Opinion issued May 12, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00344-CR

GARY ALLEN HERMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1228069

MEMORANDUM OPINION

A jury found Gary Allen Herman guilty of the felony offense of burglary of a habitation with the intent to commit theft and assessed punishment at 28 years'

confinement.[1] On appeal, Herman contends that the evidence is legally and factually insufficient to support his conviction, and that the trial court erred in denying his motion to suppress his statements to a law enforcement officer at the scene. We affirm the judgment of the trial court.

Background

Earnest Jamerson was outside his home when he saw Herman go through the side fence of a neighbor's house located across the street and five houses away. Jamerson recognized Herman from seeing him around the neighborhood attempting to sell merchandise and from a tear-drop tattoo on his right cheek. Jamerson believed Herman's name to be "Dominique." Jamerson later saw Herman exit through the front door of the house and load multiple objects into a grocery cart. Herman took several trips to fill the cart. The objects appeared to be a square, heavy object and various tools like a garden rake. Jamerson watched Herman push the cart down the street and pass directly in front of his house. Herman met a cab at the end of the street, loaded the merchandise into the cab, and drove away.

Lena Thompson, the owner of the burglarized house, received a call from family members that lived across the street telling her that Jamerson had seen someone break into the house. Her family told her that Jamerson had seen

[1] *See* TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2003).

"Dominique" go through the side gate, exit the front door, carry merchandise to a grocery cart, then load the objects into a cab and drive away. Thompson arrived to find that three window air conditioning units and several garden and work tools were missing. During this time, Thompson saw Herman ride his bike past the house.

Officer Small arrived at the scene and spoke to Thompson. Shortly thereafter, Herman again rode past the house on his bike. Thompson and several of her family members identified Herman as "Dominique." Officer Small approached Herman who stopped to speak with him. Herman wore a blue jumpsuit with the name "Dominique" on the front. In response to questions, Herman gave the officer a fake name, his address, and his date of birth, but could not produce any identification. Officer Small ran the information through the driver's license database, but could not find a match. Herman insisted the information was correct. He denied any involvement with the burglary and denied going by the name "Dominique." Officer Small continued to question Herman while waiting for Jamerson to arrive. While talking to the officer, Herman mentioned that his son's name was Gary Herman, Jr. Officer Small eventually called the burglary and theft division at the Houston Police Department, who confirmed that he did not have enough evidence to hold Herman without

Jamerson's identification, and he released Herman. The entire encounter between Officer Small and Herman lasted between 30 to 45 minutes.

Officer Small returned to the police station and conducted a more extensive database search of Herman's fake name without finding a match. He ran the name "Gary Herman," which Herman had stated was his son's name, and found a picture of Herman. He also investigated the address Herman had given him, but no one answered the door and the condition of the lawn led him to believe that no one lived at the home. Based on Officer Small's report, Officer Mora developed a photo array including Herman and showed the array to Jamerson two months after the burglary. Jamerson positively identified Herman as the burglar.

At trial, the State called Officer Small to describe his investigation and his conversation with Herman. Herman made an oral motion to suppress his statements to Officer Small and asserted that he was under arrest at the time and had not been properly advised of his rights. Herman specifically requested that the following statements be suppressed: the discussion of the name "Dominique," Herman's son's name, the fake name, and his denial that he knew anything about the robbery.

The trial court conducted a hearing outside the presence of the jury and gave both sides the opportunity to question Officer Small. Officer Small testified that he never arrested Herman or restrained him in any way. He stated that he was

conducting an investigation and that he released Herman without a positive identification. On cross-examination, Officer Small conceded that he had detained Herman to make an identification and he was not free to leave at that point. Officer Small later contradicted himself by saying Herman could have left because the officer had nothing on which to hold him. The trial court then the questioned him:

> The Court: [A]fter you got a name, whether it was a good name or a bad name—
>
> [Officer Small]: He's able to go, yes, ma'am.
>
> The Court: —10 or 15 minutes later, if he had gotten on his bike and rode away, would you have held him or would you have let him go?
>
> [Officer Small]: I would have let him go.

The trial court concluded that Herman was not in custody and denied the motion to suppress. Officer Small then testified before the jury about the results of his investigation.

In addition to Officer Small's testimony, Jamerson testified to witnessing the crime and Officer Mora testified to the photo array and Jamerson's clear identification. The State admitted the photo array which Jamerson had initialed and dated along with a map and satellite photo indicating the relative distance between Thompson's house and where Jamerson stood on the day of the burglary. Thompson identified the stolen objects.

