Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00622-CR

Antonio **TORRES**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR0934
Honorable Jefferson Moore, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: November 29, 2017

AFFIRMED

A jury found appellant Antonio Torres guilty of murder. The trial court sentenced Torres to forty years' confinement. On appeal, Torres contends the trial court erred in: (1) denying his speedy trial motion; (2) denying his motion to suppress an out-of-court identification; (3) denying his motion to suppress his statements to law enforcement; and (4) excluding evidence of the victim's gang affiliation. We affirm the trial court's judgment of conviction.

BACKGROUND

Torres does not challenge the sufficiency of the evidence to support his conviction. Moreover, resolution of the issues presented do not require a detailed analysis of the factual background. Accordingly, we provide a brief factual and procedural background for context.

In the early morning hours, officers were dispatched to a home in Bexar County. When the first officer arrived, she saw a body on the ground with chest injuries. The deceased was identified as Roy Ruiz. Officers spoke with the victim's girlfriend, Priscilla, and her mother, as well as other witnesses.

Officers were told someone knocked on the door of the house. A visitor to the home, Tracy Gonzales, answered the door. The person at the door, later identified by Ms. Gonzales as Torres, asked to speak to Priscilla's mother. When Ms. Gonzales advised that someone was asking for Priscilla's mother, Mr. Ruiz went to the door to see who was there. Ultimately, Mr. Ruiz stepped outside. After a minute or two, Mr. Ruiz opened the door without stepping inside and told Ms. Gonzales to lock it, which she did. Thereafter, the witnesses heard gunshots. Ms. Gonzales and others ran outside and saw Torres jump into a vehicle driven by someone else and flee. At that point, Ms. Gonzales saw Mr. Ruiz on the ground, gasping for air. Mr. Ruiz died at the scene from a gunshot wound to the chest.

Following an investigation, police arrested Torres for the murder of Mr. Ruiz. After his arrest, Torres was taken downtown and interviewed by Sergeant Raul Cardenas. Torres was subsequently indicted for murder. After a jury trial, Torres was convicted and sentenced to forty years' confinement. Thereafter, Torres timely perfected this appeal.

ANALYSIS

As noted above, Torres raises issues regarding the denial of his speedy trial motion, motions to suppress an out-of-court identification and statements to law enforcement, and the

exclusion of evidence regarding the victim's gang affiliation. We will consider each issue in turn, beginning with his complaint about the denial of his motion for speedy trial.

Speedy Trial

In this point of error, Torres contends a delay of thirty-two months from the time of arrest to the time of trial entitled him to a dismissal. The State counters, arguing the trial court did not err in denying the request for a dismissal based on a speedy trial violation because any delays were attributable to Torres.

Standard of Review

An appellate court reviews a trial court's ruling on a motion to dismiss based on a speedy trial claim using a bifurcated standard of review. *Gonzales v. State*, 435 S.W.3d 801, 808 (Tex. Crim. App. 2014); *Huff v. State*, 467 S.W.3d 11, 26 (Tex. App.—San Antonio 2015, pet. ref'd). With regard to factual determinations, we give almost complete deference to a trial court's historical factual findings that are supported by the record. *Gonzales*, 435 S.W.3d at 808; *Huff*, 467 S.W.3d at 26. We give the same deference to its reasonable inferences drawn from those facts. *Gonzales*, 435 S.W.3d at 808–09; *Huff*, 467 S.W.3d at 26. In addition, we view all of the evidence in favor of the trial court's ultimate ruling. *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008); *Huff*, 467 S.W.3d at 26. When the trial court evaluates the evidence at a speedy trial hearing, it may completely disregard witness testimony based on credibility and demeanor evaluations, even if the testimony is uncontroverted. *Cantu*, 253 S.W.3d at 282; *Huff*, 467 S.W.3d at 26. The trial court is also entitled to disbelieve any evidence as long as it has a "reasonable and articulable reason for doing so." *Cantu*, 253 S.W.3d at 282.

In contrast to the foregoing, we conduct a de novo review in determining whether there was sufficient presumptive prejudice to proceed to a *Barker v. Wingo* analysis and in weighing the factors set out in that case because these are legal questions. *Gonzales*, 435 S.W.3d at 808–09;

Huff, 467 S.W.3d at 26–27. "Review of the individual *Barker* factors necessarily involves fact determinations and legal conclusions, but '[t]he balancing test as a whole ... is a purely legal question.'" *Cantu*, 253 S.W.3d at 282 (quoting *Zamorano v. State*, 84 S.W.3d 643, 648 n.19 (Tex. Crim. App. 2002)).

Application

Under the United States Constitution — applicable to the states through the Fourteenth Amendment — a defendant is guaranteed the right to a speedy trial. U.S. CONST. amends. VI, XIV; *Gonzales*, 435 S.W.3d at 808; *Huff*, 467 S.W.3d at 27. Speedy trial claims are determined on a case-by-case basis, with the reviewing court weighing and balancing the factors set out by the Supreme Court in *Barker v. Wingo*: (1) length of the delay; (2) reason for the delay; (3) assertion of the right; and (4) prejudice to the accused. 407 U.S. 514, 530 (1972); *Gonzales*, 435 S.W.3d at 808. The State must justify the length of the delay, but it is the defendant who must prove he asserted the right and was prejudiced by the delay. *Cantu*, 253 S.W.3d at 281. The defendant's burden to establish assertion and prejudice is said to "var[y] inversely" with the State's degree of culpability for the delay. *Id.* (quoting *Robinson v. Whitley*, 2 F.3d 562, 570 (5th Cir. 1993)). Accordingly, "the greater the State's bad faith or official negligence and the longer its actions delay a trial, the less a defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial." *Id.* at 280–81.

