Opinion issued December 22, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00635-CR

CARLOS RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1172466

MEMORANDUM OPINION

A jury convicted appellant, Carlos Rodriguez, of murder and assessed his punishment at seventy-five years' confinement.[1] In three issues, Rodriguez

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[1] *See* TEX. PENAL CODE ANN. § 19.02(b) (Vernon 2011).

contends that: (1) the trial court erred in allowing into evidence testimony and exhibits of extraneous crimes, conduct, wrongs, and bad acts that relate to MS-13 gang membership or affiliation; (2) the trial court erred in denying his amended motion to suppress his statement; and (3) without his statement, the evidence is insufficient to support his conviction.

We affirm.

Background

On the night of June 21, 2008, Manuel Sandoval hosted a birthday party for his wife's friend. Among the thirty to forty people in attendance were Ernesto Garcia, the complainant, and three people who worked with Sandoval at his landscaping company: appellant, Joaquin Guevara, and Eliseo Perez. After midnight, appellant, Sandoval, Garcia, Guevara, and Perez left the house in Sandoval's black Ford Expedition to buy more beer. Sandoval drove, Guevara sat in the front passenger seat, appellant sat in the back seat behind Guevara, Garcia sat in the back seat behind Sandoval, and Perez sat in the middle of the third row of seats.

The first store at which Sandoval stopped was closed, and Guevara told him to continue driving to look for another store. As they were riding, Sandoval testified that Guevara was dancing in the seat, "making signs," and repeating the phrase "my throat is dry" several times to those in the back of the car. Sandoval

also testified that shortly afterwards, he saw appellant stab Garcia several times. He could not see what Perez was doing. Perez later stated to police that he also stabbed Garcia because he and appellant were MS-13 "soldiers" on a "mission" from Guevara, their leader. Perez also told police that appellant had the bigger of the two knifes, that appellant stabbed Garcia many more times than he did, and that appellant "finished off" Garcia after his own knife broke. However, at trial, Perez testified that he lied to police about what happened based on a fear of going to prison alone; that, in reality, he was the only one who stabbed Garcia; and that he did so because he saw Garcia struggling with appellant.

Guevara then directed Sandoval to find a street to turn onto. Sandoval turned at the first road he saw and stopped the truck, and Guevara removed Garcia's body from the car. Guevara told Sandoval to drive back to his home and, once they arrived, told him that they were going to take his truck. Perez, Guevara, and appellant then left with Sandoval's vehicle. The following day, Guevara informed Sandoval that his truck had been burned and told him to report it stolen. Two hours after Sandoval reported his vehicle stolen, the truck was discovered completely burned. The body of Ernesto Garcia was discovered by a citizen in the early hours of June 22, 2008.

Investigating officers took two statements from Sandoval, which led them to arrest the other men in the vehicle, including appellant. Following his arrest,

officers took appellant to the investigation facility and questioned him. The officers video-recorded appellant's statement regarding the events of the evening. Appellant told investigators that he stabbed Garcia in self-defense because, in the car on their way to get more beer, Garcia attempted to rob him of his wallet and in the resulting scuffle Garcia was somehow stabbed.

Appellant moved to suppress his statement on the ground that he did not knowingly and voluntarily waive his rights. Following the suppression hearing, the trial court denied appellant's motion to suppress and made findings of fact.

At trial, several officers and other law enforcement personnel testified regarding their roles in the investigation, including Deputy J. Balderas, who responded to the 911 call of the person who discovered Garcia's body; Deputy V. Vu, a crime scene investigator with the Harris County Sheriff's Office ("HCSO") assigned to the scene where Garcia's body was discovered; Deputy F. Rivera, an investigator with the HCSO who helped take appellant's statement; Deputy J. Cassidy, another HCSO deputy who interviewed Sandoval and, along with Deputy Rivera, discovered appellant hiding inside his apartment and observed him exhibiting odd behavior; and Deputy M. Quintanilla, the lead investigator on the case. Deputies Quintanilla and Cassidy both testified that Sandoval was not considered a suspect in the murder, even though they did not believe he was initially honest with investigators. Cassidy testified that Sandoval was hesitant to

tell police the truth about the murder because he feared that MS-13 gang members would retaliate against his family. Jose Garcia, the complainant's uncle, testified for purposes of identifying the complainant.

Dr. Mary Anzalone, the assistant medical examiner who performed Garcia's autopsy, testified regarding his cause of death. She described in detail the thirty-four sharp-force injuries present on Garcia's head, torso, and extremities, including wounds that perforated his jugular vein and carotid artery, his pulmonary artery and left lung, his diaphragm, and his colon. She testified that while some of Garcia's wounds were superficial and defensive in nature, particularly the ones on his hands and arms, many of the wounds could have been fatal, and they could have been caused by two different sharp-edged instruments. She testified that Garcia died of multiple sharp-force injuries.

