Affirmed and Opinion filed May 24, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01238-CR

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JORGE ALBERTO GONZALES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 778,276

O P I N I O N

Over his plea of not guilty, a jury convicted Jorge Alberto Gonzales ("appellant") of the capital murder of Teodoro "Daniel" Mercedes ("complainant"). The death penalty was not sought by the State, so the trial court automatically affixed appellant's punishment at life in the Texas Department of Criminal Justice, Institutional Division. Appellant briefed this Court on nine points of error. He complains on appeal in points of error one and two that his motion to suppress his in-custody written statement was improperly overruled by the trial court because, (a) the arrest warrant sworn against appellant did not have a basis of probable cause in violation of the Fourth Amendment, and (b) an officer interrogated him before he had been given *Miranda* warnings, in violation of the Fifth Amendment. In his third point of error,

appellant complains that the evidence at trial was insufficient for a jury to convict him of capital murder under a conspiracy of parties theory. In his fourth through ninth points of error, appellant complains that the evidence at trial was legally and factually insufficient to support his conviction for capital murder under any of the theories of liability that the trial court submitted to the jury. We affirm.

F A C T U A L B A C K G R O U N D

Perla Mercedes, the complainant's wife, left her home on the afternoon of December 28, 1997, with her infant daughter in tow, to run some errands. At around 7:00 p.m., she phoned her husband at home. He did not answer. She paged him and he returned her page shortly thereafter. Mercedes proceeded home from her errands. When she arrived at her apartment complex, she pulled into a parking space. A white car pulled up behind her, blocking Mercedes in the parking space.

Appellant approached the driver's side of Mercedes' vehicle. Appellant, wearing a badge around his neck, identified himself as a police officer and attempted to open the door. A second man, later identified by appellant as Cande, approached on the passenger's side and tapped on the window with a handgun. Mercedes opened the door. Instantly, appellant grabbed Mercedes by the hair and pulled her from the car, and then put her in the back seat of the white car. When in the car, appellant repeatedly struck Mercedes in the head, commanding her to keep her head down. He asked the driver of the white car, later identified by appellant as Pablo, for handcuffs and then used them to cuff Mercedes' hands behind her back.

As they drove away from the place where she had been abducted, appellant demanded money. In return, Mercedes offered him her garage door opener. They ended up back at her apartment's garage. When they arrived, appellant got out of the back of the vehicle and cautioned Mercedes that if she did not keep her head down in the car, he would kill her. After some confusion as to which garage door belonged to Mercedes, appellant directed Pablo to pull into Mercedes' garage.

Once inside the garage, appellant pulled Mercedes out by her hair and told Pablo to back the car out of the garage. Appellant dragged Mercedes upstairs to her apartment, where Pablo and Cande met them. The third man arrived with Mercedes' purse and diaper bag in hand, and went back downstairs to get Mercedes' infant daughter and the baby carrier.

Mercedes persuaded the men that she could not remember her entire alarm code and would have to enter it herself. In connection with this, she talked them into releasing her from the handcuffs. Two of the three kidnappers left to find something to open the handcuffs, leaving Mercedes alone with Pablo. When the two returned, all four of them heard the garage door open. Appellant asked Mercedes who it was. Mercedes replied that it was her husband. Appellant asked if her husband was alone. Mercedes answered that he was. Appellant went downstairs with Cande.

Mercedes then heard what she described as an "eternity" of sustained gunfire emanating from the garage. She knelt over her daughter's carrier.

After the shooting ended, appellant approached Mercedes, grabbed her by the hair again, and threw her against a wall, telling her not to turn around or move. Appellant and the other two men then fled in their car. Mercedes went downstairs. She found the complainant bleeding to death on the floor of the garage.

When the police arrived, the investigators found a loaded handgun under the complainant's body. The safety remained in the "on" position and there was no cartridge in the firing chamber. Sixteen spent shell casings laid on the floor of the garage, near the stairway. The shells had all been ejected from one weapon, and that weapon was not the complainant's handgun. A latent fingerprint, later identified as matching appellant's, was found on the driver's side window of Mercedes' car.