A *Barker* analysis is not triggered unless the defendant makes an initial showing that the delay is "presumptively prejudicial." *Gonzales*, 435 S.W.3d at 808 (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)); *Cantu*, 253 S.W.3d at 281 (same). There is no bright line rule to determine when a delay is so unreasonable that it is "presumptively prejudicial." *Cantu*, 253 S.W.3d at 281. However, the Texas Court of Criminal Appeals has held a four-month delay is insufficient, but a seventeen-month delay is sufficient. *Id.* (citing *Pete v. State*, 501 S.W.2d 683,

687 (Tex. Crim. App. 1973) (holding four-month delay is not presumptively prejudicial); *Phillips v. State*, 650 S.W.2d 396, 399 (Tex. Crim. App. 1983) (holding seventeen-month delay is presumptively prejudicial)). If the appellate court finds the delay is presumptively prejudicial, it must then analyze the speedy trial claim by first weighing the strength of the remaining factors and then balancing their relative weights in light of "the conduct of both the prosecution and the defendant." *Id.* (quoting *Barker*, 407 U.S. at 530). That is to say, the *Barker* factors are related and must be considered together along with any other relevant circumstances, and no one factor is either necessary or sufficient to find a speedy trial violation. *Id.* Thus, on review we must "engage 'in a difficult and sensitive balancing process' in each individual case" to determine whether a dismissal in favor of the defendant is warranted. *Id.* (quoting *Barker*, 407 U.S. at 533); *Dragoo v. State*, 96 S.W.3d 308, 313 (Tex. Crim. App. 2003) (citing *Barker*, 407 U.S. at 530).

1. Length of Delay

The length of delay is measured "from the time the accused is arrested or formally accused." *Gonzales*, 435 S.W.3d at 809. When the delay is longer than the minimum needed to trigger an analysis under *Barker*, the length of the delay weighs against the State. *Id.* Moreover, "the longer the delay, the more the defendant's prejudice is compounded" because "'the presumption that pretrial delay has prejudiced the accused intensifies over time.'" *Id.* (quoting *Zamorano v. State*, 84 S.W.3d 643, 649 (Tex. Crim. App. 2002) (quoting *Doggett*, 505 U.S. at 652)).

Here, the State concedes the delay in this case is presumptively prejudicial so as to trigger the *Barker* analysis. We agree. Police arrested Torres on November 13, 2013, and he was indicted on February 10, 2014. Trial did not begin until October 15, 2016, when the parties presented pretrial motions and engaged in voir dire with the potential jurors. Thus, whether we consider the original arrest date or the subsequent indictment, the delay is presumptively prejudicial. From the

time of his arrest, almost three years had elapsed prior to trial, and from the indictment, more than two-and-a half years had elapsed — both are far longer than the seventeen-month delay found presumptively prejudicial in *Phillips*. *See* 650 S.W.2d at 399. Because the delay was beyond the minimum needed to trigger the *Barker* inquiry, this factor weighs heavily in favor of finding a violation of Torres's right to a speedy trial. *See Zamorano*, 84 S.W.3d at 649.

2. Reason for Delay

With regard to the second *Barker* factor — reason for the delay — we look to the reasons put forth by the State to justify the delay. *Gonzales*, 435 S.W.3d at 809 (citing *Barker*, 407 U.S. at 531); *Huff*, 467 S.W.3d at 28. According to the Texas Court of Criminal Appeals, when assessing the reasons provided by the State for the delay, the reviewing court must allocate different weights to different reasons. *Gonzales*, 435 S.W.3d at 809 (citing *Zamorano*, 84 S.W.3d at 649); *Huff*, 467 S.W.3d at 28. The court explained in *Zamorano* that if the State deliberately attempts to delay the trial to hinder the defense, it should be weighed heavily against the State. 84 S.W.3d at 649. However, if the State has a neutral reason for the delay — e.g., negligence or overcrowded courts — it should still be weighed against the State, albeit less heavily, because the ultimate responsibility for such circumstances rests with the State as opposed to the defendant. *Id.* If the State provides a valid reason for the delay, e.g., a missing witness, an appropriate delay is justified and not weighed against the State. *Id.* Finally, delays attributable to the defendant, such as when he announces "not ready," cannot be counted against the State. *Id.* In sum, "reasons that are unjustifiable count toward the length of the delay, but justifiable reasons do not." *Huff*, 467 S.W.3d at 28 (citing *Gonzales*, 435 S.W.3d 809).

To justify the delay in this case, the State first presented evidence showing that from the day after his arrest through trial, Torres had three different attorneys. The trial court initially appointed counsel for Torres on November 14, 2013. This first attorney remained on the case for

approximately four and a half months. In March 2014, Torres retained counsel, who filed a notice of appearance on March 31, 2014. However, a little less than nine months later, on December 23, 2014, retained counsel filed a motion to withdraw. In the motion, counsel stated Torres had failed to provide payment for his attorney's fees, and because Torres was now confined, he could no longer afford retained counsel. On January 15, 2015, approximately nineteen months before trial, the trial court appointed Torres's third attorney, who remained as counsel for Torres through the trial. According to the State, each time a new attorney was appointed, it was necessary to give the attorney time to prepare for trial. Thus, the State contends the delay is attributable to Torres, not the State.

