In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00437-CR

DAVID JOE PHOMMYVONG, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 251st District Court
Potter County, Texas
Trial Court No. 73,453-C, Honorable Ana Estevez, Presiding

December 11, 2018

MEMORANDUM OPINION

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

Appellant David Joe Phommyvong appeals his conviction by jury of the felony offense of aggravated assault with a deadly weapon[1] and the resulting sentence of eight years of imprisonment and a $5000 fine.[2] Appellant challenges his conviction through

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[1] TEX. PENAL CODE ANN. §22.02(a)(2) (West 2018).

[2] TEX. PENAL CODE ANN. §12.33 (West 2018) (punishment for a second-degree felony is imprisonment for any term of not more than twenty years or less than two years and a fine not to exceed $10,000).

one issue, arguing the trial court erroneously admitted a statement in violation of *Miranda v. Arizona*.[3] We will affirm.

Background

Appellant does not challenge the sufficiency of the evidence to support his conviction. We will recite only those facts necessary to disposition of his appellate issue. TEX. R. APP. P. 47.1.

The victim of appellant's assault was Chantel Hernandez. Evidence showed appellant and Hernandez had a casual relationship and were together the day of the shooting. Hernandez testified the two argued, and the argument escalated while they were in the car. Hernandez got out of the car and started walking. Appellant pulled up next to her, "grabbed" her arm, twisted it and hit Hernandez in the face. Hernandez pulled away and continued walking. She testified appellant took out his gun and threatened to shoot her. When she responded, "Well, do it," appellant shot her in the leg. Appellant drove off and Hernandez called 911. While initially reluctant to disclose who shot her, she later admitted appellant did so.

Police went to appellant's home. Appellant was arrested, put in handcuffs, and placed in the back of a patrol car. Officer Anthony Merryman asked appellant for consent to search his residence and the vehicles parked in the driveway. Merryman testified appellant did not respond but said something that sounded like "I did it." A portion of the recording of this statement was published to the jury. The parties agree the recording is

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[3] *Miranda v. Arizona,* 384 U.S. 436, 444 (1966).

not clear and Merryman conceded appellant could have said "did" or "didn't."[4] But Merryman testified that his recollection was that appellant admitted committing the offense. Appellant had not yet been advised of his *Miranda* rights at the time he made the statement to Merryman.

Analysis

By his sole issue on appeal, appellant argues the trial court erred in admitting his alleged statement to Merryman that he shot Hernandez in the leg.

Review of a trial court's ruling on a *Miranda*-violation claim requires an appellate court to conduct a bifurcated review. *Alford v. State,* 358 S.W.3d 647, 652-53 (Tex. Crim. App. 2012) (citing *Ripkowski v. State*, 61 S.W.3d 378, 381-82 (Tex. Crim. App. 2001)). Whether custodial questioning constitutes "interrogation" under *Miranda* is a mixed question of law and fact, and we defer to the trial court's fact findings that turn on an evaluation of credibility and demeanor. *Id.* (citation omitted). "If credibility and demeanor are not necessary to the resolution of an issue, whether a set of historical facts constitutes custodial interrogation under the Fifth Amendment is subject to *de novo* review because that is an issue of law: it requires application of legal principles to a specific set of facts." *Id.* (citations omitted).

In *Miranda v. Arizona*, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Alford,* 358 S.W.3d at 653 (citing *Miranda,* 384

[4] Appellant gave no testimony regarding his recollection of his conversation with Merryman.

U.S. at 444). In *Rhode Island v. Innis*, the Court explained that "interrogation" refers to (1) express questioning and (2) "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Alford,* 358 S.W.3d at 653 (citing *Rhode Island v. Innis,* 446 U.S. 291, 301 (1980)). The *Innis* test "focuses primarily upon the perceptions of the suspect, rather than the intent of the police" in determining whether the suspect was coerced to provide incriminating information while in custody. *Id.* (citations omitted). Statements made voluntarily and not in response to custodial interrogation are admissible. *Hutchison v. State*, 424 S.W.3d 164, 178 (Tex. App.—Texarkana 2014, no pet.). It was appellant's initial burden at trial to establish that the challenged statements were the product of custodial interrogation. *Herrera v. State,* 241 S.W.3d 520, 526 (Tex. Crim. App. 2007) (citation omitted).