Manuel Sandoval testified regarding the events of the night Garcia was murdered, and he also testified about his knowledge of appellant's, Perez's, and Guevara's gang affiliations. Eliseo Perez testified regarding the events of the night of the party and the stabbing. He testified that he, appellant, Guevara, Sandoval, and Garcia left the party to get beer and that he stabbed Garcia because he saw that Garcia "wanted to do something" to appellant. Perez testified that, after the stabbing, the others left Garcia's body on the side of the road and then returned to the party and dropped Sandoval off and that he was aware the vehicle was later

burned. Perez testified extensively about the details regarding where everyone was sitting, the number of times he believed Garcia was stabbed, and his previous statement to police regarding his involvement in the stabbing. Perez also testified regarding his, appellant's, and Guevara's affiliation with the Mara Salvatrucha, or MS-13, gang.

The jury convicted appellant of murder, and proceeded to hear the evidence at punishment. Deputy Quintanilla testified again, as did Houston Police Department Officer A. Gorham-Maki, an expert on gang activity. The jury assessed appellant's punishment at seventy-five years' confinement. This appeal followed.

Gang Affiliation

In his first issue, appellant contends that the trial court abused its discretion when it allowed testimony and exhibits relating to his gang membership and affiliation. Appellant argues that the State failed to show: (1) that the evidence of his affiliation with the MS-13 gang was relevant, (2) that it was admitted for any other purpose than for showing propensity or conformity, and (3) that its probative value substantially outweighed the dangers of unfair prejudice even if it was relevant.

A. Relevant Background

Appellant requested and was granted a motion in limine disallowing any reference to his gang membership or affiliation without first approaching the bench. During Perez's testimony, the State approached the trial court and asked for permission to question Perez regarding a gang tattoo that was visible to the jury and that Perez had acquired after the stabbing. Appellant objected, arguing that "anything that is done after his arrest has got nothing to do with [appellant] and his trial. It's inflammatory. It's prejudicial." The trial court sustained appellant's objection.

Later in the trial, in its re-direct examination of Perez, the State again approached the trial court, this time regarding admission of Perez's pretrial statement to police that the killing was gang-related. Appellant objected to the State's introduction of any evidence of gang affiliation because appellant did not raise it during his cross-examination. The court overruled his objection, stating that Perez's statement that the stabbing was part of a gang "mission" was relevant to appellant's motive. The State proceeded to question Perez about his statements that appellant was mad at Garcia for hitting on his girlfriend, that he and appellant were MS-13 "soldiers" on a "mission" lead by Guevara, and that the signal to attack Garcia was the phrase "my throat is dry." Perez testified that he remembered making some of those statements but not others. Perez stated that he

was the only one who stabbed Garcia, that he stabbed Garcia in an attempt to help appellant because he saw that Garcia and appellant were struggling, and that he told police appellant was involved in the stabbing because he did not want to go to jail alone.

The State also questioned Perez about the meaning of the tattoo on his head, and Perez testified that it said "MS la Mara" and that MS stood for "Mara Salvatrucha." Perez testified that he had been a part of the Mara Salvatrucha gang for two years, but that Sandoval was not a gang member.

When the State sought to question Perez concerning photographs of himself, appellant, and Guevara making gang signs, appellant objected. He stated, "I've got an ongoing objection. . . . I'm going to have the objection that it's inflammatory, prejudicial and [of] no probative value as to [whether appellant is] guilty of murder or not guilty." The trial court overruled the objection, the photos were admitted into evidence, and Perez testified that they showed himself, appellant, and Guevara making gang signs associated with the Mara Salvatrucha gang.

The jury heard additional testimony regarding appellant's gang affiliation from Manuel Sandoval, Deputy Quintanilla, Deputy Cassidy, and Officer Gorham-Maki. Sandoval testified that, on the night of the murder, he witnessed Guevara dancing in his seat and making what he believed to be gang signs to both appellant and Perez. Sandoval also stated that he was aware of appellant's, Guevara's, and

Perez's gang affiliation, that he heard Guevara repeat "my throat is dry" several times, and that MS-13 gang members had threatened his family in El Salvador. Deputy Cassidy testified that Sandoval originally lied to investigators because he was afraid of gang retaliation.

Deputy Quintanilla testified that, after questioning Sandoval, he believed that MS-13, or Mara Salvatrucha, gang members were involved in the murder and that Sandoval provided the names of some of the gang members. Deputy Quintanilla testified that, in the course of his investigation, he received consent to search the apartment where he arrested Perez. One of the things he discovered in the course of the search were photographs "depicting males . . . throwing gang signs, mainly belonging to the MS-13 gang." Quintanilla testified that the photographs depicted Perez, Guevara, and appellant wearing colors and symbols and making signs affiliated with MS-13 gang membership. The photos were admitted into evidence.

