In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-08-00369-CR

DANNY NICHOLAS SPENCE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 07-01-00749-CR

MEMORANDUM OPINION

A jury convicted Danny Nicholas Spence of capital murder. *See* TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon Supp. 2009). Because the State did not seek the death penalty, Spence's conviction resulted in an automatic punishment of life imprisonment without the possibility of parole. *See* TEX. CODE CRIM PROC. ANN. art. 37.071, § 1 (Vernon Supp. 2009); TEX. PEN. CODE ANN. § 12.31(a)(2) (Vernon Supp. 2009). Spence raises four issues on appeal. Issues one, two, and three complain of the denial of his

motion to suppress and the admission into evidence of three custodial statements. The fourth issue contends the trial court erred in refusing to answer a question from the jury during jury deliberations. We affirm the judgment of the trial court.

BACKGROUND

At around 7:45 a.m. on January 1, 2007, Houston Police Department ("HPD") officers responded to a reported burglary in progress in Houston. Spence and his then-girlfriend, Erin Quigley, were arrested as they emerged from the burglarized residence. Quigley was carrying a vehicle's remote-control key that, when activated by one of the officers, unlocked a white pick-up truck parked nearby. The truck belonged to Travis Zielenski, who had been found murdered in his apartment in The Woodlands by Montgomery County Sheriff's Office ("MCSO") deputies the previous day.

HPD officers notified MCSO authorities and then transported Spence and Quigley to HPD's homicide division. Police first interviewed Erin Quigley and then later conducted Spence's interrogation. Spence was interviewed on three separate occasions; the interviews were recorded on videotape. Spence sought to suppress the videotaped statements. The trial court viewed the videotapes and heard testimony during the suppression hearing from Spence, Detective Hahs (MCSO), and Detective Chappell (HPD).

The January 1, 2007, videotape shows that prior to beginning the interview, Detective Hahs read Spence his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436,

444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2 (Vernon 2005). Spence consented to the interview. After approximately one hour and nine minutes, the first portion of the January 1 interview ended.

Detective Hahs testified he terminated the interview and left the room because Spence had asked for an attorney. Hahs explained that a short time later Detective Chappell informed Hahs that Spence wanted to talk to Hahs again. Hahs testified he never played any recording of Erin Quigley's interview for Spence, although Hahs agreed that it appeared someone had done so. The videotape reveals that Hahs again read Spence his *Miranda* rights before resuming the January 1 interview.

Detective Chappell testified he was in charge of handling the room arrangements and jail transfers on January 1. He understood that Hahs stopped the interview with Spence after Spence requested an attorney. When Hahs left the interview room, Chappell entered the room. Chappell testified Spence stated he wanted to talk to Hahs again. Chappell indicated he left the room and informed Hahs of Spence's request. Chappell testified he did not take a hand-held recorder into the interview room, never played any recording for Spence, and never discussed Quigley's interview with Spence, Spence's invocation of his right to an attorney, or the waiver of that right.

Spence testified that after Detective Hahs left the interview room, another officer (identified as Chappell) entered the room and asked if Spence knew his rights and if he was sure he wanted an attorney. Spence indicated he answered "yes" to both questions.

Spence testified Chappell then produced a hand-held tape recorder and played a portion of Quigley's interview with Detective Hahs for approximately thirty seconds to one minute. Spence indicated that the contents of the audiotape were "not good" for him. Chappell turned off the tape recorder and asked Spence again if he was sure he wanted an attorney in light of what he had just heard on the tape. Spence stated Chappell added that "the evidence would wind up coming out in front of a jury and it would not look good if [Spence] didn't have anything else to say really about anything that [Quigley] had said." Spence stated he then told Chappell he would like to talk to Detective Hahs again. Spence testified that the playing of Quigley's tape-recorded interview influenced his decision to resume the January 1 interview with Detective Hahs and to participate in the subsequent interviews with Hahs and Officer Mark Handler.

