Opinion issued January 27, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00791-CR

CHRISTOPHER CRENSHAW, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1172270

MEMORANDUM OPINION

Appellant, Christopher Crenshaw, appeals from a judgment sentencing him to life imprisonment for capital murder. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2010). Appellant pleaded not guilty to the jury. The jury found him guilty, and the trial court assessed his punishment. In five issues, appellant

challenges the legal and factual sufficiency of the evidence, the trial court's refusal to grant a motion to suppress his oral statements, the trial court's refusal to grant a motion to suppress the revolver, and the effectiveness of his trial counsel. We conclude that the evidence is sufficient, that the trial court did not abuse its discretion in refusing to grant the motions to suppress, and that his trial counsel was not ineffective. We affirm.

Background

On the evening of November 29, 2007, Carltrell Odom and two of his friends, Raul Duran and Vinny Lemus, were having a conversation in the parking lot of Odom's apartment complex when a group of four young men approached and surrounded them. One yelled, "This is a [expletive] robbery," and they pulled out guns, ordering Odom and his friends to the ground. One of the men took Duran's cell phone. As Odom moved to the ground, one of the attackers, Allan Nickerson, struck Odom on the head with a handgun. Odom pushed the gun away him from his face and began running away. Nickerson chased, shooting at him. The first round missed, but the second landed in Odom's back. With Odom on the ground, Nickerson approached and fired a third round in the back of Odom's head, killing him. A black sedan approached, and the four men entered and drove away.

Upon learning that Duran's cell phone had been stolen in the robbery, the police tracked the phone to Nickerson's home. Nickerson agreed to go to the

police station to discuss the previous night's incident. Nickerson admitted being present at the scene of the robbery and indicated that appellant, age fifteen, had been with him. Before being transported to the police station, Nickerson directed the police to appellant's apartment complex, where they arrived at approximately 4:00 a.m. Once there, Sergeant Huynh spoke with Michelle Crenshaw, appellant's mother, who was outside sitting in her car getting ready to leave for work. Sergeant Huynh explained that he was conducting a follow-up in a murder investigation. He asked if appellant was home and if he could speak to him. She answered affirmatively, handed her keys to Sergeant Huynh, and directed him to her apartment. Sergeant Huynh gave the keys to his partner, Sergeant Newcomb. Sergeant Newcomb, who was dressed in a suit, entered the apartment and spoke with appellant, who had been sleeping in one of the bedrooms that he shared with his brother. Sergeant Newcomb was accompanied by three uniformed officers. After speaking to appellant, Sergeant Newcomb asked appellant and his brother to come with them to the homicide office to talk about the investigation. Both appellant and his brother agreed to talk and accompany the police. Appellant's mother also consented to her sons accompanying the police to the police station.

After handing the key to Sergeant Newcomb, Sergeant Huynh returned to speak with appellant's mother. At 4:15 a.m., she signed a written consent form authorizing the police to search her apartment. After obtaining the written consent,

Sergeant Huynh conducted a search of the bedroom shared by appellant and his brother where he recovered a revolver and some marijuana inside a shoebox. Although Nickerson had not mentioned that appellant had the revolver, at this point, the police already suspected that a revolver might have been used to kill Odom as there were no bullet casings found at the crime scene. Later testing revealed that this was the same revolver used to kill Odom.

Appellant was handcuffed as required by police department policy and was transported in a marked patrol car to the Harris County Criminal Justice Center. The police later testified that at this point, they did not have probable cause and appellant was not under arrest. Nevertheless, they brought appellant to a magistrate judge to have the *Miranda*-based warnings read to appellant in case he ended up making an incriminating statement. At approximately 5:07 a.m., at the requested of the magistrate judge, the police officers removed appellant's handcuffs. The magistrate judge began by informing appellant that he had "been accused of the offense of capital murder . . . on a complaint made by the State of Texas." After being read the *Miranda*-based warnings, appellant indicated that he understood his rights.

Appellant was again handcuffed. As they were walking out of the Criminal Justice Center, appellant began, without prompting, to tell Sergeant Roberts what happened. Sergeant Roberts had to stop appellant to tell him to wait until they

were in a position to record his statement. Appellant was transported in the same marked patrol car to the homicide office where he was seated in an interrogation room and his handcuffs were removed. When Sergeant Roberts entered the interrogation room, but before he began recording, appellant again started, without prompting, to tell what had happened only to again be stopped.

At 5:28 a.m., Sergeant Roberts and his partner began interviewing appellant for an initial session, which lasted fifty-five minutes. Early on, Sergeant Roberts told appellant that two of his "buddies" who had been with him the previous night were down the hall, already telling the police a lot. Appellant admitted that he and four others had planned the robbery the day before because they "needed the money . . . to put something in our stomach[s]." The previous night, one person waited in the car while appellant and three others approached Odom, Vinny, and Lemus. Appellant admitted that the revolver found in the shoebox was the gun that the shooter used and that it was placed in his backpack after the shooting. Appellant also admitted that he brought the revolver, already loaded, that night. Appellant identified the shooter by a false name.

Appellant remained in the interrogation room for the remainder of the day where he was provided with food, drink, and opportunities to use the bathroom. There is no evidence that, during the fifteen hours in between the two interview

sessions, appellant was ever informed that he was not under arrest and that he was free to leave. Similarly, there is no evidence that appellant ever asked to leave.