Similar photos were also used during the punishment phase of trial. Officer Gorham-Maki testified about the structure of the MS-13 gang, its discipline and rules for members, its criminal activities, common hand signals, attire, and tattoos associated with that gang, and MS-13's use of nicknames. Officer Gorham-Maki also testified about photographs found in appellant's apartment that showed gang signs, dress, and tattoos associated with MS-13.

B. Standard of Review

We review a trial court's ruling on the admissibility of evidence under an abuse of discretion standard. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). "A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement." *Id.* The trial judge should not be reversed simply because an appellate court believes that it would have decided the matter otherwise. *Powell v. State*, 189 S.W.3d 285, 288 (Tex. Crim. App. 2006). We will uphold an evidentiary ruling if it is reasonably supported by the record and correct under any applicable legal theory. *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX R. EVID. 401. In general, relevant evidence is admissible, and evidence that is not relevant is inadmissible. TEX. R. EVID. 402. However, under certain circumstances, even relevant evidence can be excluded. Rule 403 provides that evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403.

A proper Rule 403 analysis requires the trial court to balance the following factors:

> (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or repeat evidence already admitted.

Casey, 215 S.W.3d at 880. The court determines the probative value of evidence by determining how strongly the evidence "serves to make more or less probable the existence of a fact of consequence to the litigation" coupled with the proponent's need for that item of evidence. *Id.* at 879. Then, the trial court must assess whether the probative value is substantially outweighed by one of the countervailing considerations listed in Rule 403. *Id.* The trial court has considerable freedom in weighing the probative value of evidence in relation to its prejudicial effect. *Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App. 1991) (op. on reh'g). In close cases, the trial court should favor admission in keeping with the presumption of admissibility of relevant evidence. *Hernandez v. State*, 817 S.W.2d 744, 746 (Tex. App.—Houston [1st Dist.] 1991, no pet.).

Rule 404(b) excludes evidence of other crimes, wrongs, or acts admitted only for the purpose of proving "the character of a person in order to show action

in conformity therewith," but it provides that such evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." TEX R. EVID. 404(b). Gang affiliation is considered Rule 404(b) evidence of a crime, wrong, or act subject to exclusion. *See Pondexter v. State*, 942 S.W.2d 577, 583–84 (Tex. Crim. App. 1996). However, during the guilt-innocence phase of the trial, gang affiliation is considered relevant and admissible to refute a defensive theory. *See Tibbs v. State*, 125 S.W.3d 84, 89 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

C. Admission of Gang Affiliation during Guilt-Innocence

Appellant argues that the evidence of his affiliation with the MS-13 gang was irrelevant and that the State failed to prove that it was admitted for any purpose other than for showing his propensity to act in conformity with his other acts as a gang member. Appellant also argues that, even if that evidence was relevant, the danger of unfair prejudice substantially outweighed the evidence's probative value. Thus, appellant's objections are based on Rules of Evidence 401, 402, 403, and 404(b).

1. Relevance and admissibility under Rule 404(b)

Texas courts have held that gang membership evidence is admissible under Rule 404(b) and Rule 402 if it is relevant to show a non-character purpose that, in

turn, tends to show the commission of the crime. *See, e.g.*, *Ortiz v. State*, 93 S.W.3d 79, 94 (Tex. Crim. App. 2002) (holding that evidence of gang affiliation is admissible under Rule 404(b) to show variety of non-character purposes); *Trevino v. State*, 228 S.W.3d 729, 735 (Tex. App.—Corpus Christi 2006, pet. ref'd) ("Gang affiliation evidence is relevant evidence of motive to show intent to kill and is permissible under rule 404(b)."); *Tibbs*, 125 S.W.3d at 89 (holding that evidence of gang affiliation was admissible to rebut appellant's defensive theories that complainant started fight and appellant acted in self-defense).

Here, appellant's defensive theory was that Garcia first attempted to steal his wallet and that he stabbed Garcia in self-defense in the ensuing scuffle. Perez also testified that he stabbed Garcia because he saw him struggling with appellant. Thus, testimony of appellant's gang affiliation and the statements that the killing was carried out as a gang "mission" in response to Garcia's behavior toward appellant's girlfriend were relevant and admissible to show appellant's motive and to rebut his self-defense theory. *See Tibbs*, 125 S.W.3d at 89.