Mercedes made a photo-spread identification of appellant. This identification, as well as the existence of the latent fingerprint were used to obtain a warrant for appellant's arrest. Once the police had arrested appellant, they took him to the offices of the Major Offenders Division of the Houston Police Department. When he was there, Officer Hernandez asked him

whether he knew what he was charged with. Appellant said he did not. Hernandez told him he was charged with capital murder, to which appellant replied that he had not killed anyone. Hernandez then read appellant his rights. Afterwards, appellant made a voluntary written statement. In this statement, appellant stated that he did not "remember who brought up that we should go to that apartment." He admitted that all three men were armed. He also claimed that he was in the middle of the stairwell when complainant was shot by Cande, while Pablo remained upstairs with Mercedes.

D I S C U S S I O N A N D H O L D I N G S

I. MOTION TO SUPPRESS

In his first and second points of error, appellant complains that the trial court erred in failing to suppress his written statement that he made while in custody. In support of this point of error, appellant argues that use of the statement violated both the Fourth Amendment, because the arrest warrant was not based on probable cause, and the Fifth Amendment, because appellant had not been given *Miranda* warnings before interrogation began. We disagree with both of these contentions.

A. Probable Cause to Support the Arrest Warrant

Appellant contends that the police arrested him without probable cause. Therefore, appellant argues that his in-custody statement must have been suppressed because it is the fruit of an unlawful arrest.

In support of this contention, appellant states that the affidavit used to obtain a warrant is supported only by Mercedes' tentative identification of appellant through a photo-spread. Appellant maintains that a critical element had been omitted from the affidavit and that was that Mercedes had made one prior misidentification of the person playing the roll she later claimed that appellant played. Also, appellant says that the affidavit made no mention of the matching fingerprint found on Mercedes' car window. The record, however, reflects that information about the fingerprint was included within the probable cause affidavit.

The issuance of search warrants is governed by the Texas Code of Criminal Procedure at article 18.01, which provides in part:

> (b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

In determining the sufficiency of an affidavit for an arrest warrant, a reviewing court is limited to the information contained within the "four corners of an affidavit." *McFarland v. State*, 928 S.W.2d 482, 510 (Tex. Crim. App. 1996), *overruled on other grounds*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998); *Jones v. State*, 833 S.W.2d 118, 123 (Tex. Crim. App. 1992).

It is true that no mention is made that Mercedes made one prior misidentification. However, it is also true, as the State points out, that appellant lodged no complaint in the trial court that the investigating officers intentionally omitted material information from the affidavit. Since we are confined to the four corners of the affidavit, the only question that remains before this Court is whether the information within those four corners sufficiently supported a probable cause finding by a neutral and detached magistrate. *See Massey v. State*, 933 S.W.2d 141, 146 (Tex. Crim. App. 1996).

To support a probable cause finding, it is required that the affidavit "must provide the magistrate with 'sufficient information to support an independent judgment that probable cause exists for the warrant.'" *McFarland*, 928 S.W.2d at 509 (quoting *Jones v. State*, 568 S.W.2d 847, 855 (Tex. Crim. App. 1978)). This affidavit stated that investigators found appellant's fingerprints on the window of Mercedes' vehicle and that, when she was shown a photo spread, Mercedes positively identified appellant as one of the assailants.

We hold that it was reasonable for the magistrate to find probable cause based on the statements of the eyewitness to the crime and on the information about appellant's fingerprints. The written statement that appellant gave while in custody was, therefore, not tainted by an illegal arrest. *See id*. at 510. Appellant's first point of error is overruled.

B. Interrogation Prior to *Miranda* Warnings

Appellant argues that prior to being given *Miranda* warnings, Officer Hernandez (1) asked appellant if he understood the nature of the charges against him, and told appellant that he was charged with capital murder; (2) told appellant that the police had fingerprint evidence and an eye-witness identification against him, and (3) explained to appellant that any statement

made by him would be used against him. Hernandez then read appellant the *Miranda* warnings.

The above assertions, made by appellant in his brief to this Court, are not supported by the record. The motion to suppress hearing evinced the following information from Officer Hernandez. First, on direct examination, Hernandez claimed that as soon as he came into contact with appellant he gave the *Miranda* warnings. However, on cross-examination, when asked if he had given the *Miranda* warnings right away, Hernandez explained that he did not. He went on to say that the first thing he asked appellant was, "[d]o you know why you were arrested?" Without ever explaining when he did give the *Miranda* warnings, Hernandez went on to describe the entire interrogation, up to and including appellant's written statement. On re-direct, Hernandez clarified that first he asked appellant whether he knew why he was arrested. Appellant replied that he did not, and asked why he was arrested. Hernandez told appellant he had been arrested for murder, to which appellant replied that he had not killed anyone. Hernandez then read the *Miranda* warnings to appellant.