Herman testified and denied any involvement in the robbery. He stated he gave a false name because of an outstanding warrant against him for writing bad checks. He asserted that the name "Dominique" on his jumpsuit and in Jamerson's statement was a coincidence. He testified as to his criminal record including past felonies in the 1980s and three misdemeanors since his release from jail in 2000, including one conviction for trespassing. He also stated he lived in the neighborhood with his family about four blocks from the scene.

The jury found Herman guilty of burglary of a habitation with the intent to commit theft. At the punishment phase of trial, Herman stipulated to his prior convictions. The jury assessed punishment at 28 years' imprisonment. Herman timely filed this appeal.

Sufficiency of the Evidence

In his first issue, Herman contends the evidence is insufficient to support the jury's finding identifying Herman as the burglar.

A. Standard of Review

This court reviews sufficiency-of-the-evidence challenges applying the same standard of review, regardless of whether an appellant raises a legal or a factual sufficiency challenge. *See Brooks v. State*, 323 S.W.3d 893, 912, 927–28 (Tex. Crim. App. 2010); *see also Ervin v. State*, 331 S.W.3d 49, 52–55 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). This standard of review is the standard

enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). *See Brooks*, 323 S.W.3d at 912, 927–28. 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 fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We can hold evidence to be insufficient under the *Jackson* 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, 320, 99 S. Ct. at 2786, 2789. The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793.

B. Sufficient Evidence of Burglary of a Habitation

A person commits the offense of burglary of a habitation if "without the

effective consent of the owner, the person . . . enters a habitation . . . not then open to the public, within intent to commit a felony, theft, or an assault. *See* TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2003). Herman contends that the evidence is insufficient to link him to the burglary. More specifically, he asserts that the only evidence that he committed the burglary is Jamerson's testimony that he saw Herman commit the offense and his identification from Officer Mora's photo array.

The testimony of a single eyewitness, however, is sufficient to support a jury's finding of guilt. *See Aguilar v.* State, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971); *see Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Jamerson testified that he witnessed Herman go around the side of the house and leave the house from the front door carrying objects. He testified that Herman pushed the loaded grocery cart directly in front of where he stood and that he recognized Herman from the neighborhood. He also later positively identified Herman through Officer Mora's photo array. This evidence amounts to more than a "modicum" of evidence to support the jury's finding that Herman committed the burglary. *See Burks v. State*, No. 01-08-00521-CR, 2010 WL 143463, at *2 (Tex. App.—Houston [1st Dist.] Jan. 14, 2010, pet. ref'd) (mem. op., not designated for publication) (holding evidence sufficient for burglary of habitation when two neighbors testified to seeing defendant exit front door); *see*

also Hollander v. State, No. 09-05-00448-CR, 2006 WL 2623279, at *1–3 (Tex. App.—Beaumont Sept. 13, 2006, pet. ref'd) (mem. op., not designated for publication) (holding evidence sufficient for burglary of habitation conviction when neighbor testified to seeing defendant go around side of mobile home and exit front door with refrigerator).

Herman asserts other evidence raises a reasonable doubt on the identity element—namely his testimony denying involvement in the burglary, the testimony that he rode his bike by the house after the crime multiple times, the alleged deficiencies in Officer Small's investigation, and the fact that Jamerson did not mention seeing Herman carrying air-conditioning units. The jury is the sole judge of the weight and credibility to give the evidence at trial and is free to credit some evidence and discredit other evidence. *See Davis*, 177 S.W.3d at 359. Therefore, the jury was free to believe Jamerson's testimony and his identification of Herman as the burglar. *See Davis*, 177 S.W.3d at 359.

We overrule Herman's first issue.

Motion to Suppress

In his second issue, Herman contends the trial court erred in denying his motion to suppress his statements made to Officer Small. He asserts Officer Small questioned him while he was under arrest and without the benefit of the statutory warnings under *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612

(1966), and article 38.22 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (West 2005).

A. Standard of Review

We review a trial court's ruling on a motion to suppress for abuse of discretion. *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). An appellate court will sustain the trial court's decision if it concludes that the decision is correct on any theory of law applicable to the case. *Id.* at 878–79

We apply a bifurcated standard of review to a ruling on a motion to suppress. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). In a hearing on a motion to suppress, the trial court is the sole and exclusive trier of fact and judge of the credibility of the witnesses and the weight to give their testimony. *Id.* Therefore, we first give almost total deference to the trial court's determination of historical facts that the record supports, especially those "based on an evaluation of credibility and demeanor." *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008). We apply the same deference to the trial court's "rulings on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on evaluation of credibility and demeanor." *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). Second, we review de novo questions of law and mixed questions of law and fact that do not turn not credibility and demeanor. *See Garcia-Cantu*, 253 S.W.3d at 241.