2. Rule 403 factors

"The term 'probative value' refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Casey*, 215 S.W.3d at 879. "'Unfair prejudice'

refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* at 879–80. The evidence must be *unfairly* prejudicial, as virtually all evidence offered by a party to a lawsuit will be prejudicial to the opposing party. *Montgomery*, 810 S.W.2d at 378. Other factors include the tendency of the evidence to confuse or distract the jury from the main issues and the likelihood that the presentation of the evidence will consume an inordinate amount of time or be unnecessarily repetitive. *See Casey*, 215 S.W.3d at 879 (citing *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006)). These factors may well blend together in practice. *Gigliobianco*, 210 S.W.3d at 642.

Although evidence of involvement with a gang can be highly prejudicial, here the probative value of the evidence to establish appellant's motive and the State's need to use the evidence to rebut his self-defense theory outweigh any unfair prejudice. Evidence of appellant's gang affiliation served to make his theory that he acted in self-defense less probable, and the State's need for such evidence to rebut that defensive theory was strong. *See Casey*, 215 S.W.3d at 883–84 (holding trial court did not abuse its discretion in admitting prejudicial photographs where photographs supported testimony of complainant that she did not consent to sexual encounter and demonstrated appellant's *modus operandi* and stating, "Although this evidence might have been inadmissible under Rule 403 had

the defense not put [the complainant's] character, motives, recollection, and conduct on trial, once he chose that strategy, the trial judge did not abuse her discretion in permitting the State to rebut it with *modus operandi* evidence.").

Appellant argues that the State introduced an "over-whelming amount of MS-13 gang affiliation evidence without conducting a balancing test." However, we presume that the trial court conducted a Rule 403 balancing test, and a silent record does not imply otherwise. *Williams v. State*, 958 S.W.2d 186, 195–96 (Tex. Crim. App. 1997). Furthermore, the record does not support a conclusion that the State devoted an excessive amount of time to presenting this evidence or that the evidence of gang affiliation presented was needlessly repetitive. The testimony of appellant's gang affiliation was a proportionately small part of Perez's, Sandoval's, Quintanilla's, and Cassidy's testimony, and several witnesses did not testify about gang activity at all. Rather, the evidence admitted was necessary to rebut appellant's defensive theories as presented by Perez's and appellant's statement and to prove appellant's motive.

D. Evidence of Gang Affiliation during Punishment

Although appellant does not specifically contest the admission of gang affiliation evidence during punishment, he argues against that the trial court erred in admitting "all evidence at trial" regarding gang affiliation, and his brief specifically complains of testimony presented only during the punishment phase of

trial. Thus, we also address the trial court's ruling to allow evidence of appellant's gang affiliation during punishment.

During a trial's punishment phase, evidence may be offered regarding any matter the court deems relevant, including evidence of a defendant's character or reputation. TEX CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2011). Relevant evidence at the punishment stage is not necessarily evidence deemed relevant under Rule 401, but instead consists of anything that may help the jury determine the appropriate punishment. *See Garcia v. State*, 239 S.W.3d 862, 865 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (citing *Mendiola v. State*, 21 S.W.3d 282, 285 (Tex. Crim. App. 2000)).

Testimony regarding a defendant's affiliation with a gang may be relevant and admissible during punishment to show the defendant's character. *Beasley v. State*, 902 S.W.2d 452, 456 (Tex. Crim. App. 1995). The evidence does not have to link the defendant to the bad acts or misconduct engaged in by the gang's members, as long as the jury is (1) provided with evidence of the defendant's gang membership, (2) provided with evidence of the character and reputation of the gang, (3) not required to determine if the defendant committed bad acts or misconduct, and (4) asked only to consider the reputation or character of the accused. *Id*. at 457.

During punishment, the officers testified generally regarding MS-13 tattoos and the history and context of MS-13 gang membership and affiliation, including its high level of brutality. Officer Gorham-Maki further testified that the photographs admitted into evidence depicting tattoos, hand signals, symbols, and clothing colors indicated that appellant was a member of the MS-13 gang.

This testimony was sufficient to show that appellant was a member of MS-13. *See Garcia*, 239 S.W.3d at 867 (holding that gang tattoos alone are sufficient evidence of gang membership). Officer Gorham-Maki also testified regarding the character and reputation of MS-13 generally. Evidence of appellant's affiliation with a well-known and dangerous gang was admissible during the punishment phase to show appellant's character. *See Dawson v. Delaware*, 503 U.S. 159, 161, 163, 112 S. Ct. 1093, 1096–97 (1992).

We overrule appellant's first issue.

Motion to Suppress

In his second issue, appellant asserts that the trial court erred when it denied his motion to suppress because he: (1) did not knowingly and intelligently waive his rights to remain silent and to be represented by counsel; and (2) he gave the statement without knowing and completely understanding his rights.