The State also points out that in March 2016, Torres requested a continuance in order to review certain telephone calls Torres made while he was in jail. The record shows that although the trial court had already decided to exclude the calls, Torres "still wanted time to review them anyway to see if there was any Brady information that might have been in those calls." The trial court gave Torres an opportunity to review those calls. Again, the State argues any delay as a result of Torres's request to review the telephone calls was not attributable to the State, but to Torres.

Finally, the State points out Torres continued to file pretrial motions up to a month before the hearing on the speedy trial issue, which was held in August 2016. The trial court stated this indicated there were issues Torres sought to resolve before trial could proceed. Thus, according to the State, this was yet another delay attributable to Torres.

We agree that the delays leading up to the appointment of Torres's final attorney, and for a short time thereafter, are attributable to Torres, at least in part, based on the need for the attorneys to prepare for trial. As the trial court stated at the hearing, "the attorneys have changed several times and that is not something that we can . . . charge against the State" and any "new attorney is

going to need more time to get ready for a trial[.]" Delays attributable to Torres cannot be weighed against the State. *See Huff*, 467 S.W.3d at 28. The same is true with regard to Torres's request for a delay in order to review the jail telephone calls for *Brady* material — even though the trial court had already determined the calls would not be admissible — as well as the additional motions filed by Torres up to a month before the speedy trial hearing. *Id.*

However, the total amount of time from the arrest to the beginning of trial was approximately three years, and not all of that delay is attributable to Torres, and the State failed to provide any justification for the portion of the delay not attributable to Torres, which constitutes several months. Because the State offered the trial court no explanation for its portion of the delay, this weighs in favor of a speedy trial violation, but not heavily. *See Dragoo*, 96 S.W.3d at 313–14. As the court explained in *Shaw v. State*, in the absence of an explanation, the trial court cannot presume either a deliberate delay by the State in order to prejudice the defendant or a valid reason for the delay. 117 S.W.3d 883, 889 (Tex. Crim. App. 2003); *see Dragoo*, 96 S.W.3d at 314.

Given the many months of delay attributable to Torres and the State's apparent negligence with regard to a portion of the delay, we hold this factor weighs against the State and in favor of a speedy trial violation, but only slightly. *See Huff*, 467 S.W.3d at 28. Here, both Torres and the State bore responsibility for the delay between Torres's arrest and the beginning of trial. *See Gonzales*, 435 S.W.3d at 809–10; *Dragoo*, 96 S.W.3d at 313–14.

3. Assertion of Right to Speedy Trial

"The timing of a defendant's assertion of his speedy trial claim affects the other *Barker* factors." *Huff*, 457 S.W.3d at 30 (citing *Gonzales*, 435 S.W.3d at 810–11 (citing *Barker*, 407 U.S. at 531)). In other words, the assertion of the right is closely associated with the other factors because the strength of the defendant's efforts is shaped by them. *Barker*, 407 U.S. at 531. The more serious the deprivation, the more likely a defendant will complain. *Id.* Thus, the details of

a defendant's assertion of his right to a speedy trial "'is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right [to a speedy trial].'" *Gonzales*, 435 S.W.3d at 810–11 (quoting *Barker*, 407 U.S. at 531–32). A defendant's failure to assert a speedy trial claim in a timely manner "'makes it difficult for a defendant to prove he was denied a speedy trial.'" *Dragoo*, 96 S.W.3d at 314 (quoting *Barker*, 407 U.S. at 532).

Torres was arrested in November 2013 and indicted three months later. Admittedly, he filed a motion for speedy trial on October 23, 2015, but it was filed pro se at a time when Torres was represented by appointed counsel. A defendant has no right to hybrid representation, and therefore, a trial court can disregard any pro se motion filed by a defendant who is represented by counsel. *Melendez v. State*, 467 S.W.3d 586, 591 (Tex. App.—San Antonio 2015, no pet.) (citing *Robinson v. State*, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007)).[1] Thus, we hold the pro se request, which was never ruled on by the trial court, cannot be considered as an assertion of Torres's right to a speedy trial for purposes of the *Barker* analysis.

Torres's counsel did not file a motion asserting the right to a speedy trial until July 27, 2016 — less than three months before trial began and almost three years after Torres was indicted. Thus, we hold Torres's assertion was untimely, coming almost three years after his original arrest and indictment. The failure to timely assert a speedy trial claim "'makes it difficult for a defendant to prove he was denied a speedy trial.'" *Dragoo*, 96 S.W.3d at 314 (quoting *Barker*, 407 U.S. at 532). The absence of a timely demand strongly suggests Torres did not really want a speedy trial and that he was not prejudiced by the lack of one. *See id.* (citing *Barker*, 407 U.S. at 532). Torres's

[1] Moreover, even if we were to consider the pro se motion as a proper assertion of Torres's right to a speedy trial, the motion was not filed until October 2015, more than a year and eight months after he was indicted, and it does not appear Torres sought a hearing on this motion.

inaction weighs more heavily against a violation of the right to a speedy trial the longer the delay becomes, and here the delay was quite extensive. *See id.*

Moreover, when Torres asserted his right, it was in the form of a motion to dismiss. Filing a motion to dismiss instead of seeking a speedy trial generally weakens a speedy-trial claim because it evinces a desire to have no trial as opposed to a speedy one. *Cantu*, 253 S.W.3d at 283; *Zamorano*, 84 S.W.3d at 651 n.40. Thus, it appears Torres was not interested in a speedy trial; rather, he was interested only in a dismissal of the charges. Accordingly, we hold Torres's delay in asserting his right to a speedy trial weighs heavily against finding a constitutional violation of his right to a speedy trial. *See Cantu*, 253 S.W.3d at 283; *Zamorano*, 84 S.W.3d at 651 n.40.

