Affirmed and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00933-CR

ALEJANDRO REYES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 692,887

O P I N I O N

Alejandro Reyes appeals a conviction for capital murder on the grounds that: (1) the trial court erred in admitting his written confession[1] because: (a) it was obtained as a result of an illegal detention; (b) there was no valid waiver of his rights; and (c) the confession was

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[1] For purposes of this opinion, the terms "confession," "written confession," and written statement will be used interchangeably.

not given voluntarily; (2) the trial court erred in admitting an in-court identification; (3) the evidence was legally and factually insufficient; and (4) appellant received ineffective assistance of counsel. We affirm.

Background

While a minor, appellant was charged with capital murder. His case was transferred from juvenile court to criminal district court. After a trial on the merits, a jury found appellant guilty and assessed punishment at life in prison.

Written Statement

Illegal Detention

The first of appellant's seven points of error argues that the trial court erred in admitting into evidence a written statement he gave to police because it was obtained before turning him over to appropriate juvenile authorities as required by section 52.02(a) of the Texas Family Code and was thus the product of an illegal detention.

To preserve error in admitting evidence for appellate review, an appellant must generally make a timely objection and state the grounds for it. *See* TEX. R. EVID. 103(a)(1); *see also* TEX. R. APP. P. 33.1. In addition, the grounds for a complaint on appeal must comport with those for the objection at trial. *See, e.g., Trevino v. State*, 991 S.W.2d 849, 854-55 (Tex. Crim. App. 1999).

In this case, appellant argued at trial that his written statement was inadmissible only because it was not voluntary in that he did not understand what he signed or what constituted a waiver of his rights. Because appellant objected at trial based only on voluntariness and not an alleged violation of Family Code procedures,[2] point of error one presents nothing for our review and is overruled.

Voluntariness

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[2] The portion of appellant's brief asserting ineffectiveness of counsel acknowledges that his trial counsel and the trial court's ruling both wholly failed to address the alleged illegal detention of appellant prior to his release to juvenile authorities.

In addition to reiterating the grounds set forth in the first point of error, appellant's second point of error argues that the trial court erred in admitting his written statement because the waiver of his constitutional right against self-incrimination was not voluntary. In particular, appellant contends that his youth, low I.Q., and lack of reading and language skills rendered him incapable of understanding his right or making an intelligent waiver of it.

Appellant asserts that the evidence demonstrated that his 75 I.Q. was far below average and that he had a learning disability that diminished his reading and language skills to the five to seven year old range. Appellant had been placed in special education classes throughout his educational career, and a special education teacher who knew appellant testified that he would not have understood many of the phrases on the statutory warnings signed by appellant.

When a defendant presents evidence raising a voluntariness question, the prosecution must controvert that evidence and prove voluntariness by a preponderance of the evidence. *See State v. Terrazas*, No. 1191-98, 1999 WL 722548, at *4 (Tex. Crim. App. Sept. 15, 1999). Where a trial court makes no express findings of fact,[3] the reviewing court implies all fact findings necessary to support the trial court's ruling. *See id.* at *5. In addition, we defer to the implied fact findings that the record supports where those findings are based on an evaluation of credibility and demeanor. *See id.* We may review a trial court's legal ruling on voluntariness de novo. *See id.*

The statement of an accused may be used in evidence against him only if it appears that the statement was made freely and voluntarily, without compulsion or persuasion. *See* TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 1979). A determination of voluntariness is based on the totality of the circumstances surrounding the statement's acquisition. *See*

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[3] Although the trial court made an express finding on the record regarding voluntariness with regard to providing statutory warnings and a lack of coercion, it made no express finding concerning appellant's mental capacity to understand or waive his rights.

Penry v. State, 903 S.W.2d 715, 744 (Tex. Crim. App. 1995). In ascertaining the voluntariness of a confession and the waiver of the Fifth Amendment right against self-incrimination, mental deficiency is a factor but is not alone determinative. *See id*. Where the evidence shows that the appellant was advised of his statutory rights, had the basic reasoning skills to understand them, and voluntarily waived them, evidence of mental retardation or illiteracy does not alone render the confession inadmissible. *See id*. at 746.

In the present case, the evidence shows that, after appellant's arrest, he was taken before Judge Jonietz, who administered statutory warnings to appellant. Judge Jonietz testified that he believed appellant understood the warnings and that appellant's understanding was clear and unequivocal. After appellant's statement was prepared, a second judge, Judge Abercia, testified that he met with appellant in his office outside the presence of the police. In this meeting, appellant indicated that he could read and write English. Judge Abercia went over appellant's entire statement with him, line by line. Judge Abercia testified that he believed appellant understood the entire statement. Appellant signed the statement in Judge Abercia's presence. In Judge Abercia's opinion, appellant understood the nature and contents of the statement and signed the statement voluntarily. The evidence also reflects that appellant located several errors in the statement and corrected them himself.

