criminal Justice. In two issues on appeal, Appellant contends that the trial court erred in (1) failing to conduct a formal competency hearing and (2) admitting hearsay testimony. We affirm.

Background Facts

The victim in this case, Joel Garcia, lived in Abilene with his daughter. Laurie Losano, Garcia's friend, had been staying with Garcia in order to help him care for his daughter. Losano is Appellant's sister.

On April 18, 2015, Vivian Moreno visited Losano and Garcia at their home. Moreno ate a meal with them. After the meal was over, Appellant arrived at Garcia's house. Garcia spoke to Appellant on the front porch. The two men then went inside the house. Moreno was in the kitchen, cleaning. Losano was in a bedroom with Garcia's daughter, folding laundry.

Moreno asked Appellant if he wanted some food. Appellant replied that he did, so Moreno began to make him a plate. Appellant, stating that he needed to use the restroom, left the room and then quickly returned.

Appellant then shot Garcia in the head with a sawed-off shotgun that he found inside Garcia's house. After he shot Garcia, he turned to Moreno and stated, "You don't understand. He raped my sister." In making this statement, Appellant was referring to Losano as the alleged victim of sexual assault. Appellant then went outside. Moreno locked the door behind him, joined Losano in the bedroom, and called 9-1-1.

Moreno testified that Appellant was "on the porch with the gun[,] knocking [and] calling [Losano's] name." In describing why she initially hung up on the 9-1-1 operator, Moreno testified that she "[did not] know he [did not] have another bullet and [was not] going to start shooting through the house." Moreno stated that she and Losano were "freaking out" and "in shock." Losano was also crying as she, Moreno, and Garcia's daughter were huddled on the bedroom floor. At some point when Appellant was outside the house with a gun, Moreno asked Losano if Garcia had raped her. Losano replied, "No, not never." Moreno and Losano hid in the bedroom until police arrived and arrested Appellant in the yard.

When law enforcement arrived, Appellant repeated his assertion that Garcia had raped Losano. Officer Aaron Flatt with the Abilene Police Department testified that Losano never made any accusations of rape to law enforcement. Appellant, while testifying at the punishment hearing, stated that he was unsure who had told him that Garcia had raped Losano.

Prior to trial, Appellant's trial counsel filed a motion suggesting incompetency and requesting an examination. The trial court appointed Dr. Samuel Brinkman to perform a psychological examination of Appellant.[1] Dr. Brinkman determined that Appellant understood the nature of the criminal proceedings against him, could name all of the participants, and understood his available defenses. Dr. Brinkman concluded that Appellant was competent to stand trial.

Appellant testified at a pretrial hearing on his motion for continuance. He testified that he believed that there was some type of video recording device capable of allowing others to "see what happened from my eyes." He also testified that he had read Dr. Brinkman's report and that he felt like he was "mentally competent to understand everything." Appellant also testified at the punishment hearing. He described his belief in a larger conspiracy involving "informants, associations, and corporations, Internet and cyberspace."

Analysis

In his first issue, Appellant contends that the trial court erred in proceeding to trial without finding him to be competent after it ordered a competency examination. Article 46B.003(a) provides that "[a] person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person." TEX. CODE CRIM.

[1]We note that Dr. Brinkman evaluated Appellant and prepared a report. Because Dr. Brinkman's report was sealed by the trial court, we do not include its specifics in this opinion.

PROC. ANN. art. 46B.003(a) (West 2006). "A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." *Id.* art. 46B.003(b).

"Whether an issue of incompetency exists at the time of trial is left to the discretion of the trial judge." *Thompson v. State*, 915 S.W.2d 897, 901 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). "We review a trial court's decision not to conduct a competency hearing for an abuse of discretion." *Lawrence v. State*, 169 S.W.3d 319, 322 (Tex. App.—Fort Worth 2005, pet. ref'd) (citing *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999)). "A trial court abuses its discretion if its decision is arbitrary or unreasonable." *Id.* (citing *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995)).

