Affirmed and Memorandum Opinion filed April 1, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00863-CR

CLARENCE GRAHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1162590

MEMORANDUM OPINION

Appellant Clarence Graham was convicted of aggravated robbery by a jury and sentenced to forty years' imprisonment. Appellant raises two issues on appeal, alleging that the trial court erred by denying his pre-trial motions to suppress (1) his written custodial statement given to police, and (2) evidence seized after his arrest. We affirm.

I. Factual and Procedural Background

At the time of the aggravated robbery, complainant Michael Castleberry—a long-haul trucker—was transporting cargo from Kentucky to a warehouse in Houston. Castleberry arrived in Houston late one evening, and decided to spend the night in his tractor trailer outside the delivery warehouse and wait until morning to unload his cargo. Later that evening, two armed men approached Castleberry's parked truck, told him they were taking his cargo load, and threatened his life. Castleberry was forced into the sleeper cab of his truck where his feet and hands were bound with duct tape, and his head was wrapped with tape covering his eyes. After some time, one of the men drove Castleberry's truck to another location, where the trailer was unhooked and connected to another truck. The men also moved Castleberry into the new truck. This truck was driven to yet another location where the men eventually stopped. The men kept Castleberry inside the second truck and repeatedly threatened his life and assaulted him. Throughout the evening, Castleberry overheard the driver make several phone calls in an effort to have someone pick up the stolen trailer. The next morning, Castleberry tried to convince his assailants that his boss would call the police if he was not allowed to call and check in. The men disengaged the trailer from the truck and drove Castleberry back to where his truck had been left the previous evening. Castleberry was dropped off on the curb next to his truck, and the two men drove away. Castleberry pulled the tape from his body and was eventually able to flag down a passing driver, who called 911 on his behalf. Police arrived at Castleberry's location and he recounted the events of the previous night. Castleberry informed police that, in addition to the trailer, the men stole several personal items from him, including his wallet, a Zippo lighter, and a cell phone.

The stolen trailer was located a few hours after Castleberry's release through a GPS tracking device located in the trailer. It was recovered at a warehouse operated by Alfredo Pastrana, who informed police that appellant called him early that morning asking if he could have a cargo load transferred from one trailer to another. Pastrana agreed, and

appellant left the trailer at the warehouse before any of Pastrana's employees arrived for work. After learning appellant's identity, police placed his picture in a photo array. When Castleberry arrived at Pastrana's warehouse to claim the stolen trailer, he positively identified appellant from the photo array as one of the men who robbed him. Officers then instructed Pastrana to call appellant and have him return to the warehouse. Later that morning, officers noticed a Cadillac Escalade drive past the warehouse. A license plate check revealed that the vehicle was registered in appellant's name. Officers then attempted to find appellant, but he could not be located. Approximately two hours later, the Escalade passed by the warehouse again. Sergeant R.C. Buchert and Officer Todd Janke—two of the Houston Police Department officers present at Pastrana's warehouse—entered separate unmarked vehicles and began following appellant. The Escalade was eventually stopped, and appellant and the vehicle's passenger were apprehended. Officers recovered Castleberry's missing lighter and cell phone after appellant's apprehension. Appellant was then arrested and transported to the police station, where he gave a written statement admitting his involvement in the robbery.

Prior to trial, appellant submitted a motion to suppress his written statement and a second motion to suppress all evidence obtained after his arrest. The trial court held a suppression hearing outside the presence of the jury, and denied both motions. Appellant's statement and the evidence obtained after his arrest were admitted at trial. The jury convicted appellant and sentenced him to forty years' confinement after he pled "true" to an enhancement paragraph alleging a prior conviction for aggravated robbery. Appellant raises two issues on appeal. His first issue alleges the trial court erred in denying his motion to suppress his custodial statement because the statement was not voluntarily given. His second issue alleges the trial court erred in denying his motion to suppress all evidence obtained after his arrest because the police lacked probable cause to arrest him without a warrant.