In light of the conflicting evidence, we afford deference to the trial court's implied determination, based on an evaluation of the credibility of the witnesses, that appellant possessed the mental capacity to make a voluntary waiver of his right against self-incrimination.[4] Accordingly, appellant's second point of error is overruled.

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[4] *See Penry*, 903 S.W.2d at 745-46 (holding confession admissible despite appellant's I.Q. ranging between forties and the seventies and expert testimony that appellant could not understand the concept of waiver,); *Casias v. State*, 452 S.W.2d 483, 488 (Tex. Crim. App. 1970) (holding confession admissible even though appellant had an I.Q. of 68, was illiterate, and had mental age of an eight to ten year old); *Grayson v. State*, 438 S.W.2d 553, 555-56 (Tex. Crim. App. 1969) (holding admissible statements from a defendant with an I.Q. of 51 and a mental age of six years).

Higher Standard Under Texas Law

Appellant's third point of error argues that the trial court erred in finding his written statement voluntary beyond a reasonable doubt because Texas law has a higher burden of proof than federal law for the admissibility of written statements. Appellant contends that the voluntariness of a statement must be proved beyond a reasonable doubt at a suppression hearing because it must be proved beyond a reasonable doubt when the issue is submitted to a jury at trial.

Although appellant is correct that voluntariness must be proved beyond a reasonable doubt when the issue is submitted to a jury at trial,[5] the same is not true at a suppression hearing where voluntariness need only be proved by a preponderance of the evidence. *See Terrazas*, 1999 WL 722548, at *4; *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). Therefore, appellant's third point of error is overruled.

In-Court Identification

Appellant's fourth point of error argues that the trial court erred in admitting an in-court identification over objection without first determining whether a pre-trial photo array was impermissibly tainted. Appellant alleges that because the eyewitness was unable to identify him in a photo array shortly after the offense but could identify him at trial almost two years later, he was denied his due process right to determine whether the original procedure was so unduly suggestive as to taint the in-court identification. Appellant contends that had his attorney realized the witness would make the in-court identification, he would have filed a motion to suppress it based on the prior tainted identification procedure. Therefore, appellant claims he is entitled to a hearing to determine whether there was any impropriety in the photo array.

To preserve a complaint for appellate review, a party must generally raise it in the trial court by a timely request, objection, or motion and state the grounds for the ruling

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[5] *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (Vernon 1979).

sought. *See* TEX. R. APP. P. 33.1(a). At trial in this case, appellant's counsel had not anticipated that the eyewitness would make an in-court identification because the witness had failed to identify appellant in a police photo array shortly after the offense was committed. However, prosecution and defense counsel examined and cross-examined the eyewitness outside the presence of the jury concerning his identification, and appellant's counsel asked to suppress the in-court identification and asked for additional time to produce psychologists who "would testify about the reliability of eyewitnesses who are looking down a gun." Presented with evidence, arguments, and this request, the trial court denied the motion and allowed the in-court identification.

On appeal, appellant does not challenge the admission of the identification but only the failure of the trial court to determine whether the pre-trial photo array was impermissibly tainted. However, appellant's brief fails to state what additional action the trial court could have taken in this regard beyond allowing the parties to question the witness and present arguments, as it did. Nor does appellant's brief allude to what additional evidence or contentions might be developed if a further hearing was held. Under these circumstances, appellant's fourth point of error fails to demonstrate error by the trial court and is overruled.

Sufficiency of the Evidence

Appellant's fifth and sixth points of error argue that the evidence was legally and factually insufficient to prove that he had the requisite intent to kill the complainant.

Standard of Review

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Gale v. State*, 998 S.W.2d 221, 223 (Tex. Crim. App. 1999). In reviewing factual sufficiency, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight

of the evidence as to be clearly wrong and unjust. *See Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999). A factual sufficiency review weighs the evidence which tends to prove the existence of the fact in dispute against the contradictory evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999).

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual. *See* TEX. PEN. CODE ANN. § 19.02(b)(1) (Vernon 1994). A person acts intentionally with respect to a result of his conduct when it is his conscious objective or desire to cause the result. *See* TEX. PEN. CODE ANN. § 6.03(a) (Vernon 1994). A person acts knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *See id.* § 6.03(b). The specific intent to kill may be inferred from the use of a deadly weapon unless in the manner of its use it is reasonably apparent that death or seriously bodily injury could not result. *See Staley v. State*, 887 S.W.2d 885, 889 (Tex. Crim. App. 1994). Further, if a deadly weapon is used in a deadly manner, the inference is almost conclusive that the defendant intended to kill. *See Adanandus v. State*, 866 S.W.2d 210, 215 (Tex. Crim. App. 1993).

