In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00229-CR

DALE THOMAS BURNS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 46th District Court
Hardeman County, Texas
Trial Court No. 4280, Honorable Dan Mike Bird, Presiding

April 1, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK, and PIRTLE, JJ.

Dale Thomas Burns appeals his conviction for unlawfully possessing body armor. His three issues involve the sufficiency of the evidence, the admission of an audio recording, and the trial court's decision to permit the jury to view a transcription of excerpts from the aforementioned recording. The recording occurred after appellant was arrested and while he awaited transport to jail. In it, he can be heard conversing with various law enforcement officers about a "bullet proof vest" he bought and wears,

and his penchant for collecting discarded personalty, among other things. We affirm the conviction.

Recording

We will review appellant's complaint about the recording first. He contends "that certain voices and certain statements on the audio . . . are *unidentified and inaudible* and, therefore, [it] does not comply with TCCP art. 38.22, Sec. 3(a) (3) & (4) . . .." (emphasis added). Because it "does not comply," the trial court allegedly should have suppressed it.

Among other things, art. 38.22, § 3(a) of the Texas Code of Criminal Procedure prohibits the admission of an oral statement by the accused "made as a result of custodial interrogation" unless the recording is accurate and unaltered and "all voices on the recording are identified . . ." TEX. CODE CRIM. PRO. ANN. art. 38.22, § 3(a)(3) & (4) (West Supp. 2015). Though the requirements of the foregoing statute must be strictly construed, Id. art. 38.22, § 3(e), "only the voices that are material" need be identified. Id. art. 38.22, § 3(e)(1). Moreover, the recording itself need not identify those voices; their identification by a witness at trial suffices. *Gomez v. State*, No. 08-12-00044-CR, 2014 Tex. App. LEXIS 501, at *12-13 (Tex. App.—El Paso January 15, 2014, pet. ref'd) (mem. op., not designated for publication); *Stewart v. State*, No. 04-08-00274-CR, 2009 Tex. App. LEXIS 5594, at *14 (Tex. App.—San Antonio July 22, 2009, pet. ref'd) (mem. op., not designated for publication); *accord, Parker v. State*, No. 02-12-00348-CR, 2013 Tex. App. LEXIS 6409, at *5-6 (Tex. App.—Fort Worth May 23, 2013, pet. ref'd) (mem. op., not designated for publication) (stating that "[e]ven if we were to address the merits of the issue, . . . Bales testified that he had watched the video

recording of Parker's post-warning statements and that the video fairly and accurately depicted what occurred. Further, Bales was able to identify the voices on the recording and recounted what was said. This is sufficient to meet the admissibility requirement of article 38.22, section 3(a)(4).")

Here, the recording did not itself identify the voices heard. But, they were identified by the individual operating the recording device at the time, that is, Trooper Henry. Furthermore, their identification occurred at a pre-trial hearing on appellant's motion to suppress the recording. Trooper Henry appeared as a witness at that hearing and named the speakers who were conversing.

As for the matter of the recording containing inaudible parts, we again cite *Parker v. State*. There, the court had before it a similar complaint and interpreted it as involving the accuracy of the recording. *Parker v. State*, 2013 Tex. App. LEXIS 6409, at *7. Thereafter, the court listened to the recording, and determined that the complained of statements "were clearly understandable . . .." So too did it cite *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981) for the proposition that "[r]ecordings must be excluded only if the inaudible or unintelligible portions 'are so substantial as to render the recording untrustworthy,' and that determination is 'left to the sound discretion of the trial judge.'" *Parker v. State*, 2013 Tex. App. LEXIS 6409, at *7-8. Given these circumstances, the *Parker* court determined that the accuracy prong of art. 38.22, § 3(a) was satisfied.

Of further note is the opinion of our Court of Criminal Appeals in *Maldonado v. State*, 998 S.W.2d 239 (Tex. Crim. App. 1999). It too was dealing with the application of art. 38.22, § 3(a) and addressing whether various "anomalies" or "over-records" in a

recorded statement warranted the latter's exclusion. In resolving the matter, the court observed that "[t]his inquiry distills to a question of witness credibility…." *Id.* at 245. That is, "did the State use the over-records to intentionally attempt to disguise editing the tape . . . to excise evidence of inappropriate promises . . ., or . . . did these brief interruptions occur accidentally, obscuring noting of value in the dialogue." *Id.* Because adequate evidence supported "the latter conclusion that the anomalies were merely inadvertent and did not affect the overall reliability of the tape," the recording was deemed "accurate" and admissible. *Id.* at 245-46.

Distilling both *Parker* and *Maldonado*, we observe that the reason for the defects (or anomalies or inaudible portions) is considered as well as whether their nature or number make the recording untrustworthy or unreliable. And, given that the initial decision to admit or exclude the evidence lies with the trial court, that court considers these indicia in exercising its discretion on what to do. If the appellate record contains evidence supporting its decision, then we defer to it.

While it is true that the recording at bar contains a number of inaudible portions, much of it is quite audible. Included in those audible portions are rather clear statements by appellant that a bullet proof vest was in the house and that he bought and wore it. Other audible portions dealt with appellant's penchant for collecting discarded personalty found at the residence where he was arrested. Additionally, in listening to the recording, we found nothing suggestive of alteration or tampering. Rather, those portions which were inaudible appeared to be so because of appellant's diction, the speed with which he spoke, and his distance from the microphone. To this we add the testimony of Trooper Henry about the recording being an accurate depiction

of the dialogue. These circumstances lead us to conclude that the trial court could well have determined that the evidence at issue was trustworthy or reliable and that art. 38.22, § 3(a)(3) was satisfied. Consequently, we cannot say that its decision constituted an instance of abused discretion.