II. Analysis

A. *Standard of Review*

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *Swain v. State*, 181 S.W.3d 359, 365 (Tex. Crim. App. 2005). We must view the evidence in the light most favorable to the trial court's ruling. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). At a suppression hearing, the trial judge is the sole trier of fact and assesses the witnesses' credibility and the weight to give witnesses' testimony. *Id.* at 24–25. We afford "almost total deference to a trial court's determination of historical facts" and review the trial court's application of search-and-seizure law to the facts de novo. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000) (quoting *Guzman v. State*, 995 S.W.2d 85, 88–89 (Tex. Crim. App. 1997)). When the trial court makes no explicit findings of historical fact, we review the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implied findings of fact supported by the record. *See id.* at 327–28. We will sustain a trial court's ruling if it is reasonably supported by the record, and is correct on any theory of law applicable to the case. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

In reviewing a trial court's suppression ruling, we generally consider only evidence adduced at the suppression hearing, because the ruling was based on it rather than evidence introduced later. *See Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996); *Turner v. State*, 252 S.W.3d 571, 577 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). However, when the parties relitigate the suppression issue at trial, either without objection or with subsequent participation by the defense, we consider all evidence from both the pre-trial hearing and the trial in reviewing the trial court's determination. *See Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007); *Turner*, 252 S.W.3d at 577. Here, because the State and appellant relitigated the suppression issue at trial, we consider the evidence presented both at the suppression hearing and at trial.

B. *Admissibility of Appellant's Written Statement*

In his first issue, appellant alleges that the trial court erred in denying his motion to suppress his written custodial statement. He argues that his statement was coerced and involuntary because "[s]omeone who needs glasses to read cannot execute a written statement by reading it." According to testimony at the suppression hearing and at trial, appellant was interviewed by Buchert, Janke, and another officer the evening of his arrest. Buchert testified that he informed appellant of his constitutional *Miranda* rights, and of his right to terminate the interview at any time. Buchert stated that appellant indicated he understood and effectively waived his rights. Appellant then provided an oral statement admitting his involvement in the robbery while Buchert transcribed appellant's words. Appellant claimed Buchert fabricated the incriminating portions of the statement, but Buchert asserted that he provided an accurate and truthful summation of appellant's statement. Appellant was given a printed copy of the completed statement that included the constitutional warnings given by Buchert. Buchert asked appellant to read the first warning orally, and, according to Buchert, appellant complied without difficulty. Appellant placed his initials in a space provided to indicate he understood and waived each of his rights and signed the statement. Appellant admitted initialing and signing the statement, but contended he did so only because the officers repeatedly threatened his life if he did not sign. He also stated that he continuously requested a lawyer, but his requests were denied. Both Buchert and Janke denied threatening or coercing appellant in any manner, and stated that appellant never invoked his right to counsel. Appellant also testified at the hearing and at trial that he could not read the statement because he did not have his glasses in the interview room, but there was no evidence that he informed police he could not read without his glasses.

The statement of an accused may be used against him if it appears it was freely and voluntarily made without compulsion or persuasion. TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 2005). When the voluntariness of a confession is challenged, the trial

court must make an independent determination in the absence of the jury as to whether the statement was voluntarily made. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (Vernon 2005); *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995) (citing *Jackson v. Denno*, 378 U.S. 368, 380 (1964)). At this hearing, the State has the burden of proving by a preponderance of the evidence that the statement was voluntary. *Alvarado*, 912 S.W.2d at 211. The determination as to whether a confession was voluntary must be analyzed by examining the totality of the circumstances. *Delao v. State*, 235 S.W.3d 235, 239 (Tex. Crim. App. 2007). We do not disturb the court's ruling unless there is a clear abuse of discretion. *Alvarado*, 912 S.W.2d at 211. After determining whether a statement was voluntarily given, the trial court is to provide findings of fact and conclusions of law as a basis for its determination. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6.

Here, the trial court did not enter written findings of fact or conclusions of law; however, the record does contain the following statements made by the trial court at the conclusion of the suppression hearing:

> The Court finds that the officers who testified have complied with Article 38.22 in its requirements. The Court finds that those requirements were adhered to; that the statement was voluntarily given; and therefore, will be admissible for purposes of trial.
>
> The Court finds, for purposes of the hearing, the testimony of the officers to be credible. The Court finds the testimony of [appellant] not credible with regard—with respect to that hearing.