Spence's account of the events surrounding the alleged playing of the abbreviated Quigley tape is inconsistent. He first indicated the Quigley tape was played in the same room where Hahs had been interrogating him. Spence changed his account and stated Chappell moved him to another room and played the Quigley tape there. Then, Spence indicated that the second part of the January 1 interview did not occur in a different room after all. Still later, Spence seemed to testify again about a room change.

At the conclusion of the suppression hearing, Spence's attorney argued that any further statements made after Spence invoked his right to an attorney and after Hahs left the room were in violation of his constitutional rights. The attorney argued that Spence's

reinitiation of contact with Hahs at the January 1 interview was coerced, and not done knowingly, intelligently, and voluntarily. The trial court orally found that Spence knowingly, intelligently, and voluntarily waived his right to counsel and admitted the January 1 videotaped statement (Exhibit 72) in its entirety into evidence. Spence did not object to the first hour and nine minutes of the videotape.

Later in the trial, the State offered into evidence Detective Hahs's second custodial interview (State's Exhibit 111), video-recorded on January 8, 2007. The record shows that Spence contacted a friend six days after the first interview and asked her to tell Hahs that Spence wanted to speak with him again. Hahs began the January 8 interview by confirming that Spence wanted to talk to him. Hahs then informed Spence of his *Miranda* rights, and Spence indicated he understood and would waive those rights and speak to Hahs. At trial, Spence objected to the admission of State's Exhibit 111 based upon his prior challenges to State's Exhibit 72. He contended that the constitutional violation in the January 1 interview -- failure to provide him counsel as he had requested -- carried over to and tainted the January 8, 2007, interview as well. The trial court overruled Spence's objections and admitted State's Exhibit 111 into evidence.

The trial court also admitted into evidence a videotape recording of the January 24 interview of Spence by polygraph examiner Mark Handler. Spence refused to take the polygraph examination without first talking to an attorney. Spence nonetheless indicated a willingness to talk to Handler, but declined to submit to a polygraph test. Handler

advised Spence of his *Miranda* rights. Spence indicated he understood his rights and agreed to the interview. At trial, Spence's counsel objected to the admission of the January 24 interview as follows: "Your Honor, the defense would object, as [with] the previous interrogations of my client, and reurge the same objections. We ask the Court to deny the admissibility of this exhibit." Spence further objected that the taint from the first interview carried over to the third interview. The trial court overruled the objections and admitted State's Exhibit 113 into evidence.

This Court abated the appeal on original submission and remanded for the trial court's entry of findings of fact and conclusions of law. A summary of the trial court's findings is as follows:

> Detective Hahs, Detective Chappell, and Officer Mark Handler were credible witnesses.
>
> Spence was not a credible witness, although "some portions of his testimony were credible."
>
> One or more unidentified police officers played part of co-defendant Quigley's audio-recorded interview for Spence at some point before his own video-recorded interview began.
>
> Neither Hahs nor Chappell was present for or aware of the Quigley tape being played for Spence.
>
> Spence invoked his right to counsel approximately one hour and nine minutes into the [January 1, 2007] interview.
>
> The audio-recording of Erin Quigley's interview was not re-played for Spence following his invocation of his right to counsel.

> Based on the credible testimony of Det. Hahs and Det. Chappell and the contents of Spence's video-recorded interview from January 1st, Spence's reinitiation of communication with Hahs was voluntary.
>
> Based on the contents of Spence's video-recorded interview from January 1st, Spence knowingly and intelligently waived his rights after reinitiating communication with Hahs.
>
> Prior to each of Spence's interviews, he was advised of his *Miranda* rights and indicated that he understood his rights.

The trial court denied Spence's motion to suppress and admitted the statements of January 1, 8, and 24, 2007, into evidence.

APPELLATE REVIEW STANDARD

We review a trial court's decision to grant or deny a motion to suppress under an abuse of discretion standard. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Id.* The Court of Criminal Appeals has held as follows:

> [T]he trial court is the 'sole and exclusive trier of fact and judge of the credibility of the witnesses' and the evidence presented[,] . . . particularly where the motion is based on the voluntariness of a confession. [G]reat deference is accorded to the trial court's decision to admit or exclude such evidence, which will be overturned on appeal only where a flagrant abuse of discretion is shown.