After completing the initial interview session, Sergeant Roberts met with the other investigators and learned that, in a simultaneously conduced interview, Allan Nickerson had given a more accurate account of what happened during the incident. As the police were preparing to transport appellant to juvenile detention, Sergeant Roberts mentioned to appellant that Nickerson had told them the truth. Appellant looked down and said he needed to talk with Sergeant Roberts and his partner again so he could tell them the truth about what really happened. At 9:38 p.m., Sergeant Roberts and his partner intervied appellant for a second session, which lasted fifteen minutes. During the second interview session, appellant restated what had happened the previous night, this time providing the shooter's real name.

Sufficiency of the Evidence

In his first and second issues, appellant challenges the evidence as legally and factually insufficient to support his conviction for capital murder as a party. In particular, appellant challenges the evidence for the predicate offense of capital murder by claiming that the evidence fails to show that the shooter intended to kill Odom. Appellant also challenges the evidence establishing his guilt as a party by

asserting the evidence fails to show he should have anticipated a murder to result from the robbery.

A. Standard of Review

This Court now reviews both legal and factual sufficiency challenges using the same standard of review. *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893, 912, 926 (Tex. Crim. App. 2010)). Under this standard, evidence is insufficient to support a conviction if considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 & n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750. Additionally, the evidence is insufficient as a matter

of law if the acts alleged do not constitute the criminal offense charged. *Williams*, 235 S.W.3d at 750.

If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982). An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). In viewing the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Id.* (citing *Hooper*, 214 S.W.3d at 13). An appellate court presumes that the factfinder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778. An appellate court also defers to the factfinder's evaluation of the credibility of the evidence and weight to give the evidence. *See Williams*, 235 S.W.3d at 750.

B. Applicable Law for Capital Murder and Law of Parties

A person commits capital murder if, in the course of committing a robbery, he intentionally causes the death of an individual. *See* TEX. PENAL CODE ANN.

§§ 19.02(b)(1) (West 2003), 19.03(a)(2); *Sholars v. State*, 312 S.W.3d 694, 695 n.1 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another; or intentionally or knowingly threatens another with, or places another in fear of, imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a) (West 2003); *Sholars*, 312 S.W.3d at 703.

Under the law of parties, a person may be held criminally responsible for the conduct of another who is acting as a co-conspirator. *See* TEX. PENAL CODE ANN. § 7.02(b) (West 2003). A person is guilty as a party to a felony offense committed by a co-conspirator if (1) the offense committed by the co-conspirator is a felony, (2) the co-conspirator committed the offense during an attempt to carry out the conspiracy, (3) the co-conspirator committed the offense in furtherance of the unlawful purpose of the conspiracy, and (4) the defendant should have anticipated that the offense would result from the carrying out of the conspiracy. *See id.*; *Love v. State*, 199 S.W.3d 447, 452 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). A criminal conspiracy forms when two or more persons agree to engage in conduct that would constitute a felony so long as the agreeing parties actually intend that a felony be committed and one of them later commits an overt act in pursuance of their agreement. TEX. PENAL CODE ANN. § 15.02(a) (West 2003). The law of

parties requires proof that the other person committed the predicate offense for which the defendant is held vicariously responsible. *See id.* § 7.02(a)–(b).

C. Predicate Offense

Appellant contends that the evidence for the predicate offense of capital murder is legally and factually insufficient to show that the shooter, Nickerson, intended to kill Odom. Specifically, appellant asserts that the only visual description of the shooting was provided by Lemus's testimony that he saw the shooter fire at Odom from ten to fifteen yards away. Lemus saw this despite lying face down on the pavement at night, looking up with a gun pointed at the back of his head while the men yelled at him. Appellant also purports that this evidence is countered by Duran's statement to the police on the night of the robbery that he had not seen any guns. Appellant does not challenge any of the other elements for the predicate offense of capital murder.

While Lemus's testimony may be the only evidence providing a visual description of the shooting, other evidence establishes that Nickerson used a revolver to kill Odom. The medical examiner who performed the autopsy provided expert testimony that Odom died as a result of the bullet wound to his back and head. Another expert testified concerning ballistic analysis that connected the spent bullet casings found in the revolver to the bullets recovered from Odom's body and the bullet fragments found at the scene. Furthermore, although he did

not see a gun, Duran explained that on the night of the robbery he was face down and felt what appeared to be firearm placed on his head.

Evidence that Nickerson shot repeatedly at Odom with a firearm shows that Nickerson intended to kill him. *See* TEX. PENAL CODE ANN. § 1.07(a)(17) (West Supp. 2010) (a firearm is a deadly weapon); *Sholars*, 312 S.W.3d at 703 ("intent to kill may be inferred from the use of a deadly weapon"). This inference is bolstered by evidence that, after the first bullet missed, Nickerson fired a second round striking Odom in the back and causing him to fall to the ground. *Cf. Dominguez v. State*, 125 S.W.3d 755, 762 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding evidence permitted inference of intent to kill when defendant and other members of his gang planned to rob person walking alone at night, and, in course of theft or attempted theft of complainant, defendant retrieved loaded shotgun from car trunk and shot complainant in abdomen, resulting in complainant's death). Finally, the evidence that Nickerson approached Odom and fired a third bullet at close range into the back of Odom's head creates a presumption that Nickerson intended to cause Odom's resulting death. *See Sholars*, 312 S.W.3d at 703 ("When a deadly weapon is fired at close range, and death results, the law presumes an intent to kill."). We conclude that the jury could have rationally determined that the evidence proved beyond a reasonable doubt the predicate offense of capital murder.