These statements satisfy the findings of fact and conclusions of law required by the Code of Criminal Procedure. *See Murphy v. State*, 112 S.W.3d 592, 601 (Tex. Crim. App. 2003) (noting that Article 38.22 is satisfied when a trial court dictates its findings and conclusions to the court reporter, and those findings are later transcribed and made part of the appellate record); *see also Busby v. State*, 253 S.W.3d 661, 669 (Tex. Crim. App. 2008).

The trial court chose to believe the version of events given by Buchert and Janke after evaluating the credibility and demeanor of the officers and appellant. According to the officers' testimony at the suppression hearing and at trial, appellant knowingly and voluntarily waived his constitutional rights, read a portion of these rights orally with no problems, never asked for an attorney, and never requested reading glasses or stated that he could not read or comprehend his statement without glasses. After reviewing the trial court's findings and the totality of the circumstances surrounding the record, we cannot say that the trial court abused its discretion by denying appellant's motion to suppress his custodial statement. *See Wyatt v. State*, 23 S.W.3d 18, 24–25 (Tex. Crim. App. 2000) (holding a confession was voluntarily given under the totality of the circumstances, despite defendant's testimony that officers coerced his statement, ignored his requests for an attorney, and that he was unable to read his statement without glasses); *Colgin v. State*, 132 S.W.3d 526, 530–31 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (finding appellant's statement was voluntarily given, where appellant contended that police ignored his request for an attorney, failed to discontinue his interview despite his statement that he was tired and wanted to rest, and did not allow him to use his reading glasses before signing his statement). We therefore overrule appellant's first issue.

C. *Admissibility of the Evidence Seized after Appellant's Arrest*

In his second issue, appellant contends that the trial court erred by denying his motion to suppress evidence because he was unlawfully arrested without a warrant.[1] Appellant argues that he was doing nothing more than "travel[ling] from one place to another" by driving past Pastrana's warehouse. Thus, he argues, the police lacked probable cause to stop and arrest him, and all evidence seized after his arrest, including his custodial statement, was illegally obtained. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005) (stating that illegally obtained evidence may not be admitted into evidence against an accused at trial).

[1] It is undisputed that no warrant for appellant's arrest was issued.

Buchert and Janke testified that they followed appellant in separate unmarked vehicles—Buchert in a Pontiac Grand Prix and Janke in a Dodge pick-up—after appellant's vehicle passed Pastrana's warehouse a second time. While following the Escalade, Buchert and Janke observed appellant commit several traffic violations. After traveling the wrong way down a one-way street, appellant's vehicle was blocked in a parking lot by Buchert and Janke. The officers exited their vehicles, identified themselves as police officers, and approached the Escalade with drawn weapons. Janke removed appellant from the driver's side of the vehicle, while Buchert removed the passenger. Buchert found Castleberry's lighter in the passenger's pocket and, on the Escalade's console, officers observed a cell phone matching the one stolen from Castleberry and a business card with a hand-written note referencing a liquor trailer. By this time, marked units had arrived at the scene, and appellant and the passenger were placed inside police vehicles. Officers searched the Escalade, and found two rolls of duct tape in the rear part of the vehicle.

Appellant testified that he was driving to Pastrana's warehouse to pick up a paycheck for cargo he had previously hauled for Pastrana. He stated he did not stop the first time he passed the warehouse because he did not see Pastrana's vehicle parked outside. After returning to the warehouse a few hours later, appellant claimed he did not stop because a Dodge pick-up nearly rear-ended the Escalade. He stated that he began driving to a police station because he was afraid he was going to be robbed, and that he did not know the Dodge's driver was a police officer because the truck was unmarked. Appellant testified that he was forced to turn the wrong way down a one-way street because the Dodge rear-ended him after he exited the freeway. He also stated that he did not know the men who exited the Dodge and the Pontiac were police officers because they were not in uniform. Janke confirmed that neither Buchert nor himself were in uniform, but stated that he was wearing a Houston Police Department jacket at the time. After Janke removed appellant from the Escalade, appellant stated that Janke forcibly threw him to the ground, made several threats and racial epithets, and dug his knee into appellant's back while

handcuffing him. Janke denied these allegations and denied ever rear-ending appellant's vehicle. Photos taken after appellant's arrest did not show any markings on the Escalade consistent with being rear-ended by another vehicle.