4. Prejudice to Torres

Because "pretrial delay is often both inevitable and wholly justifiable," the fourth *Barker* factor examines whether and to what extent the delay has prejudiced the defendant. *Barker*, 407 U.S. at 532. When a court analyzes the prejudice, if any, to the defendant, it must do so in light of the interests the right to a speedy trial was designed to protect: (1) freedom from oppressive pretrial incarceration; (2) minimization of the defendant's anxiety and concern accompanying a public accusation; and (3) limitation of the possibility that the accused's defense will be impaired. *Huff*, 467 S.W.3d at 30 (citing *Cantu*, 253 S.W.3d at 285). Of these interests, the third is the most important because the inability of a defendant to adequately prepare a defense affects the fairness of the entire system. *Id.* In this case, Torres argues this factor should weigh in favor of finding that right to a speedy trial was violated. We disagree.

As to Torres's incarceration, he was able to post bond and secure his release on April 3, 2014 following his November 13, 2013 arrest. However, he was reincarcerated on June 9, 2014, because he removed the GPS monitor from his ankle; the GPS monitor was a condition of his bond. Thus, the majority of Torres's incarceration prior to trial was a direct result of his own

actions. But for removing the GPS monitor, and assuming he did not violate any additional bond conditions, Torres would have been free up until his conviction in 2016.

As for anxiety over the murder accusation, in response to his attorney's question as to whether he had "suffered stress and anxiety while waiting for this case to go to trial," Torres answered, "Yes, ma'am, I have." However, evidence of generalized anxiety is insufficient proof of prejudice under *Barker*, especially if it is no greater than that normally associated with a criminal charge or investigation. *Cantu*, 253 S.W.3d at 286. Torres also testified that during his incarceration he was unable to spend time with his children and several relatives passed away, as did the mother of one of his seven children. As to the death of the mother of one of his children, Torres admitted on cross-examination that he had not seen her since 2012. As noted above, Torres would not have been incarcerated but for his own decision to remove his GPS monitor. Torres's decision to remove his GPS monitor resulted in his missing time with family members prior to their deaths. If the inability to see his children or attend family funerals caused him anxiety, it was of his own making. Thus, we are left with the third, most serious factor — impairment to his defense.

Torres testified only that his defense was impaired because his father, who passed away before trial, would have testified on his behalf as a character witness. A claim of prejudice based on the unavailability of witnesses requires an appellant to show: (1) the witness was unavailable at the time of trial; (2) the testimony that would have been offered was relevant and material to the defense; and (3) due diligence was exercised in an attempt to locate the witnesses for trial. *Marquez v. State*, 165 S.W.3d 741, 750 (Tex. App.—San Antonio 2005, pet. ref'd) (citing *Harris v. State*, 489 S.W.2d 303, 308 (Tex. Crim. App. 1973)); *Ervin v. State*, 125 S.W.3d 542, 548 (Tex. App.—Houston [1st Dist.] 2002, no pet.). If a witness dies or disappears during a delay, however, the defendant need only show such witness was believed to be material to the case. *Ervin*, 125

S.W.3d at 548. When deciding whether the witness is believed to be material to the case, the court can consider whether there is any evidence that the defendant attempted to obtain the witness's statement during the delay. *Id.* In this case, Torres admitted his father would not have been a fact witness. Moreover, Torres did not provide any evidence as to when his father passed away or what character testimony he would have provided. Torres did not present any evidence that he attempted obtain a statement from his father during the delay. *See id.* We hold Torres failed to make a prima facie showing that his ability to defend himself was impaired by the loss of a single, potential character witness who could have only provided such testimony during the punishment phase.

Although affirmative proof of prejudice is not necessary for every speedy trial claim because excessive delay presumptively prejudices the defendant in ways he may be unable to prove, the presumption of prejudice to Torres's ability to defend himself is diminished by his contribution to, and acquiescence in, the delay. *See Dragoo*, 96 S.W.3d at 315 (citing *Doggett*, 505 U.S. at 655, 658). Accordingly, although we presume the lengthy delay adversely affected Torres's ability to defend himself, this presumption is mitigated — as is any theoretical prejudice — due to Torres's contribution to the delay as a result of substituting attorneys and requesting additional time to review evidence, as well as his extensive delay in asserting his right to a speedy trial. *See id.* As noted above, Torres did not request a speedy trial until more than two-and-a-half years after his original arrest and indictment, and when he did, he actually sought a dismissal, not a speedy trial. Thus, we hold Torres suffered no prejudice, which weighs against his speedy trial claim.