D. Guilt as a Co-Conspirator Party

Appellant contends that the evidence is also legally and factually insufficient to show that he should have anticipated that, as a result of carrying out a conspiracy to commit robbery, a co-conspirator would intentionally cause the death of one of the people being robbed. Appellant does not challenge any of the other elements for establishing his guilt as a co-conspirator party.

In his oral statement, appellant acknowledged that, in preparation for carrying out the robbery, he provided Nickerson with the revolver. In addition to providing a gun to Nickerson, testimony by Duran and Lemus establishes that, during the robbery, appellant was also armed with another gun. The jury could have rationally determined that appellant should have anticipated that an intentional murder would result from carrying out a conspiracy to commit robbery armed with loaded guns. *See Love*, 199 S.W.3d at 453 ("Evidence that a defendant knew his co-conspirators might use guns in the course of the robbery can be sufficient to demonstrate that the defendant should have anticipated the possibility of murder occurring during the course of the robbery."); *Flores v. State*, 681 S.W.2d 94, 96 (Tex. App.—Houston [14th Dist.] 1984) (evidence that defendant knew co-defendant was armed supported rational inference that shooting could have been anticipated), *aff'd*, 690 S.W.2d 281 (Tex. Crim. App. 1985). We hold the evidence is sufficient to establish appellant's guilt as a co-conspirator party.

Corpus Delicti

In the remaining portion of his first and second issues, appellant also challenges the evidence, under the corpus delicti rule, as inadequate to support his conviction for capital murder as a party. In particular, appellant contends that there is no evidence, independent of his oral statement, tending to establish the existence of a conspiracy to commit robbery and appellant's involvement in the conspiracy or in the robbery.

A. Standard of Review

Under the corpus delicti rule, a defendant's own extrajudicial confession is insufficient to sustain his conviction for an offense unless it is corroborated by independent evidence tending to establish the fact that the offense in question has been committed by someone. *Salazar v. State*, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002). The independent, corroborating evidence need only make the fact of the crime more probable than it would otherwise be. *See Rocha v. State*, 16 S.W.3d 1, 4–5 (Tex. Crim. App. 2000). It is not required that the independent, corroborating evidence meet the legal sufficiency test announced in *Jackson*. *See id.* Once the fact that the offense was committed by someone is corroborated by independent evidence, a defendant's own extrajudicial confession, even standing alone, is sufficient to tie him to that crime. *See Salazar*, 86 S.W.3d at 644 ("the

corpus delicti rule . . . does not also require any independent evidence that the defendant was the criminal culprit") (emphasis omitted).

B. Conspiracy to Commit Robbery

Appellant asserts that the evidence is inadequate under the corpus delicti rule because there is no independent, corroborating evidence tending to show the existence of a conspiracy to commit robbery. In the case of conspiracy, independent evidence must corroborate the existence of an agreement and of an overt act pursuant to the agreement. *Morrison v. State*, 631 S.W.2d 242, 243 (Tex. App.—Fort Worth 1982, pet. ref'd) (citing TEX. PENAL CODE ANN. § 15.02(a)); *see Williams v. State*, 646 S.W.2d 221, 222 (Tex. Crim. App. 1983) ("corpus delicti of conspiracy must contain a showing of *agreement* to commit a crime") (emphasis in original).

Since an agreement between parties to act together in common design can seldom be proven by words, the actions of the parties, shown by direct or circumstantial evidence, can establish the existence of an agreement to commit an offense. TEX. PENAL CODE ANN. § 15.02(b) (agreement to commit crime may be inferred from acts of parties); *see Miller v. State*, 83 S.W.3d 308, 314 (Tex. App.—Austin 2002, pet ref'd); *Wygal v. State*, 555 S.W.2d 465, 469 (Tex. Crim. App. 1977) (circumstantial evidence sufficient to show guilt as party).

Testimony by Lemus and Duran independently corroborates the existence of agreement to commit robbery between the men who robbed them and of an overt act. Their testimonies establish that they were approached by a group of four men who, at the same moment, all brandished their guns after one of them announced that they were engaging in a robbery. The coordination of their conduct corroborates that they were acting pursuant to a prior agreement. *See Miller*, 83 S.W.3d at 314; *Wygal*, 555 S.W.2d at 469.

C. Appellant's Involvement in the Conspiracy

Appellant asserts that the evidence is also inadequate under the corpus delicti rule because there is no independent, corroborating evidence tending to show his involvement in the conspiracy to commit robbery. Appellant explains that, since the State charged him as a party to the murder, it "was thus required to present independent evidence of [his] involvement in the conspiracy."

Contrary to appellant's claim, as it applies to conspiracy, there is no corpus delicti requirement of independent, corroborating evidence tending to show a person's involvement in the conspiracy. *See Morrison*, 631 S.W.2d at 243 (must show agreement and overt act); *Williams*, 646 S.W.2d at 222 (must show agreement). A person's participation as one of the members of that conspiracy may be established by his extrajudicial statement alone. *See* TEX. PENAL CODE ANN. § 15.02(a); *Salazar*, 86 S.W.3d at 644.