Delao v. State, 235 S.W.3d 235, 238 (Tex. Crim. App. 2007) (footnotes omitted).

ADMISSIBILITY OF STATEMENTS – CUSTODIAL INTERROGATION

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any

criminal case to be a witness against himself[.]" U.S. CONST. amend. V. In *Miranda*, the United States Supreme Court adopted a set of prophylactic procedures to protect a suspect's Fifth Amendment rights. 384 U.S. at 467; *see also Montejo v. Louisiana*, __ U.S. __, 129 S.Ct. 2079, 2085-87, 2089-92, 173 L.Ed.2d 955 (2009) (discussing Court-created prophylactic rules to protect a constitutional right). Prior to custodial interrogation, police officers must warn the suspect that he has, among other rights, the right to remain silent and a right to have an attorney present. *Miranda*, 384 U.S. at 444. After a suspect has been informed of his rights, the interrogation must cease if the suspect at any point prior to or during the interrogation indicates that he wishes to remain silent. *Id.* at 473-74. Likewise, if the suspect states that he wants the assistance of counsel, the interrogation must cease until an attorney is present. *Id.* at 474. A suspect can waive these rights. *Id.* at 475.

When a suspect expresses his right to terminate further police questioning unless he has assistance of counsel, a valid waiver of this right cannot be established merely by showing that the suspect responded later to police-initiated questioning. *See Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *see also Maryland v. Shatzer*, __ U.S. __, 130 S.Ct. 1213, 1219-21, 175 L.Ed.2d 1045 (2010). "The *Edwards* rule is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights[.]'" *Montejo*, 129 S.Ct. at 2085 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990)). The State must establish (1)

that following invocation of the right to counsel, the suspect initiated further communication with the police, and (2) that, after initiating this further communication, the suspect then validly waived his previously asserted right to counsel. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983); *see also Cross v. State*, 144 S.W.3d 521, 524 (Tex. Crim. App. 2004) ("[W]hen a suspect has invoked his right to counsel, but then voluntarily reinitiates conversation with the police and expressly waives his right to counsel, the *Edwards* rule has been satisfied."). Once the State establishes the two-step test in *Bradshaw*, "the suspect has countermanded his original election to speak to authorities only with the assistance of counsel." *Cross*, 144 S.W.3d at 527.

Spence relies on *Missouri v. Seibert*, which holds that *Miranda* warnings given mid-interrogation, after the defendant has given an unwarned confession, are ineffective, and a confession repeated after warnings were administered is inadmissible at trial. *Missouri v. Seibert*, 542 U.S. 600, 604, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). The facts in *Seibert* revealed a "police strategy adapted to undermine the *Miranda* warnings." *Id*. at 616. Here, as discussed below, the record does not show a police strategy of withholding warnings until after an interrogation succeeds in eliciting a confession. *See id*. Spence also relies on *Martinez v. State*, 272 S.W.3d 615 (Tex. Crim. App. 2008). In *Martinez*, appellant "gave both statements to law-enforcement officials after his formal arrest pursuant to an arrest warrant, and both statements were given at a police station."

Id. at 624. The Court found that the "absence of *Miranda* warnings at the beginning of the interrogation process was not a mistake based on the interrogating officers' mistaken belief that appellant was not in custody, but rather a conscious choice." *Id.* Here, unlike the officers in *Seibert* and *Martinez*, the police authorities advised Spence of his *Miranda* rights before each of the three custodial statements.

ANALYSIS

At trial, Spence challenged each of the videotaped statements as being the product of an involuntary waiver of his right to an attorney, after he had invoked that right during the January 1 custodial interrogation. He makes a similar argument on appeal.