Here, the trial court concluded that Herman was not "in custody" at the time he made the statements to Officer Small. The trial court did not determine any "historical facts" such as whether Herman was free to leave during questioning and the custody finding did not turn on credibility and demeanor. *See State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008) (stating determination of arrest or investigative detention constitutes a legal conclusion and not a determination of historical fact). Therefore, we review the trial court's application of legal principles to historical facts de novo. *See id.*

B. Arrest & Investigative Detention

Herman asserts that his statements to Officer Small are inadmissible because the length and manner of his detention effectively transformed the stop into an arrest and triggered the need for *Miranda*-based warnings. *Miranda* or statutory warnings must be given when a person is under arrest or subject to custodial interrogation. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22; *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). *Miranda*-based warnings are not required in an investigative detention.[2] *See Campbell v. State*, 325 S.W.3d 223,

[2] The Court of Criminal Appeals declined to address the question of whether a defendant who is arrested under Texas statutes for the purposes of Fourth Amendment seizure is considered at the same time to be in custody for the purpose of protecting a defendant's custodial statements under *Miranda* and the Fifth Amendment. *See Dowthitt v. State*, 931 S.W.2d 244, 268 n.8 (Tex. Crim. App. 1996). On appeal, Herman does not challenge the legality of his detention as a Fourth Amendment seizure. However, this and other courts have looked to Fourth

233 (Tex. App.—Fort Worth 2010, no pet.). At trial, the defendant bears the initial burden of proving that a statement was obtained in the course of a custodial interrogation. *Herrera*, 241 S.W.3d at 526.

A law enforcement officer conducting an investigative detention temporarily detains a person suspected of criminal activity in order to obtain more information. *Hoag v. State*, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987); *see King v. State*, 35 S.W.3d 740, 743–44 (Tex. App.—Houston [1st Dist.] 2000, no pet.). An arrest and an investigative detention differ in the degree of the intrusion and the different legal standards to justify the officer's conduct.[3] *Akins v.* State, 202 S.W.3d 879, 885 (Tex. App.—Fort Worth 2006, pet. ref'd). A suspect is not free to leave in either an arrest or an investigative detention and both are considered "seizures" for constitutional purposes. *See Crain*, 315 S.W.3d at 49.

We look to the totality of the circumstances to determine whether an officer conducted an arrest or an investigative detention. *Sheppard*, 271 S.W.3d at 291;

Amendment jurisprudence for guidance in determining whether a defendant is under arrest or undergoing custodial interrogation at the time of the defendant's statements to law enforcement. *See, e.g.*, *Campbell v. State*, 325 S.W.3d 223, 233 (Tex. App.—Fort Worth 2010, no pet.); *see also Maxwell v. State*, No. 01-00-00708-CR, 2002 WL 356530, at *4 (Tex. App.—Houston [1st Dist.] Mar. 7, 2002, pet. ref'd) (mem. op., not designated for publication).

[3] An arrest requires probable cause to justify the seizure while an investigative detention requires a reasonable, articulable suspicion that the person detained is connected with criminal activity. *Amores v. State*, 816 S.W.2d 407, 411 (Tex. Crim. App. 1991).

Herrera, 241 S.W.3d at 525. Courts consider several factors in distinguishing between the degree of restraint associated with a formal arrest and an investigative detention. These factors include: the degree of force used by the officer, the duration of the detention, the nature of the crime under investigation, the degree of suspicion, the location of the stop (i.e., whether the officer transports the suspect to another location), the time of day, the reaction of the suspect, and the officer's intent and opinion.[4] *See Sheppard*, 271 S.W.3d at 291; *Campbell*, 325 S.W.3d at 234. In terms of the degree of force used, courts consider the presence of multiple officers, use or exhibition of a weapon, any physical touching of the suspect, and the use of language and tone of voice indicating that the officer might compel the suspect to comply with requests. *Crain*, 315 S.W.3d at 49–50.

For an investigative detention, an officer must also have actually conducted an investigation. *See Sheppard*, 271 S.W.3d at 291; *Campbell*, 325 S.W.3d at 234. Evidence of an investigation includes verifying the suspect's identity, asking for a suspect's reason for being in the area, "or similar reasonable inquiries of a truly investigatory nature." *Campbell*, 325 S.W.3d at 234. Finally, an investigative detention must be temporary and the questioning may last only as long as necessary to "effectuate the purpose of the stop." *Balentine v. State*, 71 S.W.3d 763, 770 (Tex. Crim. App. 2002).