Moreover, independent evidence establishes appellant's involvement in the conspiracy. The evidence reveals that the revolver used to kill Odom was found in appellant's bedroom a few hours after the murder-robbery occurred. *See Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994) (in determining whether person participated as party, courts may look to events occurring before, during, and after commission of offense). We hold the evidence of appellant's commission of capital murder as a co-conspirator party meets the requirements of the corpus delicti rule. We overrule appellant's first two issues.

Motions to Suppress

In his third and fourth issues, appellant asserts that the trial court abused its discretion in denying his motion to suppress his oral statements and his motion to suppress the revolver seized from his bedroom.

A. Standard of Review

"A trial court's ruling on a motion to suppress, like any ruling on the admission of evidence, is subject to review on appeal for abuse of discretion." *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009); *see Swain v. State*, 181 S.W.3d 359, 365 (Tex. Crim. App. 2005). "In reviewing a trial court's ruling on a motion to suppress, appellate courts must view all of the evidence in the light most favorable to the trial court's ruling." *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008). In evaluating whether a trial court's ruling on a

motion to suppress is supported by the record, we consider only evidence presented at the hearing on that motion. *Hardesty v. State*, 667 S.W.2d 130, 133 n.6 (Tex. Crim. App. 1994); *DeLeon v. State*, 985 S.W.2d 117, 199 (Tex. App.—San Antonio 1998, pet. ref'd). Where the trial court ruled on a motion to suppress but did not make explicit findings of fact, we imply those findings that are both supported by the evidence, viewed in the light most favorable to the trial court's ruling, and necessary to uphold the trial court's ruling. *Orr v. State*, 306 S.W.3d 380, 398 (Tex. Crim. App. 2010).

We give almost complete deference to a trial court's ruling if it involves either a question of historical fact or a mixed question of law and fact that turns on an evaluation of witness credibility and demeanor. *See St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007) (on question of admission of evidence, trial court is sole finder of fact, including determination of witness credibility and weight given to evidence); *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000) (same deference to application of law to fact questions) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). In contrast, we review de novo questions of law and all other mixed questions of law and fact. *See Guzman*, 955 S.W.2d at 89.

B. Admissibility of Appellant's Extrajudicial Statement

The availability of grounds for excluding a juvenile defendant's extrajudicial statement largely depends upon whether that statement stemmed from a custodial interrogation. A juvenile defendant's statement stemming from a custodial interrogation is excludable if a magistrate judge failed to first properly informed him of his *Miranda*-based rights of silence and attorney assistance. *See* TEX. FAM. CODE ANN. § 51.095(a)(2), (a)(5)(A) (West 2008); *In re L.M.*, 993 S.W.2d 276, 290–91 (Tex. App.—Austin 1999, pet. denied). Specifically, a magistrate judge must warn a juvenile defendant that (1) he has the right to remain silent and not make any statement at all but that any statement that he does make may be used in evidence against him, (2) he has the right to have an attorney present to advise him either prior to any questioning or during the questioning, (3) he has a right to have an attorney appointed to counsel with him before or during any interviews with peace officers or attorneys representing the state if he is unable to employ an attorney, and (4) he has a right to terminate the interview at any time. TEX. FAM. CODE. ANN. § 51.095(a)(1)(A). Even where a magistrate judge properly read those rights to a juvenile defendant, his statement may still be excluded if he did not waive each right knowingly, intelligently, and voluntarily. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(2) (West 2005). Conversely, if a juvenile defendant's confession did not stem from a custodial interrogation, it may be admitted regardless of whether the warning was first read to the juvenile. *Martinez v. State*,

131 S.W.3d 22, 32 (Tex. App.—San Antonio 2003, no pet.). In any case, a defendant's statement is excludable if it was not made freely and voluntarily. TEX. CODE CRIM. PROC. ANN. art. 38.21 (West 2005).

Appellant makes three arguments supporting his challenge to the denial of the motion to suppress his oral statements: (1) he claims that he was in custody at the time he made the oral statements; (2) he claims that he did not properly waive his rights; and (3) he claims that he did not freely and voluntarily speak with the police.

1. Custody

A person is in custody if a reasonable, innocent person under the circumstances would believe that his freedom of movement was restrained to the degree associated with formal arrest. *Herrera v. State*, 241 S.W.3d 520, 525 (Tex. Crim. App. 2007); *see In re D.J.C.*, 312 S.W.3d 704, 712 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (child is in custody if, under objective circumstances, reasonable child of same age would believe freedom of movement was significantly restricted). Circumstances that might indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Kaupp v. Texas*, 538 U.S. 626, 630, 123 S. Ct. 1843, 1846 (2003). A person is not

in custody if he "voluntarily accompanies police officers, who are then only in the process of investigating a crime, to a certain location, and he knows or should know that the police officers suspect he may have committed or may be implicated in committing the crime." *Turner v. State*, 252 S.W.3d 571, 580 (Tex. App.—Houston [14th Dist.] 2008, pet ref'd) (citing *Dancy v. State*, 728 S.W.2d 772, 778–79 (Tex. Crim. App. 1987)). "Once the circumstances show the person is acting upon the invitation, urging or request of police officers, and not the result of force, coercion or threat, the act is voluntary and the person is not then in custody." *Id.* (citing *Livingston v. State*, 739 S.W.2d 311, 327 (Tex. Crim. App. 1987)). However, an initially consensual encounter with police can be transformed into a custodial detention where the police procedures become qualitatively and quantitatively so intrusive with respect to a person's freedom of movement. *Kaupp*, 538 U.S. at 631, 123 S. Ct. at 1847; *Hayes v. Florida*, 470 U.S. 811, 815–16, 105 S. Ct. 1643, 1646 (1985).