Spence also contends on appeal that the *Miranda* re-warning of Spence (given after the first part of the January 1 interview), without an *express* waiver on his part, was a technique used to undermine *Miranda* protection and was not sufficient to remedy the *Edwards* violation. However, Spence did not object below to the adequacy of the *Miranda* warnings themselves for the three custodial statements and did not argue that an express waiver is required by *Miranda* and article 38.22 of the Code of Criminal Procedure. In this respect, his complaint on appeal does not comport with the challenge below. He has waived this challenge. *See* TEX. R. APP. P. 33.1; *see, e.g.*, *Resendez v. State*, 306 S.W.3d 308, 312-17 (Tex. Crim. App. 2009); *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004) (noting an objection stating one legal basis may not be used to support a different legal theory on appeal).

Moreover, the oral-confession statute, article 38.22, section 2(a) of the Texas Code of Criminal Procedure, does not require an express verbal statement from an accused that he waives his rights prior to giving a statement. *Barefield v. State*, 784 S.W.2d 38, 40-41 (Tex. Crim. App. 1989), *disapproved of on other grounds by Zimmerman v. State*, 860 S.W.2d 89, 94 (Tex. Crim. App. 1993); *see also Berghuis v. Thompkins*, No. 08-1470, 2010 WL 2160784, at *10 (U.S. June 1, 2010) ("The prosecution . . . does not need to show that a waiver of *Miranda* rights was express."). "[A] waiver [of] one's right to an attorney may be found in an express written or oral statement or may be inferred from actions and words of the person interrogated." *Barefield*, 784 S.W.2d at 41. The voluntariness of a confession is assessed by looking at the totality of the circumstances. *Id*.

A review of issues one through three requires that we consider whether, on his own initiative, Spence reinitiated contact with the authorities after he invoked his right to counsel, and whether he subsequently voluntarily waived his right to counsel after the resumption of the January 1 interview and the later January 8 and 24 interviews. In order to initiate further communication, the accused must of his own volition convey to the authorities a willingness and a desire to talk about the investigation. *See, e.g., Cross*, 144 S.W.3d at 525-27; *see also Bradshaw*, 462 U.S. at 1046. If the suspect initiates further communication, his previously invoked right may be knowingly and intelligently waived when the police again inform him of his rights and he states that he understands them. *See Etheridge v. State*, 903 S.W.2d 1, 18 (Tex. Crim. App. 1994).

The crux of Spence's argument appears to be that the "modified procedures" employed by the police (allegedly playing a portion of the Quigley tape between the first and second interviews on January 1) prompted him to reinitiate the interview on January 1 and rendered involuntary any alleged waiver of his right to counsel and any subsequent statements. Spence's argument hinges on the determination of a question of fact: Did Detective Chappell play a portion of the Quigley tape for Spence between the two portions of the January 1 interview and thereby prompt Spence to reinitiate contact with authorities?

The testimony is conflicting. Detective Hahs testified he never played the Quigley tape for Spence. Detective Chappell testified he never played the Quigley tape for Spence and never discussed the subject with him. Spence testified Chappell played the Quigley tape in the "gap" between the first and second interviews on January 1. Spence explained that this procedure caused him to agree to the remaining interviews. The trial court heard the testimony in court and viewed the videotaped statements. Based on the record before it and inferences drawn therefrom, the trial court could have reasonably concluded someone played part of the Quigley tape prior to Spence's initial custodial interview on January 1, and that Spence's decision to reinitiate the January 1 interview after invoking his right to counsel was voluntary. *See Carter v. State*, No. PD-0606-09, 2010 WL 1050319, at *7 (Tex. Crim. App. Mar. 24, 2010). The first prong of *Edwards* is satisfied: following invocation of his right to counsel, the suspect initiated further communication with police.