Standard of Review

In reviewing a decision on a motion to suppress, the appellate court must review the evidence in the light most favorable to the trial court's ruling. *Green v. State*, 615 S.W.2d 700, 707 (Tex. Crim. App. 1980); *Crawford v. State*, 932 S.W.2d 672, 673 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *Reyes v. State*, 899 S.W.2d 319, 322 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd). At a suppression hearing, the trial judge is the sole judge of the witnesses' credibility, and the court's finding should not be disturbed absent a clear abuse of discretion. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Crawford*, 932 S.W.2d at 673.

Miranda

The prosecution may not use statements stemming from custodial interrogation of the defendant unless the State demonstrates the use of procedural safeguards effective to secure the defendant's privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Alvarado v. State*, 853 S.W.2d 17, 20 (Tex. Crim. App. 1993). *Miranda* applies when (1) the suspect is "in custody," and (2) the police have "interrogated" the suspect, either by direct questioning or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 300-02; *Jones v. State*, 795 S.W.2d 171, 174 (Tex. Crim. App. 1990).

Interrogation

There is no question that appellant was in custody in the instant case. The only issue is whether Officer Hernandez interrogated appellant prior to giving him *Miranda* warnings.

"Interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions by police that the police should know are reasonably likely to lead to an incriminating response from the suspect. *Innis*, 446 U.S. at 300-01; *Jones* 795 S.W.2d at 174. However, not all post-arrest police questioning can be classified as "interrogation." *Innis*, 446 U.S. at 300-02; *Jones*, 795 S.W.2d at174. Questioning normally attendant to arrest and custody is not interrogation. *Innis*, 446 U.S. at 300-02; *Jones*, 795 S.W.2d at174 and n.3. Furthermore, questions pertaining to the suspect's understanding of his rights do not constitute interrogation. *Jones*, 795 S.W.2d at 176.

We hold that statements made by Officer Hernandez prior to giving appellant his *Miranda* warnings did not constitute interrogation for purposes of *Miranda*. The statements at issue were not the type of statements which the police should know are reasonably likely to elicit an incriminating response from the suspect. Furthermore, those statements were not even used against appellant during trial. Finally, there is no evidence that these statements caused appellant to make any post-*Miranda* incriminating responses. Therefore, affording due deference to the trial court's findings, we overrule appellant's second point of error.

II. CONSPIRACY OF PARTIES

In his third point of error, appellant complains that the evidence at trial was legally insufficient for a jury to convict him of capital murder under a conspiracy of parties theory. He argues that the trial court committed reversible error in authorizing the jury to convict the appellant for capital murder based on a conspiracy of parties theory. We disagree.

We first note that appellant's objection at trial does not comport with his objection on appeal. At trial, appellant objected to the charge including the conspiracy of parties theory because it constituted a comment on the weight of the evidence and permitted a conviction for capital or felony murder, without a finding of an intentional killing. The trial court overruled this objection. However, on appeal, appellant contends that the trial court should not have

authorized the jury to convict under a conspiracy of parties theory because this theory was not supported by any evidence in the record.

Ordinarily, in order to preserve error for appellate review, appellant must make a timely, specific objection in the trial court. TEX. R. APP. P. 33.1 (a)(1). Also, to preserve error, the arguments on appeal must correspond with the objection at trial. *Butler v. State*, 872 S.W.2d 227, 236 (Tex. Crim. App. 1994); *Fuller v. State*, 827 S.W.2d 919, 928 (Tex. Crim. App. 1992). However, the court of criminal appeals carved out an exception to this general rule for jury charge error in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (en banc) (op. on reh'g). In interpreting Article 36.19 of the Texas Code of Criminal Procedure, which governs review of the jury charge on appeal, the *Almanza* Court held that if the defendant does not object to error in the jury charge, he must show the error was fundamental in order to complain about it on appeal. *Id*. Fundamental error in the jury charge is error that is so egregious and causes such harm as to deprive the accused of a fair and impartial trial. *Taylor v. State*, 7 S.W.3d 732, 736 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing *Almanza*, 686 S.W.2d at 171).