In *Kaupp v. State*, the U.S. Supreme Court held that a seventeen-year-old juvenile defendant was in police custody despite initially and apparently consenting. *Kaupp*, 538 U.S. at 627, 629, 632, 123 S. Ct. at 1844–45, 1847. In *Kaupp*, the police, acting without a warrant, nevertheless decided to bring Kaupp into the police station to confront him with accusations made by another party to the murder. *Id.* at 628, 123 S. Ct. at 1845. In the early hours of the morning, the

police went to Kaupp's home. *Id.* After obtaining Kaupp's father's consent to enter the house, at least three police officers entered Kaupp's bedroom and awoke him with a flashlight. *Id.* One of the officers then stated, "We need to go and talk." *Id.* Kaupp replied, "Okay." The Supreme Court held that, under the circumstances, Kaupp's reply, "Okay," did not indicate voluntary consent, but rather a mere submission to a claim of lawful authority. *Id.* at 631, 123 S. Ct. at 1846. The Court explained that the police officer's instruction, "We need to go and talk," presented no option but "to go." *Id.* at 631, 123 S. Ct. at 1847.

After saying "Okay," Kaupp was then handcuffed and led shoeless, dressed only in underwear and t-shirt to a patrol car. *Id.* at 628, 123 S. Ct. at 1845. Before taking him to talk, the police first took Kaupp to the crime scene where the victim's body had just been found. *Id.* After that, Kaupp was read his *Miranda* rights and within minutes of interrogation, admitted his part in the crime. *Id.* at 628–29, 123 S. Ct. at 1845. The Supreme Court explained that "[i]t cannot seriously be suggested that when the detectives began to question Kaupp, a reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed." *Id.* at 632, 123 S. Ct. at 1847.

Appellant's situation is unlike *Kaupp* in that the record here fails to show that he was undressed or that the officers made statements to pressure him into

going with them. Like *Kaupp*, however, appellant left his house in the early morning hours after four police officers entered his house with his mother's consent. Also similar to *Kaupp*, appellant was handcuffed after agreeing to be transported to the police station to make an oral statement. Additionally, Sergeant Roberts testified that, in accordance with police department policy, appellant was temporarily placed in handcuffs while being transported from his home to the magistrate judge and again on the way to the homicide office. In *Turner*, the Fourteenth Court of Appeals distinguished the facts before it from those in *Kaupp* by observing that the Turner had been placed in handcuffs only after consenting to police transport and that he had been repeatedly told that he was not under arrest and that the handcuffs were only for safety purposes. *See Turner*, 252 S.W.3d at 582. However, like *Kaupp* and unlike *Turner*, here, there is no showing appellant was ever told that he was not under arrest or that he was handcuffed only pursuant to police policy.

We conclude that based on the totality of the circumstances, a reasonable, innocent fifteen-year-old person would believe he was in custody when he made the statement to the officers at the police station. These circumstances include the following: (1) four police officers arrived at and entered appellant's house at four in the morning; (2) the officers seized marijuana and a revolver in appellant's bedroom, which was the consistent with the type of weapon believed to have been

used in the offense; (3) appellant was handcuffed for over an hour while being transported in a marked patrol car to the police station; and (4) a magistrate told appellant that he was "accused of the offense of capital murder . . . on a complaint made by the State of Texas." Based on the totality of the circumstances, we determine that a reasonable, innocent fifteen-year-old, even though initially consenting to transport and to making a statement, would believe that he was no longer free to change his mind and leave after being handcuffed and told by a judge that he had been accused of capital murder. *See Kaupp*, 538 U.S. at 632, 123 S. Ct. at 1847; *D.J.C.*, 312 S.W.3d at 712. We conclude that appellant was in custody when he made his oral statement. Therefore, we next address appellant's complaint that he did not waive his rights, which was required for his custodial statements to be admissible at the trial.

2. Waiver

For a defendant's statement that stems from a custodial interrogation to be admissible, he must knowingly, intelligently, and voluntarily waive his right to remain silent, to have an attorney present, to have an attorney appointed if indigent, and to terminate a police interview. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(2); *Joseph v. State*, 309 S.W.3d 20, 23 (Tex. Crim. App. 2010). The State bears the burden of proving valid waiver by a preponderance of the evidence.

Joseph, 309 S.W.3d at 23 (citing *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515 (1986)).

In evaluating whether there has been a valid waiver, a court must consider the totality of the circumstances including the defendant's experience, background, and conduct. *See id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986)). A waiver is voluntary if it is the product of a free and deliberative choice rather than intimidation, coercion, or deception. *See id.* A waiver is knowing and intelligent if it is made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *See id.*

Appellant contends that he did not explicitly waive his rights. There is no requirement, however, that a defendant explicitly waive his rights. An implicit waiver can be inferred from the actions and words of the person being interrogated. *See id.* (quoting *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 1760 (1979)); *see also Marsh v. State*, 140 S.W.3d 901, 911 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (construing TEX. FAM. CODE ANN. § 51.095 consistently with TEX. CODE CRIM. PROC. ANN. art. 38.22).

