Opinion issued December 9, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-07-00853-CR

GAMALIEL H. GONZALEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1103637

MEMORANDUM OPINION

Appellant, Gamaliel H. Gonzalez, was charged by indictment with murder.[1] Appellant pleaded not guilty. A jury found appellant guilty as charged and assessed punishment at 45 years' confinement. In two points of error, appellant

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[1] *See* TEX. PENAL CODE ANN. § 19.02(b) (Vernon 2003).

challenges the trial court's denial of his motion to suppress his custodial statement during the guilt-innocence phase and the trial court's admission of an extraneous offense during the punishment phase.

We affirm.

Background

On February 7, 2007, Erica Garcia, complainant, met two of her friends at a nightclub in downtown Houston. Appellant and some of his friends arrived at the club later that night. One of appellant's friends did not like Garcia.

When the club closed, both groups left. Appellant and his friends discovered that someone had spit on their vehicle. Appellant retrieved a gun from the vehicle and stated he was going to shoot Garcia. One of appellant's friends told him to get in the car, and he did.

Garcia and her friends left the club. Garcia was alone in her car. Her two friends followed her in another car. They came to a stop at a red stop light with Garcia's friends behind her in the same lane. The vehicle appellant was in came to a stop behind these two cars, and appellant and another person exited the vehicle. Appellant approached the passenger's side of Garcia's car, began hitting the passenger-side window with his gun, and shot into the car, hitting Garcia in the head and killing her.

Appellant then approached Garcia's friend's car, hit the passenger-side window of that car with his gun, shouted expletives at Garcia's friends, and then returned to his vehicle. Appellant and his friends drove off. Garcia's friends called the police. Within fifteen minutes, a police officer pulled over the vehicle in which appellant was riding, and appellant was taken into police custody.

Appellant arrived at the police station around 5:00 A.M. on the morning of February 8, 2007. Around 12:30 P.M., appellant gave a recorded statement in which he was read his *Miranda* and statutory rights and waived his right to an attorney. In the statement, he described the events surrounding the shooting and also described an incident a few weeks earlier involving a confrontation with Garcia in which appellant had fired a shot into the air.

Over two months before trial, appellant served on the State a request for notice of intent to offer extraneous conduct. In its discovery order, the trial court set a deadline, requiring the State to provide notice of extraneous offenses ten days before trial. Twenty days before trial, the State filed a notice of intent to use evidence of a prior conviction. The portion of the form identifying the State's intent to offer extraneous offenses was left blank. Four days before trial, the State filed another notice, this time stating, "The State intends to introduce evidence that a few weeks before the fatal shooting of Erica Garcia, the Defendant shot in the direction of the complainant with a deadly weapon, namely, a firearm," and

indicating the offense took place in Harris County. The State had in its files a statement by one of Garcia's friends describing the event.

Three days before the trial, appellant filed a motion to suppress his custodial statement arguing, among other things, that appellant had made multiple requests to speak to an attorney before he gave his statement. The trial court considered appellant's motion at trial. During the hearing on the motion, appellant testified that he was kept in one room for several hours. Various people came in to question appellant. He was moved to another room and questioned for about another hour. Appellant testified that—prior to his recorded statement in which he waived his right to an attorney—he asked at least four times for an attorney but was never provided one and the questioning continued after each of these requests. Appellant testified that, early in the time he was at the police station:

> I asked them what -- if I was arrested and they said: You'll know. And then I said: Well, if I am, I need to talk to an attorney, I need to make a phone call if I am arrested. And one of the officers said: We'll let you know. I assume it was an officer, but I don't know if it was or not.

Appellant testified that later someone was asking him questions. "And I said: Don't I need an attorney? Am I under arrest? What's going on? And they didn't say anything. They just walked out of -- walked outside the room." Later still, appellant asked a person he believed to be an officer, "Should I have an attorney in here? And he -- once again, he said: We will get to it. And he asked me a couple

of other questions." He testified that, in the hour before he gave his statement, he again asked for an attorney.

Sergeant J. Brooks, one of the detectives present at appellant's recorded confession, testified that he first spoke to appellant around 10:50 in the morning. Sergeant Brooks testified that he was not aware of any request by appellant for an attorney and never heard appellant ask for one.

The trial court denied appellant's motion to suppress but also ordered certain portions of the confession to be redacted. One of these portions concerned appellant's discussion of the incident involving a confrontation with Garcia in which appellant had fired a shot into the air.

During the punishment phase, the State sought to introduce the confrontation with Garcia as evidence of an extraneous offense committed by appellant. Appellant objected on the grounds that he had not received sufficient notice. Appellant conceded that he knew of the relevant evidence for at least two months prior to trial. The trial court overruled appellant's objection.

On appeal, the State filed a motion with the Court seeking to abate the appeal and to require the trial court to file findings of fact and conclusions of law related to the denial of the motion to suppress. We granted the motion. Upon receiving the proper findings of fact and conclusions of law, we reinstated the case in March 2010.

Motion to Suppress

In his first point of error, appellant argues that the trial court abused its discretion by denying his motion to suppress his custodial statement.