We hold that the jury charge contained no error with respect to including a conspiracy of parties theory. A conspiracy exists where two or more persons, as shown by words or deeds, agree to do an unlawful act. *Butler v. State*, 758 S.W.2d 856, 860 (Tex. App.—Houston [14th Dist.] 1988, no pet.). Both the Texas Penal Code and case law in this jurisdiction allow a conspiracy to be established by circumstantial evidence and inferred by the parties' acts. TEX. PEN. CODE ANN. § 15.02(b) (Vernon 1994); *Butler*, 758 S.W.2d at 860; *Naranjo v. State*, 745 S.W.2d 430, 433 (Tex. App.—Houston [14th Dist.] 1988, no pet.). The standard of review for both direct and circumstantial evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Marroquin v. State*, 746 S.W.2d 747, 750 (Tex. Crim. App. 1988).

Rarely is direct evidence available to prove a conspiracy. A conspiracy may be proven circumstantially through evidence of the conspirators' conduct, including the circumstances surrounding that conduct. *Farrington v. State*, 489 S.W.2d 607 (Tex. Crim. App. 1972). Similar methods of operation, together with joint activities and relationships, support the finding of a single conspiracy. *United States v. Ochoa*, 609 F.2d 198, 202 (5th Cir.1980);

Kennard v. State, 649 S.W.2d 752, 764 (Tex. App.—Fort Worth 1983, pet. ref'd).

Viewed in the light most favorable to the State, the evidence shows that there is a substantial amount of circumstantial evidence of a conspiracy. Appellant and the other two assailants acted in concert when they approached Mercedes, told her that they were the police to get her out of her car, and dragged her to the white van the three of them arrived in. According to appellant's written statement, all three men carried guns. The complainant's murder was an offense which should have been anticipated as a result of the kidnapping scheme. *Naranjo*, 745 S.W.2d at 434. Therefore, the trial court did not err in submitting the conspiracy of parties charge to the jury. Appellant's third point of error is overruled.

III. SUFFICIENCY OF THE EVIDENCE

In his fourth through ninth points of error, appellant complains that the evidence at trial was legally and factually insufficient to support his conviction for capital murder under any of the theories of liability that the trial court submitted to the jury. We disagree.

The trial court instructed the jury to find appellant guilty of capital murder if it found (1) that appellant personally killed Teodoro Martinez in the course of kidnapping Perla Mercedes; (2) if the appellant aided and encouraged an accomplice to commit the offense, and was thereby guilty as a party under § 7.02(a)(2) of the Penal Code; or (3) if the appellant conspired to commit a kidnapping of Perla Mercedes and should have anticipated the commission of murder in the course of that kidnapping, and was thereby guilty as a party under §7.02(b) of the Penal Code.

We apply different standards when reviewing the evidence for factual and legal sufficiency. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 at 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict, and we set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). To do this, "[t]he court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Since the State bears the burden of proving each element of a criminal offense at trial, an appellant may challenge the sufficiency of the evidence used to establish an element of the offense by claiming that evidence supporting the adverse finding is "so weak as to be factually insufficient." *Id*. at 11. We are mindful, however, that we must give appropriate, but not absolute, deference to the judgment of the fact finder so as not to supplant the fact finder's function as the exclusive judge of the weight and credibility given to witness testimony. *Id*. at 7.

The jury found appellant guilty of capital murder as charged in the indictment. We cannot determine from their verdict under which theory of capital murder they were able to infer appellant's guilt beyond a reasonable doubt. Thus, if the evidence is legally and factually sufficient as to any of the theories, the verdict should be sustained. *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992); *Fuller v. State*, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992).

Mercedes positively identified appellant from a photo spread and also positively identified him in the courtroom during her testimony. Appellant's fingerprints were found on the window of Mercedes' car. Appellant, in his written statement, admitted that he participated in the kidnapping and that he was present at the time of the shooting. Appellant further stated that he could not remember "who brought up that we should go to that apartment." Appellant also admitted in this same statement that all three men armed themselves in preparation for this endeavor. The record reflects that appellant gave numerous orders to Mercedes, Cande, and Pablo. Viewing this evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found all the elements of capital murder as the jury was charged. Thus, the evidence is legally sufficient.

The evidence is also factually sufficient. Viewing this evidence and comparing it to the evidence offered to refute a finding of conspiracy – that Mercedes previously misidentified

another person as acting in the roll she later claimed was played by appellant – we find that the evidence supporting the verdict is not outweighed by other evidence, and thus the verdict is not against the great weight and preponderance of the evidence, and is not manifestly unjust. Appellant's fourth through ninth points of error are overruled.

Having overruled all nine of appellant's points of error, we affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed May 24, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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