Appellant's sole argument that he did not knowingly and intelligently waive his rights is that he had been roused by the police at an early hour. He contends that this may have impaired his awareness of the circumstances of his

interrogation. The evidence, however, does not support this argument. No evidence was introduced to show that lack of sleep affected his understanding. To the contrary, appellant repeatedly stated that he understood his rights despite having been woken up early. Moreover, missing a few hours of sleep does not rise to the level of impairment necessary to render a waiver invalid. *Cf. Davis v. State*, 313 S.W.3d 317, 336 (Tex. Crim. App. 2010) (defendant validly waived *Miranda*-based rights despite having "just been through multiple days without sleep [and] prolonged drug use").

Appellant contends that he did not voluntarily waive his rights because he was "explicitly directed to waive" those rights when Sergeant Robert said, "Chris tell me what went on tonight." An examination of the totality-of-the-circumstances shows that appellant was not directed to waive his rights. *See Joseph*, 209 S.W.3d at 23 (quoting *Moran*, 475 U.S. at 421, 106 S. Ct. at 1141).

The record shows that soon after appellant was informed of his rights, he began, without instigation, to attempt to tell Sergeant Roberts his side of the story. At that point, Sergeant Roberts had to stop appellant because he was not in a position to record appellant's statement. Once Sergeant Roberts began electronically recording the conversation, he was then ready to take appellant's statement. It was at this point that the sergeant gave appellant the instruction to "tell [him] what went on." Interpreted in context, the trial court could have

concluded that Sergeant Roberts's statement was a prompt to continue, informing appellant he was now prepared to take appellant's statement. We hold that the totality-of-the-circumstances supports the trial court's finding that appellant knowingly, intelligently, and voluntarily waived his rights. *Cf. Crissam v. State*, 403 S.W.2d 414, 416 (Tex. Crim. App. 1966) (incriminating statement admissible where defendant persisted in desire to make statement even after being taken before magistrate and being advised of his right to remain silent and where defendant had not been subject to prolonged interrogation); *Turner*, 252 S.W.3d at 582 (valid waiver despite no express waiver where defendant was properly advised of rights, acknowledged understanding rights, and proceeded to answer officer's questions).

3. Voluntariness of Statement

A defendant's statement is excludable if it was not made freely and voluntarily. TEX. CODE CRIM. PROC. ANN. art. 38.21. A statement given by a juvenile defendant must be deemed involuntarily if the circumstances indicate that defendant was threatened, coerced, promised some consideration in exchange for his confession, or incapable of understanding his rights and the warnings given. *See Darden v. State*, 629 S.W.2d 46, 51 (Tex. Crim. App. 1982). A statement is also involuntary if there was "official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially

free and unconstrained choice by its maker." *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). Courts evaluate the voluntariness of a statement within the totality-of-the-circumstances. *See Delao v. State*, 235 S.W.3d 235, 239 (Tex. Crim. App. 2007); *Wyatt v. State*, 23 S.W.3d 18, 23 (Tex. Crim. App. 2000); *Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997).

Whether a defendant made a statement freely and voluntarily is a mixed question of law and fact. *Garcia v. State*, 15 S.W.3d 533, 535 (Tex. Crim. App. 2000). In determining that appellant made his statement freely and voluntarily, the trial court found credible and relied upon Sergeant Roberts's testimony. Accordingly, we give almost complete deference to the trial court's determination that appellant made his statement freely and voluntarily. *See St. George*, 237 S.W.3d at 725; *Ross*, 32 S.W.3d at 856.

Appellant complains that law enforcement employed deceptive tactics in order to induce him to give his statements. The police told appellant that his "buddies" had incriminated him. Such ordinary techniques are not the type of "third-degree" techniques that would render a defendant's statement involuntary. *See Estrada v. State*, 313 S.W.3d 274, 297 (Tex. Crim. App. 2010) (statement voluntary despite interrogation techniques of repeated accusations of criminal conduct and assertions that Estrada was lying). Moreover, "a misrepresentation relating to an accused's connection to the crime is the least likely to render a

confession involuntary." *Weaver v. State*, 265 S.W.3d 523 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd)) (citing *Green v. State*, 934 S.W.2d 92, 99 (Tex. Crim. App. 1996)).

The statements by appellant confirm he was voluntarily speaking to the police. At the beginning of the second interview, appellant was asked, "[Y]ou want to tell us what really happened, is that correct?" Appellant answered, "Yes sir." Similarly, at the end of the second interview, appellant maked clear he was to not being coerced:

[Sergeant Roberts]:	Ok, Chris, has anybody beat you up or threatened to hurt you to get you to make this statement?
[Appellant]:	No sir
[Sergeant Roberts]:	Have [you] been treated good while you were here?
[Appellant]:	Yes
[Sergeant Roberts]:	[We] [l]et you go to the bathroom, got you something to drink, something to eat?
[Appellant]:	Yes sir
[Sergeant Roberts]:	Ok, so . . . we've treated you pretty reasonably?
[Appellant]:	Yes sir

The record, therefore, supports the trial court's finding that appellant's statement was freely and voluntarily made. *Cf. Gomes v. State*, 9 S.W.3d 373,

377–80 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (although defendant lacked experience dealing with police, did not realize she was free to leave, and was tired and hungry, defendant's statement was freely and voluntarily made where defendant had basic reasoning abilities and police made no threats or promises).