Transcription

Next, appellant argues that the trial court abused its discretion by "erroneously overruling Appellant's TRE 403 objection and allowing the State to use 'transcripts' of the mostly inaudible portions of the objected to audio statement of Appellant as demonstrative exhibits before the jury." The transcripts in question were three in number and various verbal exchanges. One was between appellant and Trooper Henry, another between appellant and Deputy Biddy, and a third between appellant and Special Agent Rangel. Each transcript varied in length, but none was over three pages long. In resolving whether the decision to admit them was wrong, we turn to precedent.

An objection to the use of transcripts of a partially inaudible recording at trial was also made in *Garrett v. State*, 658 S.W.2d 592 (Tex. Crim. App. 1983). According to the appellant, their use constituted improper bolstering. In assessing whether appellant was right, the Court of Criminal Appeals noted that: 1) the transcripts were not admitted into evidence but were simply "made available to the jurors *only* during the playing of the tape"; 2) the jury was instructed that the transcripts were to aid in listening to the tape and then collected; 3) so too was it instructed that if there were a difference between the transcript and recording, "you are to remember what is on the tape and not what is on the transcript"; 4) the witness who made the recording and was party to the conversation testified that the transcript accurately reflected the conversation; and 5)

the use of transcripts "is no different than testimony by that witness that the transcribed words were spoken by the participants at the time of his conversation with appellant." *Id.* at 593-94 (emphasis added). "Under [these] circumstances presented in this case," said the court, "we hold it was not error to overrule the appellant's bolstering objection." *Id.* at 594.

According to subsequent courts, the *Garrett* ruling permits the use of transcripts as jury aids when listening to an audio recording if 1) the appellant is given an advance copy and adequate time to review and contest it, 2) the transcript is not admitted as evidence, and 3) the trial court provides a limiting instruction akin to that in *Garrett*. *Green v. State*, No. 10-09-00241-CR, 2011 Tex. App. LEXIS 2625, at *11 n.2 (Tex. App.—Waco April 6, 2011, no pet.) (mem. op., not designated for publication); *accord, Goodlow v. State*, No. 01-99-00185-CR, 2000 Tex. App. LEXIS 308, at *8 (Tex. App.—Houston [1st Dist.] January 13, 2000, pet. ref'd) (stating that "[t]he jurors may refer to a transcript when: it is not introduced into evidence; the jury is allowed to read the transcript only during the playing of the recording; and the jury is properly instructed regarding the limited use of the transcript.")

Here, appellant received the transcripts prior to trial and had opportunity to attack them in a pretrial hearing. The record further contains evidence from the trooper who made the recording and participated in some of the conversations; he stated that the transcripts accurately reflected what appeared on the recording. That they were not admitted into evidence is unquestioned. Also, their distribution to the jury was accompanied by this limiting instruction:

> The transcript[s] of those audio conversations have been provided but are not evidence in the cause. The transcripts are intended to aid you, if they

> do, in listening to the audio conversations. Any conflict between the two must be resolved in favor of the audio conversation. These transcripts, "A" and "B", you will not be allowed to take those into the jury room for any purpose.

Given these circumstances, we cannot find that the trial court abused its discretion in overruling appellant's objection, even if portions of the recording were inaudible.

Sufficiency of the Evidence

Finally we address appellant's argument that the evidence was insufficient to support his conviction. Two grounds are uttered in support of the contention. First, he asserts that the State failed to prove he possessed the body armor in question. That contention is easily disposed of given appellant's own recorded, verbal admission that he bought and wore the bullet proof vest. His own words are more than enough to permit a rational factfinder to conclude, beyond reasonable doubt, that he exercised custody and control over the item. *See McKinney v. State*, No. 07-15-00116-CR, 2016 Tex. App. LEXIS 1765, at *5 (Tex. App.—Amarillo February 18, 2016, no pet. h.) (mem. op., not designated for publication) (stating that "[w]hen the legal sufficiency of the evidence is attacked, we peruse the record and view all the evidence it contains in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt).

The second ground relates to a purported failure by the State to prove appellant knew it was illegal for a felon to possess a bullet proof vest.[1] According to the penal statute in question, "[a] person who has been convicted of a felony commits an offense if after the conviction the person possesses metal or body armor." TEX. PEN. CODE ANN.

[1] Appellant does not aver that the State failed to prove the vest was body armor.

§ 46.041(b) (West 2011). To paraphrase the court in *Crain v. State*, 153 S.W. 155 (Tex. Crim. App. 1913), "ignorance of [this] law excuses no one." *Id.* at 155 (involving the contention that the appellant did not know that carrying a dismantled pistol in his pockets constituted an illegal act). Indeed, those within the State are charged with constructive knowledge of the criminal law. *See Taylor v. State*, No. 02-08-00405-CR, 2009 Tex. App. LEXIS 8596, at *8-9 (Tex. App.—Fort Worth November 5, 2009, no pet.) (mem. op., not designated for publication) (stating that the defendant was charged with constructive knowledge of the law); *Hayes v. State*, 672 S.W.2d 246, 247-48 (Tex. App.—Beaumont 1984, no pet.) (stating that "[t]he courts of this State have long held that persons are presumed to know the law and ignorance of the law excuses no man," and holding that "an accused may be criminally liable for knowingly carrying a weapon, even if the accused did not know that the carrying of the weapon constituted an offense.") So, the State was not required to prove that appellant, who was a felon, knew he could not lawfully possess body armor. *Hayes v. State*, *supra*.

Each issue is overruled, and we affirm the judgment of the trial court.

Brian Quinn
Chief Justice

Do not publish.