A. Relevant Background

At the suppression hearing, Deputy Quintanilla testified that he discovered that appellant was a suspect in Garcia's murder after questioning Sandoval, who "basically gave [officers] a synopsis of what happened, how it happened, how it occurred, the people involved, and how the murder took place." Sandoval helped Deputy Quintanilla find appellant's and the other suspects' apartments and informed the officers that all of the suspects planned on collecting their paychecks and leaving Houston first thing in the morning.

Deputy Cassidy made the first contact with appellant at his apartment, informed appellant why he was there, and received consent to search the apartment. When Deputy Quintanilla arrived at appellant's apartment, Sandoval positively identified appellant as the person who had stabbed Garcia. At that time, Deputy Quintanilla placed appellant under arrest, informed him that he was a suspect in a murder investigation, and transported him to a police facility for questioning.

Deputy Quintanilla took a formal, video-recorded statement from appellant. He testified that he read appellant his rights in Spanish, that appellant verbally indicated that he understood those rights, and that appellant agreed to waive those rights and make a statement. Quintanilla testified that he offered appellant something to eat or drink, that he asked appellant if he needed to use the bathroom,

and that appellant did not appear to be intoxicated. He further testified that he did not threaten or coerce appellant at any time during the recorded interview and that he did not directly or indirectly promise appellant anything.

The State introduced a copy of the video recording of appellant's statement, a written transcript, and a translation of appellant's statement. According to the transcript, Deputy Rivera asked appellant if he would like to use the restroom or get something to eat. Per appellant's request, Deputy Rivera brought appellant "sugar water."

Deputy Quintanilla began the interview by stating:

> [Quintanilla]: Look, I'm going to read this. We're going to start the interview, and I have to read something. And you tell me if you understand or not. Okay. You have the right to maintain your silence and say absolutely nothing. Any statement you make can be used against you in the cause in which you are accused. Do you understand what I'm telling you?
>
> [Appellant]: No.
>
> [Quintanilla]: Why don't you understand?
>
> [Appellant]: Like, well, nothing, I don't understand anything.
>
> [Quintanilla]: Pardon?
>
> [Appellant]: I don't understand anything. Can you repeat it?
>
> [Quintanilla]: But do you understand…
>
> [Appellant]: Huh? No, nothing, nothing.

Deputy Quintanilla agreed that appellant answered "emphatically" that he did not understand. Deputy Quintanilla then questioned appellant about his educational level and literacy. Appellant told Quintanilla that he went to the seventh grade and that he understood how to read. Quintanilla then asked appellant whether he "understand[s] well," and appellant responded, "Yes."

Quintanilla then proceeded to repeat appellant's rights in Spanish and, pausing after each one, asked appellant if he understood:

> [Quintanilla]: Ok. (inaudible) You have the right to maintain your silence and say absolutely nothing. Any statement you make may be used against you in the cause in which you are accused. Do you understand that?
>
> [Appellant]: Uh huh.
>
> [Quintanilla]: Yes?
>
> [Appellant]: Yes.
>
> [Quintanilla]: Any statement you make can be used as evidence against you in court. Do you understand that? Ok. You have the right to have a lawyer present to advise you before questioning and during the time you're being questioned. Do you understand that? Yes? Say yes or no.
>
> [Appellant]: Yes.
>
> [Quintanilla]: Ok. If you can't employ a lawyer, you have the right to have a lawyer appointed to you so that he can advise you before or during the time you are questioned. Do you understand that?

[Appellant]: Yes.

[Quintanilla]: You have the right to end this interview at any moment you wish. Do you understand that?

[Appellant]: Yes.

[Quintanilla]: Ok. Now you, I read you your rights, understanding your rights, do you want to tell your part about what happened? Yes? Ok. Um, start from, from Saturday. What happened Saturday when you arrived at the party?

In response to Deputy Quintanilla's question, appellant began his statement. Appellant told Quintanilla that, after he left the party with Guevara and Perez, he fell asleep in the back seat and woke up to Garcia attempting to take his wallet. He stated that Garcia first threatened him and attacked him with a knife, and that, in the ensuing struggle, he hit Garcia and caused Garcia to stab himself.

At the hearing on his motion to suppress, appellant testified that he was scared when the officers arrived at his apartment that morning, that Deputy Quintanilla did not inform him that he was a suspect in a murder investigation, and that when he arrived, and before he was taken to the interrogation room, he was struck twice in the face by Deputy Rivera. He further testified that although he understood the words that Deputy Quintanilla was saying, he did not understand their significance. He testified that although he eventually answered "yes" in response to the officer's questions, he did so because Deputy Rivera was "nodding his head at [him] like to say 'yes.'" Appellant further testified that he was afraid of

Deputy Rivera because police in his native country torture its citizens and because Deputy Rivera had insulted and struck him previously.