We also note that appellant raises for the first time on appeal the argument that his statements should have been suppressed because one of the voices on the interrogation is unknown. *See* TEX. FAM. CODE. ANN. § 51.095(5)(C). Since this complaint does not comport with any ground raised in his motion to suppress, we do not reach this issue as it is not preserved for appeal. *See* TEX R. APP. PROC. 33(1)(a); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). We overrule appellant's third issue.

C. Admissibly of Revolver

In his fourth issue, appellant asserts that the trial court abused its discretion in denying his motion to suppress the revolver seized from a shoe box inside his bedroom. Appellant bases this upon his contentions that his mother had insufficient control over his bedroom to effectively consent to a search and that she consented to the search only after the search had already begun. We note that the trial court did not enter any explicit findings of fact in rejecting appellant's motion

to suppress. Accordingly, we imply the findings of fact that are supported by evidence and necessary to support the ruling. *See Orr*, 306 S.W.3d at 398.

Upon a criminal defendant's appropriate challenge to evidence offered to prove his guilt, the trial court must exclude, or admit subject to a limitation, the evidence if it was obtained in violation of the defendant's right to be secure in his property against unreasonable government searches. *See* U.S. CONST. amend. IV, XIV; *Amador*, 275 S.W.3d at 880 n.4 (citing *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961)). A government search is unreasonable only if it invades the defendant's reasonable expectation of privacy in the thing searched. *See Luna v. State*, 268 S.W.3d 594, 615 (Tex. Crim. App. 2008) (citing *Rakas v. Illinois*, 439 U.S. 128, 139, 99 S. Ct. 421, 428 (1978)). A search that invades a defendant's reasonable expectation of privacy is nevertheless reasonable if a third party having actual or apparent common authority over the property searched consents. *Hubert v. State*, 312 S.W.3d 554, 560–61 (Tex. Crim. App. 2010). A third party has actual common authority if he and the other party mutually use the property and have joint access or control for most purposes. *Id.* A third party has apparent common authority if the police officer reasonably, though erroneously, believes the third party purporting to provide consent has actual common authority. *Id.* The State has the burden to prove by a preponderance of the evidence that the party who consented had authority. *Id.*

Where a juvenile defendant lives with a parent and that parent consents to a search of defendant's bedroom, there arises a rebuttable presumption that the parent had sufficient common authority over the bedroom to authorize the consent to search. *Id.* Appellant bases his assertion that his mother lacked the common authority to use the bedroom on the fact that he was sleeping in the bedroom at the time of the search. Sergeant Huynh's testimony, however, reveals that the apartment only had two bedrooms shared among three residents—appellant, his mother, and his brother. The record reveals that one bedroom was appellant's mother's and that on the morning of the search, appellant and his brother were sharing the other bedroom, both asleep. That appellant's brother also slept in the bedroom, at least on that occasion, weakens appellant's claim that he had authority over the bedroom to the exclusion of other family members. Appellant also points out that his mother, in talking the police, referred to it as "his bedroom." His mother's use of the possessive pronoun could reasonably be interpreted as a mere indication that the bedroom was the one that appellant used. Given that the trial court did not make explicit findings of fact in this regard, we imply findings that appellant failed to rebut the presumption of common authority.

Appellant also contends that police began their search before seeking consent from appellant's mother. Appellant quotes the first portion of the testimony reproduced below:

[Prosecutor]: Okay. What did you tell her about why you were there?

[Sergeant Huynh]: I told her I was conducting a follow-up investigation. I . . . [j]ust kept, in general, that it was a murder investigation and if she had a son named Chris Crenshaw and she answered, Yes.

. . . .

[Sergeant Huynh]: I asked her if Chris was home and she said, Yes.
I said, May I speak to Chris?
She said, Sure. She said, Chris is sleeping.
She pointed at . . . [the apartment] unit . . . , to say, He's up there sleeping with his brother in his bedroom.
I said, May I talk to him?
At that time she said, Sure.
At that time she turned her engine off, handed me the car keys and pointed to the house keys and said this was the key to the house.
. . . .
So, I ran up [to the apartment unit front door] . . . [and] I handed Sergeant Newcomb the key and came back down, continuing my conversation with her.

. . . .

[Sergeant Huynh]: [Right] [a]fter I handed the key to Sergeant Newcomb, I came back down and continued to talk to her and I asked her if I may go into her apartment and look around and I – that's when I pulled out the consent to search form . . . – explained to her what it was and I handed it to her and asked her to read it.

. . . .

[Prosecutor]: Does she sign [the consent form]?

[Sergeant Huynh]: Yes

[Prosecutor]: Now, what is [the consent form] authorizing . . . you or Sergeant Newcomb, to do?

[Sergeant Huynh]: It authorizes myself and Sergeant Newcomb to go in and basically, as it says on here, to seize any – all letters, papers, material, any property which we may desire.

. . . .

[Prosecutor]: Sergeant Huynh, after [appellant's mother] signed the consent to search the apartment, was the apartment searched?

[Sergeant Huynh]: Just the room. That's what I went up there and took the consent to search form with me and I told Sergeant Newcomb we had been authorized to search the apartment, but we concentrated in the bedroom where [appellant] was sleeping.

