Affirmed and Opinion filed July 19, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00637-CR

SHAUN B. SANDERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 758,050

O P I N I O N

Appellant appeals his conviction of capital murder. In four points of error appellant contends that: 1) the evidence was legally insufficient to establish guilt beyond a reasonable doubt; 2) the evidence was factually insufficient to establish guilt beyond a reasonable doubt; 3) the trial court erred in admitting appellant's oral confession; and 4) the trial court erred in admitting appellant's written confession. We affirm.

On July 12, 1997, appellant and his brother, Windeon Sanders ("Windeon"), broke into Phyllis Shelby's ("complainant") residence, believing the house to contain 75 pounds of

marijuana and $18,000.00. Appellant and Windeon entered the house through a back window. In the process of looking for the drugs and money, complainant returned home with her three young daughters. Instead of fleeing the house, appellant and Windeon hid in the bathroom. Complainant and her three children entered the house and went straight back to the bedroom. Appellant confronted complainant in the bedroom, in the presence of her three children, demanding drugs, money, and jewelry. Appellant and Windeon continued to ransack the house. Windeon, then came into the bedroom brandishing a gun, and asked complainant where the money was located. Appellant threatened complainant with a pistol whipping if she did not tell them where the money was located.

Appellant grabbed complainant's wallet and emptied the contents on the floor. Appellant then forced complainant to open a briefcase. The wallet contained very little money, and the briefcase was empty. Frustrated, Windeon threatened to kill complainant while she and her three daughters were sitting on the bed. Windeon, with appellant standing next to him, shot complainant twice, killing her. Following the murder, appellant and Windeon continued to ransack the house. When complainant's three daughters no longer heard the intruders, they slipped out through the bedroom window, went to a neighbor, and the police were called.

When arrested, Windeon confessed to being the triggerman and indicated that appellant was involved in the murder. Following the arrest of Windeon, appellant voluntarily walked into the police station and indicated that he wanted to talk to investigators ("Swaim and Waters"). Appellant initially told Swaim and Waters that he was not near the crime scene on the night in question, and had alibi witnesses that would confirm his whereabouts. Appellant then requested to speak with Windeon. In the presence of Swaim and Waters, Windeon told appellant to tell the truth. Swaim and Waters left appellant and went to call the district attorney's office for advice. Appellant then told Swaim and Waters that he was ready to tell his story. Appellant voluntarily confessed to his involvement in the aggravated robbery of complainant, and was placed under arrest. The next day, appellant voluntarily gave a written statement. Both statements were admitted at trial over objection. The jury found appellant guilty of capital

murder and the trial court sentenced him to life in prison.

Appellant asserts four points of error, comprising two general categories: 1) a legal and factual sufficiency challenge; and 2) a challenge to the admission of his oral and written confessions. We affirm.

Legal and Factual Sufficiency

In appellant's first and second points of error, he contends that the evidence was legally and factually insufficient to sustain a conviction for capital murder. Specifically, appellant complains that the evidence was legally and factually insufficient to establish that he committed murder in the course of either committing burglary, or robbery.

In reviewing legal sufficiency challenges, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all elements of the offense beyond a reasonable doubt. *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2871, 2879, 61 L.Ed.2d 560 (1979)). "[I]f any evidence establishes guilt beyond a reasonable doubt, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency." *Arthur v. State*, 11 S.W.3d 386, 389 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). The *Johnson* court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9.

Appellant contends that the evidence was legally and factually insufficient to establish

that he committed murder in the course of committing a burglary. Specifically, appellant argues that the crime of burglary was completed before the murder was committed. Furthermore, appellant argues that the evidence was legally and factually insufficient to establish that he committed murder in the course of committing a robbery because the complainant did not own the property that appellant was seeking. We disagree.

In a capital murder prosecution the evidence need only be sufficient to establish one of the underlying felonies in the indictment. *Gunter v. State*, 858 S.W.2d 430, 439–40 (Tex. Crim. App.1993) (burglary, robbery, kidnaping; evidence sufficient to show kidnaping); *Pinkerton v. State*, 660 S.W.2d 58, 62 (Tex. Crim. App.1983) (burglary and robbery; evidence sufficient to show burglary). Therefore, if the evidence in this case establishes burglary, we need not examine whether there was sufficient evidence to show robbery.

Appellant contends that the offense of burglary is complete once the burglar enters the building. Accordingly, appellant avers that he could not be guilty of capital murder because the necessary underlying offense, burglary, had ended when the victim was murdered. We find appellant's contention to be specious.

A person commits the offense of burglary when the person:

> (1) enters a habitation . . . with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a . . . habitation; or
>
> (3) enters a . . . habitation and commits or attempts to commit a felony, theft or an assault.

