Opinion issued March 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00958-CR

ANDREW GARCIA JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1176954

MEMORANDUM OPINION

A jury found appellant, Andrew Garcia, Jr., guilty of the offense of murder[1] and assessed his punishment at confinement for seventy years. In two issues,

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

appellant contends that the trial court erred in not performing an informal inquiry as to his competency to stand trial and in admitting hearsay "identification" testimony.

We affirm.

Background

After a Harris County grand jury issued a true bill of indictment, accusing appellant of committing the offense of murder, the trial court, on August 17, 2009, ordered that appellant undergo a psychiatric examination. In its order, the trial court noted that appellant had claimed that he was "hearing voices." Appellant's mother confirmed that he had made the same claims to her. On September 8, 2009, Dr. Ginari Price, pursuant to the trial court's order, filed a psychiatric report, in which he stated that he had conducted a psychiatric examination of appellant. Ginari noted that appellant was "receiving medication" and needed an "additional time" of fourteen days for "stabilization." Ginari did not conclude that appellant needed a "formal mental health evaluation." Additionally, on September 25, 2009, Dr. Enrique Huerta, pursuant to the trial court's order, filed a psychiatric report, in which he stated that he had conducted another psychiatric examination of appellant. Huerta determined that appellant was "receiving medication" and no longer needed any "additional time" for "stabilization." Consistent with Ginari's conclusions, Huerta did not recommend appellant for a "formal mental health

evaluation."[2] There is nothing else in the record to indicate that appellant ever raised any challenge to his competency to stand trial until after jury selection.

On October 19, 2009, after jury selection, the following exchange occurred between appellant's counsel and the trial court:

> [Appellant's counsel]: Judge, my client is telling me that he feels he is not competent to stand trial. I don't necessarily agree with that assessment. But he's been telling me the whole jury selection that—he also said something about that he was examined at the jail by someone.
>
> [Trial court]: Yeah.
>
> [Appellant's counsel]: And they found him incompetent is what he's telling me. I've never done a full-blown competency; so, I'm not really sure.
>
> [Trial court]: No. We did that a long time ago.
>
> [Appellant's counsel]: I'm not aware of any finding he's not competent is what I'm saying.
>
> [Trial court]: I don't have any information of that at all.
>
> [Appellant's counsel]: We have the 2l-day in the file?
>
> [Trial court]: I know the order was done a long time ago, probably at the very beginning.

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[2] In his reply brief, appellant complains that neither of these reports were originally contained in the clerk's record in the underlying trial cause number, but instead were filed in a clerk's record for a separate cause number. However, the trial court's order for the psychiatric review, which appellant himself relies upon, and the two reports authored by Drs. Ginari and Huerta, all concern the same three identical cause numbers, including the cause number that is the subject of the instant appeal.

[Appellant's counsel]: He is telling me something recently occurred in jail. Is that something that would occur in the jail? I'm not aware. Is that possible?

[Trial court]: I don't know. You can call to forensics and find out—if he would have been found incompetent, I can assure you they would have sent me a notice. Maybe he would like to be incompetent, but if he's competent enough to know he's incompetent, that's interesting.

[Appellant's counsel]: So, there's nothing in the file to reflect that.

[Trial court]: You are welcome to look at the file.

[Appellant's counsel]: Can I look at the file?

[Trial court]: Sure. Because I get all those letters.

Following this exchange, the proceedings concluded for the day. The next day, the trial commenced, and the parties presented their cases. Neither party raised any further challenges regarding appellant's competence to stand trial.

Competency

In his first issue, appellant argues that the trial court erred in not performing an informal competency inquiry because appellant's counsel, after jury selection, suggested that appellant might be incompetent to stand trial, the record does not include a psychiatric report of findings from a court-ordered psychiatric examination, a witness testified during trial that appellant "wasn't in his right state of mind" at the time appellant was involved in an extraneous "shooting incident,"

and appellant's mother testified during trial that appellant was "bipolar and hears voices."

We review complaints regarding the adequacy of the trial court's informal competency inquiry, and the trial court's finding following an informal competency inquiry, for an abuse of discretion.[3] *Luna v. State*, 268 S.W.3d 594, 600 (Tex. Crim. App. 2008); *Thomas v. State*, 312 S.W.3d 732, 736–37 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

A person is incompetent to stand trial if he does not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational, as well as factual, understanding of the proceedings against him. TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (Vernon 2007). 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) (Vernon 2007). Either party may suggest by motion, or the trial court may suggest on its own motion, that the defendant may be incompetent to stand trial. *Id*. art. 46B.004 (Vernon 2007). On suggestion that the defendant may be incompetent to stand trial, the trial court shall determine by "informal inquiry" whether there is "some evidence" from any source that would support a finding