The procedure by which a trial court determines competency is set out in Chapter 46B of the Texas Code of Criminal Procedure. CRIM. PROC. ch. 46B (West 2006 & Supp. 2017). "This determination involves a two-step process: first, an informal 'competency inquiry'; and second, if applicable, a mandatory 'competency examination' and formal 'competency hearing.'" *Iniquez v. State*, 374 S.W.3d 611, 615 (Tex. App.—Austin 2012, no pet.). In the first step, the trial court must conduct an informal inquiry, known as a competency inquiry, to determine whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial. *Id.* "If the trial court determines that such evidence exists, the court proceeds to the second step, at which time the court must order a psychological examination to determine whether the defendant is competent to stand trial." *Id.*

Appellant contends that the trial court did not complete its informal inquiry into his competency because it never received Appellant's examination results from Dr. Brinkman. It appears that Appellant is making this assertion on the mistaken belief that "no report from Dr. Brinkman exists in the record." However, after

Appellant filed his brief in this court, the State filed a motion in the trial court to unseal the expert's competency report, supplement the appellate record, and reseal the report. The trial court granted the order, and the record was supplemented with Dr. Brinkman's report. As set forth above, Dr. Brinkman concluded that Appellant was competent to stand trial.

Appellant also contends that the trial court should have conducted a formal competency hearing because the appointment of Dr. Brinkman constituted a determination that evidence existed that would support a finding that Appellant was incompetent. We disagree. Dr. Brinkman determined, under the legal definition of competency, that Appellant was competent to stand trial. Thus, the trial court ordered a competency examination of Appellant as Appellant requested, and the expert opined that Appellant was competent. Furthermore, the record does not indicate that Appellant requested a formal competency trial afterwards. Accordingly, the trial court did not err in not conducting a formal competency hearing. *See Turner v. State*, 422 S.W.3d 676, 693 (Tex. Crim. App. 2013) ("[W]e find no fault in the trial court's failure to conduct a formal competency trial following the initial evaluations . . . since they deemed the appellant to be competent. After all, the appellant's trial counsel made no request for a formal competency trial at that time."). Accordingly, we overrule Appellant's first issue.

In his second issue, Appellant contends that the trial court erred in admitting Losano's statement to Moreno that Garcia never raped her. Appellant asserts that this statement was inadmissible hearsay. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001).

Hearsay is a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. TEX. R. EVID. 801(d); *Tienda v. State*, 479 S.W.3d 863, 874 (Tex. App.—Eastland 2015, no pet.). Hearsay is inadmissible except as provided by statute or the Texas Rules of Evidence. TEX. R. EVID. 802; *Tienda*, 479 S.W.3d at 874. In response to Appellant's hearsay objection, the prosecutor asserted that Losano's statement to Moreno constituted an excited utterance. Excited utterances are admissible as an exception to the hearsay rule. TEX. R. EVID. 803(2); *Tienda*, 479 S.W.3d at 874. An excited utterance is a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement" caused by the event or condition. TEX. R. EVID. 803(2); *Salazar*, 38 S.W.3d at 154; *Tienda*, 479 S.W.3d at 874.

Appellant contends that the fact that Losano's statement was in response to Moreno's question "weighs heavily in favor of exclusion." Whether a hearsay statement is made in response to questioning is a factor in determining whether that statement is admissible as an excited utterance. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). However, it is not dispositive that the statement is made in answer to a question. *Id.* at 596; *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992); *White v. State*, 201 S.W.3d 233, 245 (Tex. App.—Fort Worth 2006, pet. ref'd). "The critical determination is 'whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event' or condition at the time of the statement." *Zuliani*, 97 S.W.3d at 596 (quoting *McFarland*, 845 S.W.2d at 846).

In this case, Losano was present in the house when Appellant shot Garcia. Losano began sobbing immediately after the shooting. After Moreno locked Appellant out of the house, Appellant began knocking on the window and calling Losano's name. Moreno and Losano were sitting on the floor with Garcia's daughter. Moreno testified that Losano was "in shock" and "freaking out." It was

at this time that Moreno asked Losano if Garcia had raped her and Losano responded, "No, not never." Given this evidence, the trial court could have reasonably concluded that Losano's response related to a startling event or condition and that it was made while she was under the stress of excitement that it caused. *See* TEX. R. EVID. 803(2). Losano likely was still dominated by fear and excitement from the recent shooting and from the fact that Appellant remained outside the house with a shotgun and was calling out her name. *See Zuliani*, 97 S.W.3d at 596. Therefore, we cannot say that the trial court's decision to admit Losano's statement fell outside the zone of reasonable disagreement and constituted an abuse of discretion. We overrule Appellant's second issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

February 15, 2018

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Willson, J.,
Bailey, J., and Wright, S.C.J.[2]

[2]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.