Although Spence has not preserved the challenge regarding express waiver, we nonetheless must consider whether the State satisfied the second *Edwards* prong: After initiating further communication with the police, did Spence validly waive his previously asserted right to counsel? *See Bradshaw*, 462 U.S. at 1046. For a custodial statement to be admitted into evidence, the State must show that a suspect knowingly, intelligently, and voluntarily waived his Miranda rights. *See Joseph v. State*, No. PD-1111-08, 2010 WL 625072, at **1-3 (Tex. Crim. App. Feb. 24, 2010) (citing *Miranda*, 384 U.S. at 444, 475). The State's burden of proof is by a preponderance of the evidence. *Id*. at *3. "'[T]he general rule [is] that neither a written nor an oral express waiver is required.'" *Id*. (quoting *Watson v. State*, 762 S.W.2d 591, 601 (Tex. Crim. App. 1988)). "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 384 U.S. at 475. "But a waiver need not assume a particular form and, in some cases, a 'waiver can be clearly inferred from the actions and words of the person interrogated.'" *Joseph*, 2010 WL 625072, at *3 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)). "The question is not whether Appellant 'explicitly' waived his *Miranda* rights, but whether he did so knowingly, intelligently, and voluntarily." *Id*. "The 'totality-of-the-circumstances approach' requires the consideration of 'all the circumstances surrounding the interrogation,' including the defendant's experience, background, and conduct." *Id*. (quoting *Fare v. Michael C.*, 442

U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

Under the standard set out in *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986), we consider two factors:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (citing *Fare*, 442 U.S. at 725). Hahs and Handler orally advised Spence of his *Miranda* rights; those warnings informed Spence that he had the right to remain silent and that he had the right to an attorney. During the second half of the January 1 interview and during the January 8 and 24 interviews, Spence did not request an attorney or ask that the interviews be stopped. The videotapes of the interviews do not show evidence of intimidation or coercion. Spence willingly participated in the interviews. Spence's conduct during those portions of the interviews reveals he also had the necessary level of comprehension to waive his *Miranda* rights. When asked if he understood his rights, Spence responded affirmatively. As stated in *Joseph*, the warnings "made him fully aware of the rights set forth in *Miranda* and Article 38.22, as well as the consequences of abandoning those rights." *Joseph*, 2010 WL 625072, at *4. Based on the record before us, we conclude that Spence voluntarily, knowingly, and intelligently waived his right to

have counsel during the January 1, 8, and 24 interrogations under *Miranda* and article 38.22. The second prong of *Edwards* was satisfied. The trial court did not err in denying the motions to suppress and properly admitted the three videotaped statements.

COMMUNICATION BETWEEN JURY AND TRIAL COURT

In issue four, Spence argues the trial court erred by refusing defense counsel's request to answer the written question that the jury submitted to the trial court during jury deliberations. The jury asked to "know the law regarding under what circumstances a defendant who has asked for a lawyer can be reinteregated [sic]." The trial court had given an article 38.23 instruction in paragraph III of the court's charge. *See* TEX. CODE CRIM. PROC. art. 38.23 (Vernon 2005). The trial court answered, "Please refer to the Court's Charge and continue with your deliberations." Spence asserts that the trial court's refusal to direct the jury to the applicable paragraph in the jury charge "disable[d]" the article 38.23 charge and was reversible error.

Article 36.27 of the Texas Code of Criminal Procedure governs communication between the jury and the trial court. TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 2006). Spence does not argue that the trial court failed to follow the procedure set out in article 36.27 or that the trial court's response to the jury was incorrect. He argues the trial court should have been more specific in its response. If the trial court responds substantively to a jury question during deliberations, the communication essentially amounts to an additional or supplemental jury instruction. *Daniell v. State*, 848 S.W.2d

145, 147 (Tex. Crim. App. 1993). However, "a communication from the [trial] court that merely refers the jury to the original charge is not an 'additional instruction."' *Dixon v. State*, 64 S.W.3d 469, 475 (Tex. App.--Amarillo 2001, pet. ref'd). Here, the trial court referred the jury to the original charge. Spence does not provide us with case law or statutory authority indicating the trial court must specify the particular portion of the charge that applies to the jury's question, and we have found none. *See Payne v. State*, 516 S.W.2d 675, 676 (Tex. Crim. App. 1974) (finding no error in trial court's referring jury to court's charge after jury submitted written question to trial court during deliberations); *see generally Gamblin v. State*, 476 S.W.2d 18, 20 (Tex. Crim. App. 1972). We overrule Spence's issues and affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on September 17, 2009
Opinion Delivered June 23, 2010
Do not publish

Before Gaultney, Kreger, and Horton, JJ.