[3] If the trial court had found evidence to support a finding that appellant was incompetent, the trial court would have proceeded to a trial on the issue of competency. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (Vernon 2007).

that the defendant may be incompetent to stand trial. *Id*. art. 46B.003(c) (Vernon 2007). A trial court should conduct an informal inquiry to determine if there is evidence that would support a finding of incompetence if it "has a bona fide doubt about the competency of the defendant." *Montoya v. State*, 291 S.W.3d 420, 425 (Tex. Crim. App. 2009). A bona fide doubt may exist if the defendant exhibits truly bizarre behavior or has a recent history of severe mental illness or at least moderate mental retardation. *Id*.

Here, the trial court, after initially noting that appellant had claimed to be "hearing voices," ordered a psychiatric review of appellant. Pursuant to this order, Drs. Ginari and Huerta prepared reports, in which they stated their opinion that appellant did not need a "formal mental health evaluation."[4] Ginari noted that, at the time of his September 8, 2009 report, appellant was on medication and needed an additional fourteen days for "stabilization." Just over fourteen days later, Huerta noted that appellant remained on medication and no longer needed additional time for "stabilization." Although the trial court did not make specific reference to these reports during its exchange with appellant's counsel, the trial court acknowledged that an "order" had been entered "a long time ago" and that

[4] We note that these reports appear to be the reports that appellant's counsel inquired about in his exchange with the trial court after jury selection. Appellant's counsel asked about the existence of "the 2l-day in the file," and the reports reflect that they were made "not later than twenty-one (21) days of the issuance" of the trial court's order.

documents from these examinations would be in its file. Thus, the record reveals that the trial court had already considered, by informal inquiry, the issue of appellant's competence to stand trial. Based upon the history of the proceedings, the trial court could have reasonably concluded that appellant was competent to stand trial. This is because a trial court, at the informal inquiry stage, is entitled to consider reports similar to those furnished here in determining if there is any evidence of incompetence.[5] *See Luna*, 268 S.W.3d at 600 (indicating that psychiatric examinations, even if not necessary for informal inquiry, may be considered by trial court); *Lawrence v. State*, 169 S.W.3d 319, 328 n.1 (Tex.

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[5] If, after informal inquiry, a trial court determines that evidence exists to support a finding of incompetency, it "shall" order an examination of a defendant's competency by an expert. TEX. CODE CRIM. PROC. ANN. arts. 46B.005(a), 46B.021(b) (Vernon 2007).

In his reply brief, appellant complains that "there is no evidence that the judge examined the medical status reports," this Court "cannot presume that the [trial court] examined reports that were hiding in another file," the trial court was not entitled to "rely upon [its] memory" of the past proceedings, and the "medical status reports reflect a cursory psychiatric examination . . . rather than a full formal mental health evaluation." As we have noted above, the reports bear the same cause numbers as the trial court's order, the record supports a finding that the trial court considered by informal inquiry appellant's competence, and the trial court was entitled to consider its own observations in determining if an informal inquiry was necessary and if there was "some evidence" from "any source" that would have supported a finding that appellant was incompetent to stand trial. Moreover, although a trial court may rely upon reports at the informal inquiry stage in determining if there is any evidence of incompetence, there is no statutory obligation for the trial court to conduct an examination beyond those conducted here. The trial court had requested a psychiatric review, and two reports were furnished pursuant to its order. The most recent report indicated that appellant had been "stabilized" on medications and did not need further examination.

App.—Fort Worth 2005, pet. ref'd) (stating that review of any psychological evaluations of defendant constitutes "useful source" of information for trial court in conducting informal inquiry); *see also* TEX. CODE CRIM. PROC. ANN. art. 46B.021(a) (Vernon 2007) (stating that, on suggestion of incompetency, court may appoint one or more disinterested experts to examine defendant and report to court on competency of defendant). The trial court stated that, after ordering the expert reports, it had not received any information to indicate that appellant was incompetent to stand trial, and nothing in the record contradicts this.

Moreover, the trial court could have reasonably concluded that appellant, during the exchange after jury selection, did not present any new information or evidence that would have required another informal inquiry. During the exchange, appellant's counsel even suggested that he did not "necessarily" agree with appellant's competence claims. Rather, it appears that counsel was merely inquiring about the status of any prior competence proceedings. At the end of the exchange, the trial court invited counsel to review the court's file and search it for any reports. Counsel did not object to proceeding to trial, and there is nothing in the record to indicate that counsel ever raised a competence objection again or complained that the reports previously ordered by the trial court had not been prepared, filed in the record, or misplaced. There is also nothing in the record to indicate whether appellant's counsel ever obtained the reports of Drs. Ginari and

Huerta or learned of their findings before proceeding to trial. In fact, appellant's counsel, in arguments at the punishment phase, asked the jury to consider the fact that appellant suffered mental illness while expressly stating that "[n]o one's saying he's not competent to stand trial."