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[4] Courts utilize all of these factors in Fourth Amendment cases to determine the type of seizure conducted by the officer and the justification for the seizure.

Based on the totality of the circumstances, we hold that Herman was not under arrest at the time of his questioning, but was instead the subject of a valid investigative detention. Officer Small approached Herman on foot as the suspect rode in his bicycle down the public street after Thompson and other bystanders identified him as "Dominique." Officer Small did not use force to detain Herman and the record contains no evidence of any other method of coercion. At no point in the encounter was Herman handcuffed, placed in the patrol car, or physically restrained in any way. Officer Small was the only officer involved. No gun was shown during the encounter, nor is there evidence that Small's use of language or tone of voice indicated that compliance might be compelled. Herman was never told that he could not leave. At that time, there was no probable cause to arrest him and Officer Small released him after HPD told him he did not have sufficient evidence for probable cause. The encounter occurred in the afternoon in front of Thompson's house, another factor that indicates the lack of a custodial interrogation. *See Sheppard*, 271 S.W.3d at 291. The witnesses at trial described Herman as cooperative as he answered Officer Small's questions and he made no attempt to flee the scene. All of these facts together indicate that Herman was not in custody. *See Crain*, 315 S.W.3d at 49–50; *Sheppard*, 271 S.W.3d at 291; *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996).

Officer Small also conducted an investigation. He asked Herman for his name and address, whether he ever went by the name "Dominique" as written on his jumpsuit, and whether he was involved in the burglary. He continued to ask Herman questions after being unable to verify his identity. Thus Officer Smith in fact conducted an investigation as required for an investigative detention. *See Sheppard*, 271 S.W.3d at 291.

Herman asserts that the length of his detention dictates his detention was unreasonable and amounted to an arrest. No bright-line rule exists for the length of a permissible investigative detention, but the detention must be temporary and no longer than necessary to effectuate the purpose of the stop. *Balentine*, 71 S.W.3d at 770. Herman and Officer Small's encounter lasted between 30 to 45 minutes. Courts have found longer detentions to be permissible as long as the stops were not longer than necessary. *See Balentine*, 71 S.W.3d at 770–771, 770 n.7 (holding detention which lasted between 30 and 60 minutes reasonable); *Josey v. State*, 981 S.W.2d 831, 845 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (holding 90 minute detention reasonable). Officer Small also testified that he could not verify Herman's identity because of the fake name Herman gave and continued to ask follow-up questions. Herman's evasive answers, therefore, increased the amount of time needed to conduct the investigation. *See Balentine*, 71 S.W.3d at 771 (stating amount of time necessary for investigation increased because of

defendant's evasive answers).

The parties dispute whether Herman was free to leave, but this is not the focus of our inquiry because a person subject to an investigative detention is not free to leave. *See Crain*, 315 S.W.3d at 49. Further, even more intrusive physical restraints than Officer Small's method may constitute investigative detentions. *See, e.g.*, *Sheppard*, 271 S.W.3d at 292 (holding that officer's brief handcuffing of suspect in order to conduct search of trailer for another suspect was investigative detention and not Fourth Amendment arrest); *Rhodes v. State*, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997) (stating investigative detention occurred when officer testified he handcuffed suspect chiefly out of safety concerns after car chase through high-crime area). "In *Miranda*, the Court was primarily concerned with the fact that custodial interrogation is inherently coercive; it typically involves 'incommunicado' questioning 'in a police-dominated atmosphere' and 'compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" *Herrera*, 241 S.W.3d at 531 (quoting *Miranda*, 384 U.S. at 445, 467 S. Ct. at 1602)). There is no evidence that the coercive aspects of custodial interrogation were present during Officer Small's questioning.

We conclude that Officer Small conducted a valid investigative detention and not an arrest. *See Balentine*, 71 S.W.3d at 770. Therefore, no *Miranda*-based

warnings were required. *See Campbell*, 325 S.W.3d at 233. Therefore, the trial court did not err in denying Herman's motion to suppress.

We overrule Herman's second issue.

Conclusion

We hold the evidence is sufficient to support the jury's guilty finding on burglary of a habitation. We also hold the trial court did not err in denying Herman's motion to suppress his statements to Officer Small. We therefore affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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