Appellant stated that he did not understand the American judicial system or that he was going to make an oral statement. Instead, appellant believed a statement to be something written and signed. He also testified that the deputies promised that he could leave after he gave his statement and that they raised their voices during the interrogation, which scared him. On cross-examination, he admitted that there were no visible injuries to his face following his interrogation.

At the conclusion of the hearing, the trial court denied appellant's motion to suppress his statement. It found that appellant knowingly, intelligently, and voluntarily gave his statement and waived his rights. Because the deputy asked if appellant wanted to tell what happened and appellant then answered, the court found this to be an implicit waiver. Furthermore, the court found Deputy Quintanilla to be credible and appellant to be not credible. Specifically, the court found it noteworthy that because appellant understood and used words like "urinate" and "significance," and yet appellant stated that he did not understand the word "interview," it was likely that appellant was being dishonest. In addition, the court found that because appellant was asked and able to both use the restroom and have something to drink, there was no force or coercion used in obtaining his statement.

B. Standard of Review

We review the denial of a motion to suppress for an abuse of discretion. *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). We give almost total deference to the trial court's express or implied determinations of historical facts while reviewing de novo the court's application of the law to those facts. *Id.*; *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We view the evidence in the light most favorable to the trial court's ruling. *Shepherd*, 273 S.W.3d at 684. The trial court is the sole trier of fact and the judge of the credibility of the witnesses and the weight to be given their testimony. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). As a result, the trial court is free to believe or disregard any or all of a witness's testimony. *Green v. State*, 934 S.W.2d 92, 98 (Tex. Crim. App. 1996). We sustain the trial court's ruling if it is reasonably supported by the record and correct on any theory of law applicable to the case. *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003).

A defendant's statement may be used in evidence against him if he made it freely and voluntarily and without compulsion or persuasion. TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 2005). Code of Criminal Procedure article 38.22 specifically provides that an oral statement given while an accused was in custody may not be used unless "prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused

knowingly, intelligently, and voluntarily waives any rights set out in the warning." *Id.* art. 38.22, § 3(a)(2) (Vernon 2005). Section 2(a) provides that the accused must be warned that:

> (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
>
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
>
> (5) he has the right to terminate the interview at any time. . . .

Id. art. 38.22, § 2(a)(1)–(5).

A defendant may claim that his statement was involuntary under several different theories: (1) general involuntariness; (2) failure to warn against self-incrimination; and (3) the deprivation of due process. *See Oursbourn v. State*, 259 S.W.3d 159, 169 (Tex. Crim. App. 2008); *see also Moore v. State*, 233 S.W.3d 32, 44 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding statements may be deemed involuntary in instances of noncompliance with Code of Criminal Procedure article 38.22, noncompliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), or when there is violation of due process or due course of law

like coercion or threats) (citing *Wolfe v. State*, 917 S.W.2d 270, 282 (Tex. Crim. App. 1996)). "The determination of whether a confession is voluntary is based on an examination of the totality of circumstance surrounding its acquisition." *Wyatt v. State*, 23 S.W.3d 18, 23 (Tex. Crim. App. 2000); *see also Moore*, 233 S.W.3d at 44 (holding that we must determine whether, in totality of circumstances, defendant was coerced to degree that coercion, rather than his free will, produced statement).

Once a defendant raises the question of voluntariness, the State has the burden to controvert the defendant's evidence and must prove the voluntariness of the confession by a preponderance of the evidence. *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). If the defendant's evidence is not controverted by the State, then the confession is inadmissible as a matter of law. *Brownlee v. State*, 944 S.W.2d 463, 467 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). However, it is only necessary for the State to controvert the evidence—it is not necessary for the State to rebut the evidence. *Muniz v. State*, 851 S.W.2d 238, 252 (Tex. Crim. App. 1993).

The Court of Criminal Appeals has held that the following fact scenarios can raise a state-law claim of involuntariness: "(1) the suspect was ill and on medication and that fact may have rendered his confession involuntary"; "(2) the suspect was mentally retarded and may not have 'knowingly, intelligently and

voluntarily' waived his rights"; (3) the suspect "lacked the mental capacity to understand his rights"; (4) the suspect was intoxicated, and he "did not know what he was signing and thought it was an accident report." *Oursbourn*, 259 S.W.3d at 172–73; *see also Westly v. State*, 754 S.W.2d 224, 229 (Tex. Crim. App. 1988) (considering suspect's literacy); *Armstrong v. State*, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985) (holding that relevant circumstances have included length of detention, incommunicado or prolonged interrogation, refusing request to telephone lawyer or friend, and physical brutality), *overruled on other grounds, Mosely v. State*, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998). A defendant's statement may also be involuntary if it was induced by a promise that was: (1) positive; (2) of some benefit to the suspect; (3) made or sanctioned by someone in authority; and (4) of such an influential nature that a defendant would speak untruthfully in response. *Creager v. State*, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997).