5. Balancing the Barker Factors

Having addressed the *Barker* factors, we must now balance them. *See Cantu*, 253 S.W.3d at 280. Weighing slightly in favor of finding a violation of Torres's right to a speedy trial is the extensive length of the delay and the absence of any reason for parte of it. Weighing against a

speedy trial violation are Torres's failure to demonstrate prejudice and his acquiescence in the delay for more than two-and-a-half years before he requested a dismissal, which indicated he did not really want a speedy trial. We hold the weight of the four factors, when balanced together, militates against finding a speedy trial violation. *See Barker*, 407 U.S. at 534 (holding that where defendant was not seriously prejudiced by five-year delay between arrest and trial and actions demonstrated he did not want speedy trial, defendant's Sixth Amendment right to speedy trial not violated). Accordingly, we overrule Torres's first point of error.

Suppression — Out-of-Court Identification and Statements to Law Enforcement

In his second point of error, Torres contends the trial court erred in denying his motion to suppress an out-of-court identification.[2] Torres argues the pretrial identification made by Tracy Gonzales, the woman who answered the door on the night of the murder, was based on an impermissibly suggestive photo lineup. In his third and fourth points of error, he contends the trial court violated his rights under the United States Constitution and Texas statutory law by denying his motion to suppress the statements he gave to law enforcement on the night of his arrest. Specifically, Torres contends he did not knowingly, intentionally, and voluntarily waive his rights before providing statements to law enforcement.

Standard of Review

We review a trial court's ruling on a motion to suppress for an abuse of discretion and apply a bifurcated standard of review. *Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016); *see Brodnex v. State*, 485 S.W.3d 432, 436 (Tex. Crim. App. 2016). Under this standard, we afford almost total deference to the trial court's determination of historical facts, especially

[2] As he admits in his brief, Torres failed to object at trial to the witness's in-court identification. He further concedes that his failure to complain or object in the trial court to the in-court identification waives any complaint regarding the in-court identification on appeal. *See Mason v. State*, 416 S.W.3d 720, 738 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Therefore, we consider only Torres's arguments concerning the pretrial identification procedures. *See id.*

when it is based on assessments of witness credibility and demeanor. *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016); *Brodnex*, 485 S.W.3d at 436. However, we conduct a de novo review of mixed questions of law and fact that do not hinge on credibility or demeanor, such as trial court's application of the law to the facts. *Brodnex*, 485 S.W.3d at 436. We also conduct a de novo review with regard to pure questions of law. *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011).

At a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Weems*, 493 S.W.3d at 577; *State v. Evans*, 500 S.W.3d 528, 535 (Tex. App.—San Antonio 2016, no pet.) (quoting *State v. Gray*, 158 S.W.3d 465, 466 (Tex. Crim. App. 2005)). A trial court may "believe or disbelieve all or part of the witness's testimony — even if that testimony is uncontroverted — because the court has the opportunity to observe the witness's demeanor and appearance." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010) (quoting *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000)); *see Evans*, 500 S.W.3d at 535.

If a trial court makes express findings of fact, we view the evidence in the light most favorable to its ruling and uphold those factual findings as long as they are supported by the evidence. *State v. Rodriguez*, 521 S.W.3d 1, 8 (Tex. Crim. App. 2017) (citing *Valtierra*, 310 S.W.3d at 447). When a trial court does not make express findings of fact, we view the evidence in the light most favorable to the trial court's ruling and assume it made implicit findings that support its ruling, as long as those findings are supported by the record. *Furr*, 499 S.W.3d at 877; *Brodnex*, 485 S.W.3d at 436. We will 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. *Furr*, 499 S.W.3d at 877; *Weems*, 493 S.W.3d at 577.

Motion to Suppress Pretrial Identification

As set out above, Torres contends the trial court erred in denying his motion to suppress a witness's pretrial identification. Specifically, he argues his motion should have been granted because the photographic lineup shown to Ms. Gonzales was impermissibly suggestive.

The Texas Court of Criminal Appeals addressed the issue of suggestive lineups in *Balderas v. State*, 517 S.W.3d 756 (Tex. Crim. App. 2016), *cert. denied*, 137 S.Ct. 1207 (2017). The court began by noting that as a rule, the Constitution protects defendants from convictions based on evidence of "questionable reliability" not by precluding its admission, but by giving the defendant the means to persuade the trier of fact that the evidence should be "discounted as unworthy of credit." *Id.* at 791. The admission of identification evidence is constitutionally barred only when its introduction "is so extremely unfair that its admission violates fundamental conceptions of justice." *Id.* (citing *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

We undertake a de novo review to determine if, considering the totality of the circumstances, the pretrial identification procedure was impermissibly suggestive. *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998); *Hamilton v. State*, 300 S.W.3d 14, 18 (Tex. App.—San Antonio 2009, pet. ref'd). It is the defendant who must establish by clear and convincing evidence that the pretrial procedure was impermissibly suggestive. *Balderas*, 517 S.W.3d at 792.

If we find the pretrial identification procedure was impermissibly suggestive, we must then assess the reliability of the identification under the totality of the circumstances. *Id.* In our assessment, we must view the trial court's historical findings of fact in the light most favorable to its ruling, and then, using a de novo review, we must weigh them against the corrupting effect of the suggestive pretrial identification procedure. *Id.* The defendant must also establish an absence

of reliability by clear and convincing evidence. *Hamilton*, 300 S.W.3d at 18. We assess reliability by weighing five non-exclusive factors — opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, accuracy of the witness's prior description of the suspect, the level of certainty shown by the witness at the confrontation, and the length of time between the crime and the identification — against "the corrupting effect of any suggestive identification procedure." *Balderas*, 517 S.W.3d at 792.