TEX. PEN. CODE ANN. § 30.02 (Vernon Supp. 2001). The evidence establishes that appellant and Windeon entered the residence and attempted to commit a theft when complainant and her three children entered the house. Appellant and Windeon confronted the complainant and her

three children, threatening that they would shoot her unless she told them where the money was hidden. While in the course of committing the burglary, Windeon shot the complainant on the bed with her three daughters present. Moreover, the record indicates that appellant and Windeon continued to search the house for the money after complainant had been shot. Accordingly, the evidence was neither legally nor factually insufficient for the jury to find that the complainant was killed in the course of appellant's commission of a burglary. We overrule appellant's first and second points of error.

Oral and Written Confessions

In appellant's third and fourth points of error, he contends that the trial court erred in denying his motion to suppress his oral statement and his written statement. With regard to the oral statement, appellant asserts the statement was made while he was in custody and in violation of article 38.22 of the Texas Code of Criminal Procedure. With regard to his written statement, appellant asserts the statement was involuntary because it was made as a result of improper inducement by the questioning officer. We disagree with both assertions.

In reviewing a ruling on a motion to suppress evidence, we must determine the applicable standard of review. We should afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We should afford the same amount of deference to a trial court's rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Id*. However, we may review de novo "mixed questions of law and fact" not falling within this category. *Id*.

A. The Oral Statement

Article 38.22, section 3(a) governs the admissibility of oral confessions. An oral statement of an accused made during a custodial interrogation is generally not admissible

against the accused unless an electronic recording is made of the statement. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(1) (Vernon Supp. Pamph. 2001). However, oral statements asserting facts or circumstances establishing the guilt of the accused are admissible if at the time they were made they contain assertions unknown by law enforcement which are later corroborated. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(c) (Vernon Supp. Pamph. 2001); *Dansby v. State*, 931 S.W.2d 297 (Tex. Crim. App. 1996); *Gunter v. State*, 858 S.W.2d 430 (Tex. Crim. App. 1993). We must first determine whether appellant made the statement during a custodial interrogation. If the statement did not stem from custodial interrogation, we will not reach appellant's contention that there were no facts in the confession that were found to be true.

Whether a suspect is in custody is determined upon a case-by-case basis. *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). We consider the following objective factors to determine when custody is established: 1) an officer has probable cause to arrest a suspect and does not tell him that he is free to leave; 2) the officer manifests this knowledge to the suspect; and 3) a reasonable person in the suspect's position would believe he is under restraint to the degree associated with an arrest. *Dowthitt*, 931 S.W.2d at 255. None of these factors are present in our case.

Appellant came to the police station voluntarily, and without request, in order to give his side of the story. Swaim told appellant that he was not under arrest, that he was free to leave at any time, and that if he wanted to talk they could go to the interview room. Appellant voluntarily entered the interview room with Swaim and Waters and denied any involvement in the murder. Appellant then requested to speak with Windeon who was in custody for the murder. After speaking with Windeon, appellant again volunteered to tell his side of the story. This time, however, appellant admitted to his involvement in the murder. After this admission, appellant was placed under arrest. There is no evidence in the record that either Swaim or Waters engaged in any type of questioning to elicit appellant's oral confession. The record reflects that on two occasions appellant volunteered to tell his side of the story. Additionally,

the record reflects that appellant was allowed to freely move between interview rooms and never placed in handcuffs. We hold that a reasonable person in appellant's position would not have believed he was under arrest. Further, we find that appellant was not in custody at the time he made his oral confession to Swaim and Waters. Article 38.22, section 3(c) of the Texas Code of Criminal Procedure, therefore, did not govern the admissibility of appellant's oral confession, and the trial court did not err in admitting appellant's oral confession. We overrule appellant's third point of error.

B. The Written Statement

To determine whether the circumstances render an accused's written statement involuntary, we ultimately must determine whether his will was "overborne" by police coercion. *Armstrong v. State*, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985). Relevant circumstances with regard to this question include the "length of detention, incommunicado or prolonged detention, denying family access to a defendant, refusing a defendant's request to telephone a lawyer or family, and physical brutality." *Id*. None of these factors are present in our case.

The record reflects that after appellant's oral confession, Swaim and Waters asked appellant to give a written statement. Appellant replied "I've told you what happened, and that ought to be good enough." Swaim and Waters instructed appellant that his oral confession was "not good enough." Appellant, however, refused to give a written statement at that time. The record reflects that appellant did ask Swaim and Waters to come see him the next day in jail and told them that he would give his written statement then.

The next day, Swaim and Waters went to the jail to see appellant. Appellant was given his article 38.22 warnings. Appellant stated that he understood his rights and he freely and voluntarily waived those rights. Appellant then gave a written statement which he signed. The record reflects no evidence to support that appellant's written confession was in any way involuntary. In fact, the record suggests that appellant, and not Swaim and Waters, controlled

when and where he would give his written statement. Accordingly, the trial court did not err in admitting appellant's written statement. We overrule appellant's fourth point of error.

Conclusion

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

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justice Hudson, Senior Chief Justice Murphy and Former Justice Amidei.[1]

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[1] Senior Justice Murphy and Former Justice Amidei sitting by assignment.