When a motorist commits a traffic violation in a peace officer's presence, the officer has probable cause to lawfully stop and arrest or detain the violator. *See* TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 2005); TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999); *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992); *Vafaiyan v. State*, 279 S.W.3d 374, 380 (Tex. App.—Fort Worth 2008, pet. ref'd) (stating that violation of Texas traffic laws constitutes probable cause to arrest the violator). At the suppression hearing and at trial, Buchert and Janke testified that they observed appellant commit several traffic violations, including: (1) failure to stop for a red light, *see* TEX. TRANSP. CODE ANN. § 544.007(d) (Vernon 1999), (2) failure to stop at a stop sign, *see id.* § 544.010 (Vernon 1999), (3) improperly driving on a highway shoulder, *see id.* § 545.058 (Vernon 1999), and (4) driving against the flow of one-way traffic, *see id.* § 545.059(b) (Vernon 1999). Appellant consistently testified that any traffic violations he may have committed were the result of Janke rear-ending his vehicle, and the officers consistently testified that they never rear-ended the Escalade. As the sole judge of the witness' credibility at the suppression hearing, the trial court could believe the officers' testimony and disbelieve appellant. *See Wiede*, 214 S.W.3d at 24–25. Although the trial court did not make findings of fact, the record supports a conclusion that officers had probable cause to arrest appellant based on his numerous traffic violations. *See Carmouche*, 10 S.W.3d at 327–28 (stating that we assume the trial court made implied findings of historical facts supported by record evidence); *see also, e.g.*, *Vafaiyan*, 279 S.W.3d at 380 (recognizing that peace officers may arrest motorists who commit traffic violations in the officers' presence).

Police may perform a warrantless search of a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search, or it is reasonable to believe the vehicle contains evidence of the offense

of arrest. *See Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009). Absent these justifications, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. *Id.* at 1723–24. One of these exceptions authorizes police to search a vehicle if there is probable cause to believe the vehicle contains evidence of criminal activity, even if the search is for evidence unrelated to the offense of arrest. *Id.* at 1721; *see also Neal v. State*, 256 S.W.3d 264, 282 (Tex. Crim. App. 2008); *Liffick v. State*, 167 S.W.3d 518, 520 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Prior to appellant's apprehension, Castleberry positively identified appellant as one of the men who abducted and robbed him. Pastrana also identified appellant as the person who delivered the stolen cargo trailer to the warehouse. While conducting a search incident to the arrest of the Escalade's passenger, Buchert discovered a lighter matching the one stolen from Castleberry.[2] Because appellant was identified as a party to Castleberry's robbery and property matching an item stolen from Castleberry was recovered from appellant's passenger, the police had probable cause to believe the Escalade could contain more evidence related to the robbery, thus allowing the police to search "any area of the vehicle in which the evidence might be found." *See Gant*, 129 S. Ct. at 1721; *see also, e.g.*, *Neal*, 256 S.W.3d at 282. Thus, based on the facts in the record, appellant's warrantless arrest was legally justified, and the evidence gathered after appellant's arrest—both the physical evidence from his vehicle and his custodial statement—was not obtained in a manner which violated appellant's Fourth Amendment rights. *See* U.S. CONST. amend. IV; *Villarreal*, 935 S.W.2d at 138 (stating that a trial court's decision regarding a motion to suppress will be upheld if it is correct on any applicable theory of law and is reasonably supported by the evidence). Therefore, we

[2] Although appellant's motion to suppress and appellate brief challenged the seizure of the lighter from the passenger, appellant cannot challenge this search and seizure because Fourth Amendment rights are personal rights that may not be vicariously asserted. *Alderman v. United States*, 394 U.S. 165, 174 (1969); *see also Busby v. State*, 990 S.W.2d 263, 270 (Tex. Crim. App. 1999) (stating the Fourth Amendment does not confer standing to challenge the search of a third party, and ruling appellant could not challenge the search of a vehicle's passenger).

conclude that the trial court did not abuse its discretion by denying appellant's motion to suppress all of the evidence collected after his warrantless arrest. Appellant's second issue is overruled.

III. Conclusion

Because we have determined that the trial court did not abuse its discretion by denying either of appellant's motions to suppress, we overrule each of appellant's issues on appeal and affirm the judgment of the trial court.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Frost, and Brown.
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