A pretrial lineup may be impermissibly suggestive if the defendant is the only individual in the photo array who closely resembles the pre-procedure description. *Id.* at 794. Participants in the photo array need not be identical to satisfy due process requirements. *Id.* However, every photo array must generally contain photographs of individuals who more or less fit the description of the suspect. *Fisher v. State*, 525 S.W.3d 759, 762–63 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (citing *Buxton v. State*, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985)).

On appeal, Torres contends the photo array shown to Ms. Gonzales was impermissibly suggestive because he was the only person in the six-man array wearing a "jail uniform." He points out that Ms. Gonzales testified she knew the person she identified was wearing a jail uniform because she had been in jail. However, she also testified there was nothing unique that singled out Torres's photograph. Ms. Gonzales testified she recognized Torres as the perpetrator because it was the first time she had seen him since the night of the murder when he knocked on the door, and as she noted on the document that recorded her choice, she chose Torres's photograph because "his face got [her] [a]ttention." She also testified she would have recognized Torres even if she had not seen the photo array. The record shows Ms. Gonzales made her identification on the night the offense occurred. She was shown six black and white photographs of Hispanic males who shared similar complexions, hairstyles, and facial hair. In making his ruling, the trial court noted Ms. Gonzales did not testify that she picked Torres's photograph based on his "jail clothing."

Rather, she testified she picked him out of the lineup because she recognized him as the person she saw at the door on the night of the murder. The trial court further stated that although Ms. Gonzales had the ability to identify jail clothing, it did not believe it was a deciding factor for her with regard to the identification of Torres.

Although we afford great deference to the trial court's evaluation of Ms. Gonzales's credibility and demeanor, the issue of the photo array's suggestiveness does not turn on this evaluation. *See Loserth*, 963 S.W.2d at 772; *Hamilton*, 300 S.W.3d at 18. Rather, we review de novo the issue of suggestiveness. *See Loserth*, 963 S.W.2d at 772; *Hamilton*, 300 S.W.3d at 18. Considering the evidence in the record, including the photo array, the physical similarity of the subjects, and Ms. Gonzales's testimony, we hold Torres failed to prove by clear and convincing evidence that the photo array was impermissibly suggestive. *See Roberts v. State*, No. 14-04-01048-CR, 2006 WL 561786, at *2 (Tex. App.—Houston [14th Dist.] Mar. 9, 2006, pet. ref'd) (mem. op., not designated for publication) (holding that witness's belief that suspect she chose from photo array was wearing a county jail jumpsuit did not render array impermissibly suggestive when witness also testified her identification was based on her memory of seeing suspect's face on day of robbery); *see also Fisher*, 525 S.W.3d at 762–63 (holding that clear weight of Texas authority does not support contention that clothing worn by suspect in photo array renders it impermissibly suggestive). We therefore overrule his second point of error.

Motion to Suppress Statements to Law Enforcement

In addition to challenging the trial court's refusal to suppress the pretrial identification, Torres contends the trial court erred in denying his motion to suppress statements he made to law enforcement following his arrest — specifically, the statements he made while being interviewed by Sergeant Raul Cardenas. Torres argues his statements, which consisted of general information and numerous denials that he killed Mr. Ruiz, should have been suppressed because they were

involuntary.[3] Torres claims that when he was questioned by authorities he was sleep-deprived and suffering pain from a previous injury. Given his condition, Torres insists his statements were involuntary and therefore inadmissible under the Due Process Clause of the United States Constitution and Texas statutory law, specifically Article 38.22 of the Texas Code of Criminal Procedure.[4]

1. Due Process Clause

"A confession may be involuntary under the Due Process Clause only when there is police overreaching." *Oursbourn v. State*, 259 S.W.3d 159, 169 (Tex. Crim. App. 2008). To render a statement involuntary, the overreaching must rise to a level where the defendant's will was "overborne and his capacity for self-determination critically impaired." *Contreras v. State*, 312 S.W.3d 566, 574 (Tex. Crim. App. 2010) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973)). Absent some sort of police misconduct that is causally related to the defendant's statements, there is no deprivation of due process of law by a state actor, and therefore, no due process violation. *Oursbourn*, 259 S.W.3d at 170. In *Colorado v. Connelly*, the Supreme Court specifically held that if there is no police coercion or overreaching, there is no due-process violation. *Id.* (citing 479 U.S. 157, 164 (1986)). Thus, in the absence of police misconduct causally related to the confession, there is "simply no basis for concluding that any state actor has

[3] This case does not involve a confession or other inculpatory statements by Torres. Rather, the statements Torres sought to suppress were exculpatory statements — denials of any involvement in the murder and explanations as to why he could not have committed the offense. The Texas Court of Criminal Appeals has held that Article 38.22 makes no distinction between exculpatory and inculpatory statements with regard to voluntariness, but applies to all statements that might be used in some way to incriminate the defendant. *See Harrison v. State*, 556 S.W.2d 811, 813 (Tex. Crim. App. 1977), *overruled on other grounds*, *Girndt v. State*, 623 S.W.2d 930, 933 (Tex. Crim. App. 1981). Here, Torres contends his denials, in the face of the State's evidence, served to incriminate him. For purposes of our analysis, we accept this contention.