Appellant does not contend Merryman engaged in express questioning. Rather, through his argument on appeal, appellant contends that the combination of Merryman's telling appellant he was under arrest and his asking for appellant's consent to search his home and cars was the "functional equivalent of interrogation." The State argues admission of appellant's statement did not violate *Miranda* because it responded to Merryman's question seeking consent to search, one normally attendant to arrest and custody.

Analyzing appellant's contention, we first note that appellant's objection to Merryman's testimony came while the officer testified on voir dire outside the jury's presence. Merryman said he asked appellant for consent to search the residence and the cars before appellant made the incriminating statement. At that point in the officer's

voir dire testimony, appellant objected that the officer "had clearly begun his inquiries of [appellant] while he was in custody in the back seat of the car and without giving him his Miranda [sic] warnings." The prosecutor responded that the officer had not testified to any interrogation of appellant, and that *Miranda* therefore did not apply to their exchange. The trial court overruled appellant's objection.

We agree with the State's position. Requesting consent to search is not interrogation. *See Jones v. State,* 7 S.W.3d 172, 175 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (consent to search is not an interrogation within the meaning of *Miranda* because the giving of consent is not a self-incriminating statement) (citations omitted). *See also Rayford v. State,* 125 S.W.3d 521, 528 (Tex. Crim. App. 2003), *cert. denied,* 543 U.S. 823 (2004) (noting "we know of no authority that requires informing a suspect of his rights under *Miranda* before obtaining a consent to search . . ."). Thus, Merryman's request for appellant's consent to search was not custodial interrogation and *Miranda* does not apply to appellant's statement made after Merryman's request. *See generally Martinez-Hernandez v. State,* 468 S.W.3d 748, 758 (Tex. App.—San Antonio 2015, no pet.) ("police practices seeking only physical evidence, not testimonial confessions of guilt, are excluded from the scope of incriminating responses" and "routine questions, questions incident to booking, broad general questions . . . and questions mandated by public safety concerns are not interrogation") (citing *State v. Ortiz,* 346 S.W.3d 127, 134 (Tex. App.—Amarillo 2011), *aff'd* 382 S.W.3d 367 (Tex. Crim. App. 2012)) (internal quotations omitted).

In his argument on appeal, appellant refers also to Merryman's testimony that he made a statement during their exchange that appellant "had been involved in the shooting

of his girlfriend." Appellant's brief contends Merryman's "unqualified assertion that appellant's guilt had already been determined was reasonably likely to elicit from him an incriminating response." But the court had not heard Merryman's testimony regarding that statement when it ruled on appellant's *Miranda* objection. Merryman testified to that statement after testimony resumed before the jury, and appellant raised no *Miranda*-violation objection when the statement was related. We review the trial court's ruling in light of what was before the court at the time the ruling was made. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). The trial court had no opportunity to consider the issue appellant raises on appeal, i.e., his assertion that the "combination" of Merryman's statement that appellant was involved in the shooting with Merryman's requests to search the residence and the cars constituted the functional equivalent of interrogation. The issue thus presents nothing for our review. *See Wilson v. State,* 71 S.W.3d 346, 349 (Tex. Crim. App. 2002) (point on appeal must comport with objection made at trial) (citation omitted).

We find the trial court did not err in overruling appellant's objection to the officer's statement and so resolve appellant's issue against him.

Conclusion

Having overruled appellant's sole issue on appeal, we affirm the judgment of the trial court.

James T. Campbell
Justice

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