A. Standard of Review

In a motion to suppress hearing, the State has the burden of showing, by a preponderance of the evidence, that a defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. *Joseph v. State*, 309 S.W.3d 20, 24 (Tex. Crim. App. 2010).

Under the Fifth Amendment of the United States Constitution, an accused has the right to have an attorney present during custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 481–82, 101 S. Ct. 1880, 1883 (1981) (noting that that right was first declared in *Miranda* decision); *State v. Gobert*, 275 S.W.3d 888, 892 (Tex. Crim. App. 2009). Once an accused has invoked that right, police interrogation must stop until counsel has been made available or the accused himself initiates a dialogue with the police. *Edwards*, 451 U.S. at 484–85, 101 S. Ct. at 1885; *Gobert*, 275 S.W.3d at 892.

However, a person in custody must unambiguously and unequivocally invoke his right to counsel before interrogation must cease. *Davis v. United States*, 512 U.S. 452, 458–62, 114 S. Ct 2350, 2354–57 (1994). Not every mention of a lawyer will invoke the right to the presence of counsel during questioning.

Gobert, 275 S.W.3d at 892. An ambiguous or equivocal statement regarding counsel does not require officers to halt the interrogation or even to seek clarification. *Davis*, 512 U.S. at 461–62, 114 S. Ct. at 2356; *Gobert*, 275 S.W.3d at 892.

Whether the particular mention of an attorney constitutes a clear invocation of the right to counsel depends on the statement itself and the totality of the surrounding circumstances. *Gobert*, 275 S.W.3d at 893. The test is an objective one: "whether a reasonable police officer, under similar circumstances, would have understood the statement to be a request for an attorney or merely one that *might* be invoking the right to counsel." *Reed v. State*, 227 S.W.3d 111, 116 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Dinkins v. State*, 894 S.W.2d 330, 351 (Tex. Crim. App. 1995)). "The suspect 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Gobert*, 275 S.W.3d at 893 (quoting *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355).

In reviewing the trial court's ruling on a motion to suppress evidence, we apply a bifurcated standard of review, giving almost total deference to the trial court's determination of historic facts and reviewing de novo the court's application of the law of search and seizure to those facts. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). If the issue involves the credibility of a

witness, such that the demeanor of the witness is important, then great deference will be given to the trial court's ruling on that issue. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). In a motion to suppress hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). Accordingly, the trial court may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted. *Id.* We will uphold the trial court's ruling on a motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case. *Id.* at 856.

As here, when the trial court files findings of fact with its ruling on a motion to suppress, an appellate court does not engage in its own factual review, but determines only whether the record supports the trial court's fact findings. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). Unless the trial court abused its discretion by making a finding not supported by the record, we will defer to the trial court's fact findings and not disturb the findings on appeal. *Cantu v. State*, 817 S.W.2d 74, 77 (Tex. Crim. App. 1991). On appellate review, we address only the question of whether the trial court properly applied the law to the facts. *Romero*, 800 S.W.2d at 543.

B. Analysis

Appellant argues that, before he gave his statement, he invoked his right to have an attorney present at least four times. Admissibility of a confession based on a claim of a violation of a defendant's invocation of his right to have an attorney present depends on two distinct inquiries: (1) whether the accused actually invoked his right to counsel; and (2) if the right was invoked, whether the accused waived that right. *Russell v. State*, 727 S.W.2d 573, 575 (Tex. Crim. App. 1987). We first must address whether the trial court abused its discretion in determining that appellant did not invoke his right to counsel prior to giving his *Mirandized* statement in which he waived that right.

During the hearing on the motion to suppress, appellant testified that prior to his recorded statement, in which he waived his right to an attorney, he had asked at least four times for an attorney but was never provided one and that the questioning continued after each of these requests. Sergeant Brooks testified that he first spoke to appellant around 10:50 in the morning. He also testified that he was not aware of any request by appellant for an attorney and never heard appellant ask for one.

In its findings of fact and conclusions of law, the trial court made the following findings:

> 3. Officers at the police station provided the defendant with food and beverages and allowed him to use the restroom several

times. Officer John Brooks provided the defendant with a blanket when he indicated he was cold. Brooks also allowed the defendant to speak to his friend, the Hummer's driver.

4. Detective Phil Waters informed the defendant of his rights provided by *Miranda v. Arizona* and article 38.22 of the Texas Code of Criminal Procedure. The defendant indicated to the officer that he understood his rights and he voluntarily waived them. The defendant then gave a voluntary statement.

5. The defendant never requested an attorney. He was not handcuffed during the interview and the officers never used any intimidation, coercion, or force against the defendant. Nor did the officers promise the defendant anything in exchange for his statement.

. . . .

7. The testimony of the police officers and other State's witnesses was true and is found to be credible.

8. The testimony of the defendant was not true and is not found to be credible.

The trial court reached the following conclusions:

2. The officers correctly informed the defendant of his rights and the defendant understood each one of his rights. The defendant voluntarily waived his rights and voluntarily spoke to the officers during the recorded interview.