[4] There are three theories by which a defendant may claim his statement was involuntary: (1) failure to comply with the mandates of *Miranda v. Arizona*, 384 U.S. 436 (1966) — as expanded in Article 38.22, sections 2 and 3 of the Texas Code of Criminal Procedure; (2) violation of the Due Process Clause; or (3) failure to comply with article 38.22, section 6 of the Code of Criminal Procedure — general voluntariness. *Oursbourn v. State*, 259 S.W.3d 159, 169–72 (Tex. Crim. App. 2008). After reviewing his substantive argument, we hold that Torres asserts a violation of due process and Article 38.22, section 6. He makes no contention regarding his *Miranda* rights.

deprived a criminal defendant of due process of law." *Id.* (quoting *Connelly*, 479 U.S. at 164). Thus, due-process claims of involuntariness concern an objective assessment of police behavior, not an assessment of the defendant's state of mind at the time of the statement. *See id.* at 170–71.

Torres contends his statements to law enforcement were involuntary because he was sleep-deprived and suffering from a painful injury, a burn he sustained a month or so before he was arrested. Torres's theory that his statements were involuntary is based on his state of mind, not police misconduct. *See id.* We have reviewed the entire interrogation videotape and the testimony from the suppression hearing. The record shows Torres was given warnings pursuant to *Miranda*, was permitted to sleep for more than two hours, was offered and given water, and was permitted to call his father. There is nothing in the record reflecting misconduct or overreaching by law enforcement, and notably, Torres does not argue that any occurred. An objective assessment of police behavior in this case belies Torre's claim of involuntariness under the Due Process Clause. *See id.* Thus, we hold the trial court did not err in denying Torres's motion to suppress based on a violation of due process.

2. Article 38.22 of the Code of Criminal Procedure

When, as here, a defendant claims his statements were involuntary due to his state of mind, those claims are "to be resolved by state laws governing the admission of evidence." *Id.* at 171. In Texas, Articles 38.21 and 38.22 govern a voluntariness inquiry. *Id.* Although claims of involuntariness under Article 38.22 may be based on police overreaching, which we have already determined did not occur in this case, they may also be based on the defendant's state of mind. *See id.* at 172. The Texas Court of Criminal Appeals has construed section 6 "as protecting people from themselves because the focus is upon whether the defendant voluntarily made the statement." *Id.* Thus, the question is whether it appears — as Article 38.21 requires — that the statement was freely and voluntarily made without compulsion or persuasion. *Id.* As the court noted in

Oursbourn, statements "given under the duress of hallucinations, illness, medications, or even a private threat, for example, could be involuntary" under Articles 38.21 and 38.22. *Id.*

We assess the voluntariness of a statement by considering the totality of the circumstances under which it was made. *Delao v. State*, 235 S.W.3d 235, 239 (Tex. Crim. App. 2007) (citing *Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991)); *Williams v. State*, 502 S.W.3d 262, 272 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). In this consideration, we take into account the defendant's experience, background, and conduct, as well as his characteristics. *Umana v. State*, 447 S.W.3d 346, 351 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (citations omitted).

The totality of the circumstances supports the trial court's determination that Torres's statements were voluntary. Although Torres might have been sleepy and in some pain due to his month-old injury, the record shows he was advised of his rights, indicated he understood his rights, and consented to questioning. He appeared animated during questioning, providing answers to the questions posed and formulating exculpatory, defensive responses. Although Torres was in the interrogation room for approximately four and a half hours — from approximately 5:25 p.m. to 9:52 p.m., he was left alone much of that time, which he spent sleeping. More specifically, Torres spoke to Sergeant Cardenas from 5:42 p.m. to 6:37 p.m. — less than an hour. Thereafter, Torres was left alone until approximately 9:02 p.m. — almost two hours — and he slept most of that time. At approximately 9:05 p.m., Torres invoked his right to counsel and asked to call his father. Sergeant Cardenas ceased the interrogation and left the room. Torres spoke to his father on the telephone for several minutes. When Sergeant Cardenas re-entered the interview room, he spoke to Torres's father on the telephone at Torres's request and then began the process of removing Torres's clothing for submission to forensics. At no time during the interview did the sergeant threaten Torres — he never even raised his voice — nor was the interview otherwise coercive in nature. True, Torres had a bandage on his arm, which he stated was covering a burn he suffered a

month earlier, but he never mentioned the injury until Sergeant Cardenas inquired about the blood on his pants. At that point, Torres described the injury as a burn, stating "it hurts a lot right now . . . still real bad." Yet, at numerous times during the course of the interview and while he spoke to his father, Torres can be seen waving his arm around without any appearance of discomfort. He never asked for medical attention until the very end of the interview when he was told he was being taken to jail. At that time, Sergeant Cardenas advised the burn would be treated.

Accordingly, considering the totality of the circumstances, we hold the trial court did not abuse its discretion in denying Torres's motion to suppress pursuant to his claim of involuntariness under Article 38.22 of the Code of Criminal Procedure.

Exclusion of Evidence

In his final point of error, Torres contends the trial court erred in excluding evidence of the victim's gang affiliation. Torres argues he should have been permitted to introduce evidence showing Mr. Ruiz was a member of the Mexican Mafia involved in extortion activities, which resulted in his murder. Torres argues the exclusion of this gang-affiliation evidence denied him the right to present a complete defense. Alternatively, he argues the trial court erred because the evidence was relevant and not overly prejudicial.

Standard of Review

An appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* Before a reviewing court may reverse the trial court's decision, "it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Henley*, 493 S.W.3d at 83 (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)).

Moreover, a trial court's evidentiary ruling will be upheld if it was correct on any theory of law applicable to the case. *Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016).