C. Analysis

Appellant contends that his statement was involuntary because he was not aware of the significance of his rights or the consequences of waiving those rights. Appellant also argues that he was coerced and intimidated into giving his statement by physical mistreatment and by the deputy's promises that he would be allowed to leave.

However, Deputy Quintanilla testified that appellant was not mistreated and that the deputies did not make any promises to him. The transcript of appellant's interrogation shows that, prior to questioning, Deputy Rivera—the officer who appellant asserts struck him—offered appellant food, drink, and use of the restroom, and Rivera, at appellant's request, brought a "sugar water" for him to drink. The transcript contains no threats, coercion, or promises. Furthermore, the alleged promise in this situation—a promise that he could leave after he gave his statement—is not of such an influential nature that a defendant would speak untruthfully in response. *See Creager*, 952 S.W.2d at 856.

Appellant also testified that he was unable to comprehend the significance of his rights and the waiver of such rights. At the beginning of the interrogation, appellant clearly answered "no" in response to Deputy Quintanilla's questions concerning his understanding of his rights. He testified that although he eventually answered "yes," he only did so out of fear of the deputies and because Deputy Rivera was suggesting that "yes" was the correct way to respond.

However, after appellant told Deputy Quintanilla that he did not understand what was being said to him, Quintanilla asked questions to establish that appellant was literate and capable of understanding Spanish, that he was not ill or taking any medications, and that he was not intoxicated or impaired in some way. Quintanilla read appellant his rights in Spanish a second time, pausing after each one to give

appellant an opportunity to respond. Quintanilla testified that he believed appellant understood his rights, and the transcript of the interrogation shows that appellant responded in the affirmative. *See Villarreal v. State*, 61 S.W.3d 673, 678 (Tex. App.—Corpus Christi 2001, pet. ref'd) (holding that *Miranda* waiver requirements are satisfied if, before making statement, defendant is advised of his rights and merely states that he understands them).

The trial court heard the testimony of the witnesses and determined Deputy Quintanilla to be credible and appellant to be not credible, and because these findings are supported by the record, we give almost total deference to this determination. *See Shepherd*, 273 S.W.3d at 684. Looking at the totality of the circumstances, we cannot say that the trial court abused its discretion in finding that appellant was not coerced to the degree that coercion, rather than his free will, produced his statement. *See Moore*, 233 S.W.3d at 44.

We overrule appellant's second issue.

Sufficiency of the Evidence

In his third issue, Rodriguez contends that had his statement been suppressed, the State's evidence was legally and factually insufficient to support a murder conviction.

In light of the Court of Criminal Appeals' recent holding in *Brooks v. State* that there is no meaningful distinction between the standards for legal and factual

sufficiency review, we will review the evidence only for legal sufficiency. 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (overruling *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), and holding that legal-sufficiency standard from *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979) is only standard to be applied in determining whether evidence is sufficient to support finding of each element of criminal offense beyond reasonable doubt).

When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks*, 323 S.W.3d at 899, 912. The jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks*, 323 S.W.3d at 899. A jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony. *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000), *overruled on other grounds*, *Laster v. State*, 275 S.W.3d 512 (Tex. Crim. App. 2009). We may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We resolve any inconsistencies in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

The indictment alleges that appellant "unlawfully, intentionally, and knowingly cause[d] the death of Ernesto Garcia . . . by stabbing the complainant with a deadly weapon, namely a knife." *See* TEX PENAL CODE ANN. § 19.02(b)(1) (Vernon 2011).

Appellant argues that the evidence was insufficient without the improper admission of the statement he made to police. However, we have already held that the trial court did not abuse its discretion in denying appellant's motion to suppress, and thus appellant's statement was properly before the jury. Appellant also argues that Sandoval and Perez were accomplices to the murder, that their testimony could not support his conviction because it was uncorroborated by non-accomplice evidence, and that their testimony was not credible, dependable, or reliable.

Code of Criminal Procedure article 38.14 provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 2005).

"An accomplice is someone who participates with the defendant before, during, or after the commission of a crime and acts with the required culpable mental state." *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). A witness is not an accomplice merely because he knew of the offense and did not

disclose it or concealed it—the witness's participation with the defendant must have involved some affirmative act that promoted the commission of the offense. *Id.* "[T]he witness's mere presence at the scene of the crime does not render that witness an accomplice witness." *Id.*

When evaluating the sufficiency of corroboration evidence under the accomplice witness rule, we "eliminate the accomplice testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime." *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008) (quoting *Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001)). To meet the requirements of the rule, the corroborating evidence need not prove the defendant's guilt beyond a reasonable doubt by itself. *Id.* Nor is it necessary for the corroborating evidence to directly link the accused to the commission of the offense. *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999). "Rather, the evidence must simply link the accused in some way to the commission of the crime and show that 'rational jurors could conclude that this evidence sufficiently tended to connect [the accused] to the offense.'" *Malone*, 253 S.W.3d at 257 (quoting *Hernandez v. State*, 939 S.W.2d 173, 179 (Tex. Crim. App. 1997)).