In regard to appellant's reliance upon the testimony presented at trial by a witness concerning appellant's state of mind during the commission of an extraneous offense, we note that this testimony did not require the trial court to conduct another informal inquiry into whether appellant was competent to stand trial. And in regard to appellant's reliance upon his mother's testimony at the punishment phase that he was "bipolar" and "heard voices," we note that the record reveals that this matter had already been considered by the trial court in its informal inquiry. Appellant has not cited any authority for the proposition that such testimony compelled the trial court to conduct another informal inquiry, and the Texas Code of Criminal Procedure does not provide that the trial court had any such duty.[6]

Accordingly, we hold that the trial court did not abuse its discretion in not conducting an informal competence inquiry just prior to or during the trial on the merits.

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[6] In his brief, appellant also asserts that the trial record "is dappled" with evidence of "mental illness" and "bizarre acts," but appellant provides no citation to the record in support of this assertion.

We overrule appellant's first issue.

Hearsay

In his second issue, appellant argues that the trial court erred in admitting "identification testimony from a police officer on an extraneous offense" during the punishment phase of trial because "the complaining witness was unavailable to testify."

During the punishment phase, the State introduced evidence concerning another aggravated robbery allegedly committed by appellant. Alejandro Ruiz testified that on July 28, 2009, his mother was staying at his apartment and, when Ruiz returned to his apartment for lunch, he found his mother outside the apartment in shock and crying. Based upon what his mother had told him, Ruiz called for emergency assistance. Ruiz inspected his apartment and discovered cash and property missing. Ruiz explained that when police officers showed his mother a photographic lineup, she identified the person who had robbed her. Appellant then objected to the testimony concerning what Ruiz's mother had said during the identification, and the trial court sustained the objection and instructed the jury to disregard the testimony about what Ruiz's mother had said.

The State then introduced the testimony of Houston Police Officer J. Sosa. During the State's direct examination of Sosa concerning the photographic lineup that he had shown to Ruiz's mother, appellant objected to "that portion of the

photograph" that contained her handwritten notes identifying appellant as her assailant. Appellant's only objection was that the handwritten notes constituted hearsay. The trial court overruled appellant's objection to the notes and permitted Sosa to testify that Ruiz's mother had made the notations.

Although appellant timely objected to testimony concerning the handwritten notes on the photographic lineup, appellant did not object to Officer Sosa's testimony concerning the identification of appellant by Ruiz's mother as her assailant. Prior to the line of questioning to which appellant did object, Sosa testified, without objection, that he had conducted an investigation into the aggravated robbery and "a photospread was shown to the complainant where[in] [appellant] was identified." Sosa further testified, without objection, that Ruiz's mother had identified appellant as her assailant after he had given her the required admonishments. Moreover, after the challenged line of questioning, Sosa again testified, without objection, that Ruiz's mother had identified appellant in the photographic lineup. Sosa explained that she had selected the person in the bottom right of the photographic line up, this person was appellant, and after Sosa interviewed Ruiz's mother, he presented a case against appellant to the district attorney. Sosa also noted that he had learned that appellant was "already wanted on other cases" and the aggravated robbery case against appellant was still "pending."

Appellant, on appeal, now generally complains of Officer Sosa's testimony concerning the identification of Ruiz's mother. However, because appellant did not object to this testimony at trial, we hold that he has waived this challenge on appeal. *See* TEX. R. APP. P. 33.1. Moreover, even construing appellant's challenge on appeal as related to Sosa's testimony regarding the photographic lineup, the handwritten notations on the lineup exhibit were merely cumulative of Sosa's testimony concerning the identification of appellant by Ruiz's mother. *See Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999) (providing that admission of inadmissible evidence becomes harmless error if other evidence proving same fact is admitted elsewhere without objection); *Smith v. State*, 236 S.W.3d 282, 300 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (stating that "improper admission of evidence is harmless if the same or similar evidence is admitted without objection at another point in the trial"). Accordingly, we hold that any error in the admission of this evidence did not affect appellant's substantial rights. *See* TEX. R. APP. P. 44.2; *Smith*, 236 S.W.3d at 300 (noting that "admission of inadmissible hearsay is nonconstitutional error and will be considered harmless if, after examining the record as a whole, we are reasonably assured that the error did not affect appellant's substantial rights—i.e., did not have a substantial and injurious effect or influence in determining the jury's verdict").

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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