Application

At trial, Torres sought to present testimony from Corporal Steven Womble of the Bexar County Sheriff's Department. Corporal Womble is a custodian of records for Bexar County Classification. The record shows Torres sought to secure the introduction of a 2004 gang status sheet through Corporal Womble. In that sheet, the victim admitted his affiliation with the Mexican Mafia. The State objected to the admission of the evidence, claiming it was irrelevant and prejudicial. The trial court sustained the State's objection and refused to allow Torres to authenticate the gang status sheet through Corporal Womble or admit it into evidence. Torres contends the trial court erred in excluding this evidence, arguing — as he did below — that the exclusion precluded him from presenting a complete defense. Specifically, he claims he was not able to present his defensive theory that someone named A.D. murdered the victim, and the murder was a result of the victim's association with the Mexican Mafia and its extortion activities.

1. Right to Present a Meaningful Defense

We agree a defendant is constitutionally guaranteed the right to "'a meaningful opportunity to present a complete defense.'" *Nevada v. Jackson*, 569 U.S. 505, 505 (2013) (per curiam) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). However, an erroneous evidentiary ruling rarely rises to the level of denying the fundamental right to present a meaningful defense. *Potier v. State*, 68 S.W.3d 657, 663 (Tex. Crim. App. 2002). An erroneous evidentiary ruling denies a defendant his right to present a complete defense when the ruling is clearly erroneous and excludes "otherwise relevant, reliable evidence which forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Wiley v. State*, 74 S.W.3d 399, 405 (Tex. Crim. App. 2002). Here, we hold Torres was not denied the right to present his chosen

defense because the thrust of the evidence he sought to admit was admitted elsewhere during trial, which allowed Torres to argue, as he did, that A.D. murdered Mr. Ruiz because Mr. Ruiz extorted money from A.D. as part of Mr. Ruiz's gang activities with the Mexican Mafia. Thus, Torres was fully able to present, and did present, his chosen defense.

Sergeant Cardenas testified he was told by Torres's girlfriend, Kimberly, and Torres that Mr. Ruiz was a member of the Mexican Mafia. Kimberly testified Mr. Ruiz was "an ex-member" of the Mexican Mafia and "he was doing stuff that he wasn't even supposed to be doing." When asked if Mr. Ruiz was trying to extort money from people, Kimberly admitted he was. She also testified she had written in letters that A.D. killed Mr. Ruiz. Given this evidence, we hold the trial court could have, in its discretion, concluded the twelve-year-old, gang-affiliation sheet was repetitive and excluded it on this basis. *See Crane*, 476 U.S. at 689–90 (holding that Constitution permits judges to exclude evidence that is repetitive, marginally relevant, or that poses undue risk of harassment, prejudice, or confusion of issues). Moreover, given the testimony that was admitted, the exclusion of the 2004 gang-affiliation sheet did not preclude Torres from presenting his chosen defense.

Torres argued to the jury that A.D. killed Mr. Ruiz because Mr. Ruiz was extorting money for a gang:

> [Kimberly] said that A.D. shot Roy and she said that many times in letters. . . . Use your common sense like the D.A. asked you. We know that [the victim] must have been in a gang. We did hear from Kimberly that A.D. is the one that shot Roy because Roy was extorting money from other people as being a member of the gang. . . . In this case, ladies and gentlemen, I believe that the State did not meet their burden of proof, they did not prove to you that my client, Antonio Torres, was the person that killed Roy Ruiz on the night in question.

This excerpt establishes Torres presented the defense that A.D., not Torres, shot Mr. Ruiz based on Mr. Ruiz's alleged extortion activities relating to his gang affiliation. This is the exact defense Torres contends he was precluded from presenting based on the exclusion of the gang-affiliation

sheet. Accordingly, we hold the exclusion of the 2004 gang-affiliation sheet did not preclude Torres from exercising his constitutionally guaranteed right to "'a meaningful opportunity to present a complete defense.'" *See Jackson*, 133 S.Ct. at 1992.

2. Relevancy and Prejudice

Torres contends that even if he was not denied his constitutional right to present a complete defense, the trial court erred in refusing to admit the gang-affiliation evidence because it was relevant and its probative value was outweighed by its prejudicial effect. *See* TEX. R. EVID. 401, 403. We hold that even if the trial court erred in excluding the gang-affiliation status sheet under the Texas Rules of Evidence, Torres has not demonstrated the exclusion affected his substantial rights. *See* TEX. R. APP. P. 44.2(b) (stating that unconstitutional error that does not affect substantial rights must be disregarded). As detailed above, the same evidence Torres complains was improperly excluded — Mr. Ruiz's gang affiliation and extortion activity — was admitted through the testimony of two other witnesses. Torres specifically argued to the jury that someone other than Torres killed Mr. Ruiz because of gang affiliation and extortion activity. Thus, the excluded evidence was cumulative of other evidence that was admitted and formed at least a partial basis for Torres's argument that someone else killed Mr. Ruiz. Accordingly, we hold any error in excluding the 2004 gang-affiliation sheet does not constitute reversible error. *See id*.

CONCLUSION

Based on our analysis, we hold the trial court did not err in denying Torres's speedy trial motion, motion to suppress the out-of-court identification, motion to suppress his statements to law enforcement, and did not err in excluding evidence of the victim's gang affiliation. Accordingly, we overrule Torres's points of error and affirm the trial court's judgment.

Marialyn Barnard, Justice

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