3. The defendant did not invoke his right to counsel.

Appellant acknowledges that the trial court found that appellant's testimony was not credible and that he never requested an attorney. Appellant also acknowledges that this finding, based on the trial court's evaluation of appellant's credibility, is given almost total deference. *See Amador*, 221 S.W.3d at 673.

Appellant argues, however, that there is error because the trial court based its finding that appellant did not invoke his right to counsel upon the testimony of Officer Brooks, who was not in appellant's presence for three out of the four times appellant claimed he invoked his right to counsel. We disagree with this argument.

The trial court's findings state that the trial court did not find appellant credible and did not believe appellant requested an attorney. The findings do not state that the determination that appellant did not invoke his right to counsel was based on Officer Brooks's testimony. It was within the trial court's discretion to disbelieve any or all of appellant's testimony. *See Ross*, 32 S.W.3d at 855. Without the testimony of appellant, there was no evidence that appellant invoked his right to counsel prior to giving his *Mirandized* statement in which he waived that right.

There is nothing else in the record that shows that appellant did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. The record supports the trial court's finding that appellant was provided with food and drink on the officers' initiative; that appellant was provided at least one restroom break when it was requested and a blanket when he said he was cold; and that there was no evidence of the officers using intimidation, coercion, or force against the defendant or of the officers offering appellant anything to induce the confession.

We hold that the trial court did not abuse its discretion in denying appellant's motion to suppress.

We overrule appellant's first point of error.

Extraneous Offense Evidence

In his second point of error, appellant argues that the trial court abused its discretion by admitting evidence of a prior extraneous offense when the State failed to give timely notice of its intent to introduce the evidence.

A. Standard of Review

We review the trial court's ruling as to the admissibility of extraneous offense evidence under an abuse of discretion standard. *Brooks v. State*, 76 S.W.3d 426, 430 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

B. Analysis

Over two months before trial, appellant served on the State a request for notice of intent to offer extraneous conduct. In its discovery order, the trial court set a deadline, requiring the State to provide notice of extraneous offenses ten days before trial. The State filed a notice of intention to use evidence of a prior conviction twenty days before trial. The portion of the form identifying the State's intent to offer extraneous offenses was left blank. Four days before trial, the State filed another notice, this time stating, "The State intends to introduce evidence that a few weeks before the fatal shooting of Erica Garcia, the Defendant shot in the

direction of the complainant with a deadly weapon, namely, a firearm," and indicating the offense took place in Harris County. The State had in its files a statement by one of Garcia's friends describing the event. This event is the same one that was described by appellant in the redacted portion of his confession.

During the punishment phase, the State sought to introduce evidence of the extraneous offense. Appellant objected on the grounds that he had not received sufficient notice. Appellant conceded that he knew of the relevant evidence for at least two months prior to trial. The trial court overruled appellant's objection.

Section 3(g) of article 37.07 of the Texas Code of Criminal Procedure provides:

> On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Evidence. If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence, notice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(g) (Vernon Supp. 2010). The notice requirement under Rule 404(b) of the Texas Rules of Evidence requires that, upon request, "reasonable notice" must be given "in advance of trial." TEX. R. EVID. 404(b). The purpose of section 3(g) is to avoid unfair surprise and to enable the

defendant to prepare to answer the extraneous-offense evidence. *Apolinar v. State*, 106 S.W.3d 407, 414 (Tex. App.—Houston [1st Dist.] 2003), *aff'd on other grounds*, 155 S.W.3d 184 (Tex. Crim. App. 2005).

Appellant argues that notice four days in advance of trial is not "reasonable notice" as required under Rule 404(b) and, by extension, Section 3(b) of Article 37.07. We do not need to determine whether four days' notice is reasonable, because, even if it is not, we hold that there is no evidence of harm.

Even when the State fails to provide any notice of its intent to introduce evidence of extraneous offenses, an appellant court must determine whether the improper admission of evidence caused the appellant harm. *Hernandez v. State*, 176 S.W.3d 821, 824 (Tex. Crim. App. 2005). Admitting evidence without timely notice does not involve constitutional error. *McDonald v. State*, 179 S.W.3d 571, 578 (Tex. Crim. App. 2005). Accordingly, we disregard any error that does not affect a substantial right. TEX. R. APP. P. 44.2(b); *Apolinar*, 106 S.W.3d at 414. When, as here, appellant only objected to the lack of notice—and not to the admissibility of the uncharged conduct itself—"we look only at the harm that may have been caused by the lack of notice and the effect the lack of notice had on the appellant's ability to mount an adequate defense." *McDonald*, 179 S.W.3d at 578.

During the hearing on appellant's objections to the admissibility of the extraneous offense evidence, the following exchange occurred:

> The Court: So the Court is abundantly clear, you have known about this for at least two months. Is that correct?
>
> [Appellant's Counsel]: That is correct. [State's counsel] is correct that we have had [appellant's confession discussing the offense].
>
> The Court: There is no surprise about the conduct?
>
> [Appellant's Counsel]: There is no surprise . . . .

Because appellant admitted that he knew about the offense for two months and was not surprised by the introduction of the evidence, we hold that appellant was not harmed by any failure of the State to provide reasonable notice in advance of the trial.

We overrule appellant's second point of error.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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