Legal Sufficiency

In this case, contrary to his purported legal sufficiency challenge, appellant's brief "concedes there is probative evidence in the record which indicates [appellant] intentionally shot the victim . . . ." This includes the testimony of one of the robbery victims, Martinez, who testified that as he and his brother, Mejia, walked down the street, appellant and another man approached them. Appellant stopped eight to ten feet in front of the brothers, pulled out a gun, and told the brothers to give him what they had. The second man circled behind the brothers. Mejia started to run away, but was shot by appellant in the chest and left leg. While Mejia was still standing, appellant told him that he would shoot him again unless Mejia gave appellant what he had. Mejia then collapsed and appellant searched his pockets. Mejia later died of his gunshot wounds. Appellant's intent to kill may be inferred

from his deliberate shooting of Mejia and because it was not reasonably apparent that death or seriously bodily injury could not result from doing so. Therefore, as appellant concedes, the evidence is legally sufficient to show an intent to kill.

Factual Sufficiency

The thrust of appellant's factual sufficiency challenge is that: (1) there is no direct evidence of premeditation or intent to kill, but only to scare or injure; and (2) any inference of an intent to kill is rebutted by evidence that: (a) appellant's written statement (which he contends was inadmissible) states that: (i) he wasn't going to shoot Mejia until appellant saw Mejia coming toward him; (ii) after Mejia was on the ground wounded, appellant saw that he had a knife and thought Mejia was going to use it on him; and (iii) appellant didn't know where his shots had hit Mejia or that the shots would be fatal; (b) appellant shot Mejia from eight to ten feet away rather than from a closer range; (c) appellant had five unfired rounds left in the gun which he could have used to insure the Mejia's death if that had been his intent. This evidence does not render the verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Therefore, appellant's factual sufficiency challenge fails, and his fifth and sixth points of error are overruled.

Ineffective Assistance

Appellant's seventh point of error argues that he received ineffective assistance of counsel in that his trial counsel failed to: (1) adequately preserve error on the illegal detention which resulted in the admission of his written statement into evidence; and (2) file a motion to suppress the in-court identification based on the tainted pretrial procedure and produce experts to refute the State's identification witness and physical evidence.

The standard for reviewing effectiveness of counsel is whether: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v.*

Washington, 466 U.S. 668, 687-88, 694 (1984); *Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999). The defendant bears the burden of proving an ineffective assistance claim by a preponderance of the evidence. *See Young*, 991 S.W.2d at 837.

When reviewing such a claim, there is a strong presumption that counsel's actions fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689; *Young*, 991 S.W.2d at 837. An ineffectiveness claim must be judged on the totality of the representation rather than by isolating any portion of it. *See Strickland*, 466 U.S. at 695; *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). In assessing whether a defendant suffered prejudice, a court should presume that the judge or jury acted according to the law, absent a challenge to the legal sufficiency of the evidence. *See Strickland*, 466 U.S. at 694. A court need not address both *Strickland* prongs if an ineffectiveness claim can be disposed of based on the lack of either. *See id*. at 697.

Ordinarily, the presumption that a defense attorney's actions were sound strategy cannot be overcome absent evidence in the record of the attorney's reasons for his actions. *See Busby v. State*, 990 S.W.2d 263, 269 (Tex. Crim. App. 1999). Thus, when a record is silent as to counsel's trial strategy, we do not speculate about why counsel acted as he did. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Similarly, some possibility that an error might affect the proceedings is insufficient to show prejudice. *See Kober v. State*, 988 S.W.2d 230, 232 (Tex. Crim. App. 1999). Therefore, it is not enough to show merely that the errors had some conceivable effect on the outcome of the proceeding. *See id*. at 232-33.

In this case, appellant's trial counsel elected to oppose admission of appellant's written statement based on voluntariness rather than illegal detention. In the absence of a record of the attorney's reason for this choice, the presumption that this was sound trial strategy is not overcome. *See Busby*, 990 S.W.2d at 269.

With regard to the showing of prejudice, appellant contends that his written statement was the most crucial piece of evidence and that the entire defense strategy was based on the trial court's ruling that it was admissible. However, he does not address the existence or effect of other prosecution evidence or any other circumstances to show that suppression of the confession would have affected the outcome of the trial. Similarly, as noted above, appellant has not shown what further evidence or arguments might have been offered to challenge the admission, or rebut the effect, of the in-court identification. Without such a showing, the seventh point of error fails to satisfy either prong of the *Strickland* standard and

is overruled. Accordingly, the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justices Yates, Edelman, and Draughn.[6]

Do not publish — TEX. R. APP. P. 47.3(b).

[6] Senior Justice Joe L. Draughn sitting by assignment.