Appellant contends that, by giving Sergeant Huynh the key to her apartment, appellant's mother was merely consenting to Sergeant Huynh speaking to her son and was not consenting to a search of the apartment. However, by giving Sergeant Huynh the key, appellant's mother implicitly consented to the police entering into her apartment to speak to appellant. No evidence shows that the police conducted any search, other than for appellant, until Sergeant Huynh returned with full search and seizure consent. We hold that the trial court did not abused its discretion in

denying the motion to suppress by impliedly determining that the officers did not exceed the scope of the search. *See Joseph v. State*, 807 S.W.2d 303, 307 (Tex. Crim. App. 1991) ("The scope of a search . . . is restricted to the object of the search and the places in which there is probable cause to believe it may be found.") (citing *United States v. Ross*, 456 U.S. 798, 924, 102 S. Ct. 2157, 2172 (1982)). We overrule appellant's fourth issue.

Ineffective Assistance of Counsel

In his fifth issue, appellant asserts that his trial counsel was ineffective by failing to challenge the admission of his oral statement and the revolver because they were obtained after an illegal arrest.

A. Applicable Law

An appellant can prevail on a claim of ineffective assistance of counsel only if he proves by a preponderance of the evidence that (1) defense counsel's performance was so deficient that his assistance fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for the deficient performance, the outcome would have been different. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64 (1984)). The effectiveness of assistance of counsel is reviewed in context with the totality of the representation and the particular circumstances of each case. *Id.* at 813. In proving that his counsel's

performance was deficient, an appellant must overcome a strong presumption that counsel's action was a sound trial strategy. *Id.* To show the lack of a sound trial strategy, an appellant must show that if counsel had lodged the objection, it would have been successful. *Alexander v. State*, 282 S.W.3d 701, 710 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

The custodial detention of a person constitutes an illegal arrest if (1) there is no probable cause to believe that the person committed an offense or (2) the police lacked a warrant and no exception to the warrant requirement applies. *See* TEX. CODE CRIM. PROC. ANN. art. 14.01–.02, .04 (West 2005), 14.03, .031 (West Supp. 2010); *Kaupp*, 538 U.S. at 630, 123 S. Ct. at 1846; *Dyar v. State*, 125 S.W.3d 460, 463 (Tex. Crim. App. 2003). A police officer has probable cause if based on the totality of the circumstance before him, he could reasonably believe that the elements comprising the offense exist. *See Delgado v. State*, 718 S.W.2d 718, 720–21 (Tex. Crim. App. 1986). A police officer may arrest a person without a warrant if he has probable cause to believe that the person has committed an offense in his presence or within his view. *See* TEX. CODE. CRIM. PROC. ANN. art. 14.01(b); *Kaupp*, 538 U.S. at 630, 123 S. Ct. at 1846; *Dyar*, 125 S.W.3d at 463. "A formal arrest . . . always constitutes 'custody' for purposes of [custodial interrogation], regardless of the offense that prompted the arrest." *Thai Ngoc Nguyen v. State*, 292 S.W.3d 671, 677 n.27, 677–78 (Tex. Crim. App. 2009);

Garcia v. State, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992) (rejecting pretextual arrest doctrine).

B. Analysis

Here, it is undisputed that the police did not have a warrant. Accordingly, appellant's warrantless arrest was illegal if no warrant exception applies.[1] *See Dyar*, 125 S.W.3d at 463. Pursuant to appellant's mother's written consent to a search of her apartment, Sergeant Huynh discovered marijuana in the bedroom that appellant was sleeping in when the police arrived. Although appellant shared that bedroom with his brother, his mother referred to the room as "his bedroom" when speaking with the police. We note that, on appeal, appellant argues that the bedroom was under his exclusive control. Under these circumstances, the police had probable cause to believe that appellant committed, within their view, the offense of unlawful possession of marijuana. *See* TEX. CODE CRIM. PROC. ANN. art. 14.01(b); TEX. HEALTH & SAFETY CODE ANN. § 481.121(a) (West 2010). Accordingly, the police were authorized to arrest appellant without a warrant. *See Thai Ngoc Nguyen*, 292 S.W.3d at 677–78 (holding arrest for possession of methamphetamine was sufficient to justify custodial interrogation regarding other offense); *Delgado*, 718 S.W.2d at 720–21. The subjective intention of the police,

[1] Even if we were to assume that the police had probable cause to believe that appellant was a party to the robbery-turned-capital murder, this would be insufficient, standing alone, to justify a warrantless arrest. *See Dyar v. State*, 125 S.W.3d 460, 463 (Tex. Crim. App. 2003).

to interrogate appellant concerning the capital murder, is irrelevant to whether appellant's arrest was illegal. *See Thai Ngoc Nguyen*, 292 S.W.3d at 677–78; *Randle v. State*, 89 S.W.3d 839, 843 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

Appellant also contends his trial counsel should have challenged the admission of the revolver for having been obtained in an unlawful arrest. However, the police obtained the revolver in a lawful search of appellant's bedroom, which occurred at the same time as appellant's purportedly illegal arrest. *See Monge*, 315 S.W.3d at 40. Appellant does not explain how his simultaneous arrest led police to obtain the revolver. Moreover, appellant's trial counsel properly objected on the ground that the revolver was obtained in an illegal search.

We hold that appellant has not established that his defense counsel's performance was so deficient that his assistance fell below an objective standard of reasonableness. *See Alexander*, 282 S.W.3d at 710. We overrule appellant's fifth issue.

Conclusion

We affirm the judgment.

Elsa Alcala
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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