Each case must be judged on its own facts, as there is no set amount of non-accomplice corroboration evidence that is required for sufficiency purposes. *Id.*

Circumstances that are apparently insignificant may constitute sufficient evidence of corroboration. *Trevino v. State*, 991 S.W.2d 849, 852 (Tex. Crim. App. 1999). Additionally, while the mere presence of a defendant at the scene of a crime is, by itself, insufficient to corroborate accomplice testimony, "[p]roof that the accused was at or near the scene of the crime at or about the time of its commission, when coupled with other suspicious circumstances, may tend to connect the accused to the crime so as to furnish sufficient corroboration to support a conviction." *Malone*, 253 S.W.3d at 257 (quoting *Brown v. State*, 672 S.W.2d 487, 489 (Tex. Crim. App. 1984)).

The trial court instructed the jury that, as a matter of law, Perez was an accomplice, and thus the jury could not convict appellant based on Perez's testimony unless it believed that there was other evidence in the case, outside the testimony of Perez, tending to connect appellant with the commission of the offense. The jury was also instructed that if it believed that Sandoval was an accomplice or if it had a reasonable doubt whether he was or not, then it could not convict appellant based upon Sandoval's testimony unless it further believed that there was other evidence in the case, outside the testimony of both Sandoval and Perez, tending to connect appellant with commission of the offense.

Regarding Sandoval's testimony, the jury was permitted to determine that Sandoval was not an accomplice, and thus his testimony did not require

corroborating evidence before it could be considered. *See Druery*, 225 S.W.3d at 498–99 ("If the evidence presented by the parties is conflicting and it remains unclear whether the witness is an accomplice, the trial judge should allow the jury to decide whether the inculpatory witness is an accomplice witness as a matter of fact. . . ."). Sandoval's own testimony indicated that he did not participate in the commission of the murder in any way—he agreed to drive the other four men to get beer and witnessed the murder. He testified that Guevara returned him to the party, drove off in his vehicle, and then called the next morning to tell him that his truck had been burned and that he should report it stolen.

At most, Sandoval was present at the scene of the crime and concealed its occurrence from investigators, but this is not sufficient to show that he acted as an accomplice. *See id.* at 498. Furthermore, Deputies Cassidy and Quintanilla both testified that they did not consider Sandoval a suspect in the investigation, and Cassidy testified that Sandoval was fearful of telling the truth about the murder because he believed MS-13 was a threat to his family. Thus, we conclude that the jury could have considered Sandoval's testimony without corroborating evidence. *See id.* at 498–99; *see also Curry*, 30 S.W.3d at 406 (holding that we resolve any inconsistencies in evidence in favor of verdict).

Furthermore, appellant's own statements indicate that he was at the scene of the murder and provide evidence of suspicious factors that are sufficient to

corroborate Perez's testimony and tend to connect appellant with the crime. *See Malone*, 253 S.W.3d at 257; *see also Cox v. State*, 830 S.W.2d 609, 611–12 (Tex. Crim. App. 1992) (holding that appellant's confession that he was at scene, combined with other suspicious factors, was sufficient to corroborate accomplice testimony). In his statement, appellant explained that he acted in response to Garcia's attempt to steal his wallet, that Garcia was the one who instigated the attack by making threats and brandishing a knife, and that Garcia was somehow stabbed in the course of the ensuing struggle. Deputies Rivera and Cassidy testified that when they went to appellant's apartment to investigate, they found him hiding in a bedroom and that appellant was "acting weird."

Thus we conclude that Perez's testimony was sufficiently corroborated by non-accomplice evidence. *See Malone*, 253 S.W.3d at 257

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational fact finder could have found that appellant intentionally and knowingly stabbed Garcia to death. Sandoval testified that he saw appellant stab Garcia. Perez acknowledged that he had previously told police that he and appellant killed Garcia as part of a "mission" for the MS-13 gang, that he and appellant both stabbed Garcia, and that appellant "finished off" Garcia after Perez's knife broke. Dr. Anzalone testified that Garcia died of multiple sharp-

force injuries, that many of his wounds could have been fatal, and that two different sharp-edged instruments could have been used to cause Garcia's injuries.

We conclude that the evidence was sufficient to support appellant's conviction.

We overrule appellant's third issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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