Affirmed and Opinion filed December 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00843-CR

JOSE RIOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 183rd District Court
Harris County, Texas
Trial Court Cause No. 830,517

O P I N I O N

Jose Rios appeals a conviction for felony burglary of a habitation with intent to commit theft[1] on the grounds that: (1) the evidence is legally and factually insufficient to prove that he asserted a right to any of the stolen property or possessed it with knowledge that it was stolen; and (2) the trial court erred in admitting his post-arrest statement because it was not an excited utterance. We affirm.

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[1] A jury found appellant guilty, and the trial court sentenced him to 60 years confinement.

Sufficiency of the Evidence

Appellant's first and second issues argue that the evidence is legally and factually insufficient to prove that he exercised a conscious assertion of a right to any property owned by the complainant or that he possessed it with knowledge that it was stolen. However, a person commits the offense of burglary, as appellant was charged in this case, if, without the effective consent of the owner, the person merely enters a habitation with intent to commit a theft. *See* TEX. PEN. CODE ANN. § 30.02(a)(1) (Vernon Supp. 2001). Under this version of the offense, neither assertion of a right to stolen property nor possession of stolen property is an element; property need not even be stolen. Because appellant has not challenged the sufficiency of the evidence to prove that he entered a habitation with intent to commit theft, and because the matters for which he challenges the sufficiency of the evidence were not required to be proved by the State, the first and second issues fail to demonstrate error, and are overruled.

Admission of Statement

Appellant's third issue argues that the trial court erred in admitting his post-arrest statement that the police could only "finger" him in three of the burglaries because the statement was not an excited utterance.[2] Appellant contends that the State did not demonstrate that this admission was a spontaneous result of a shocking event and that the intervening circumstances surrounding the arrest, such as his being arrested, handcuffed, read his statutory warnings, and transported in a patrol car, negate that the statement was spontaneous.

For a complaint to be preserved for appellate review, the record must show that the objecting party made the trial court aware of it by stating with sufficient specificity the grounds for the ruling that he sought in a timely request, objection, or motion. TEX. R. APP.

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[2] *See* TEX. R. EVID. 803(2) (A hearsay exception exists for an excited utterance *i.e.*, a statement describing or explaining an event or condition made while the declarant was under the stress of excitement caused by the event or condition).

P. 33.1. In this case, appellant filed a generic hand written motion to suppress his statement which did not indicate what statement he wanted suppressed or assert any challenge based on a failure to meet the requirements of an excited utterance. Similarly, although appellant's counsel elicited testimony from Maldonado at the motion to "quash" (suppress) hearing during trial, he never stated any objection to the evidence or the judge's ruling admitting the statement. Because the record therefore does not reflect that the complaint appellant asserts on appeal was ever raised in the trial court, that complaint presents nothing for our review.

Moreover, a trial court's denial of a motion to suppress will be upheld if it is correct under any theory of law applicable to the case. *Hughes v. State*, 24 S.W.3d 833, 840 n.4 (Tex. Crim. App. 2000). In this case, the State offered the statement at trial through Maldonado, and the court admitted it, as a "res gestae" statement made by appellant, not in response to any question by an officer.[3] *See* TEX. CODE CRIM. PROC. ANN. art. 38.22(5) (Vernon Supp. 2001) ("Nothing in this article precludes the admission . . . of a statement that is the *res gestae* of the arrest or of the offense, or of a statement that does not stem from custodial interrogation . . . .").

A statement is not hearsay if it is an admission by a party-opponent, *i.e.*, a party's own statement offered against the party. TEX. R. EVID. 801 (e)(2)(A).[4] In this case, because appellant's statement was a non-hearsay admission of a party opponent, it did not need to satisfy a hearsay exception, such as for an excited utterance, to be admissible. Therefore, the trial court did not abuse its discretion in admitting the statement into evidence, even if the

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[3] Appellant does not contend that his statement was made in response to any form of custodial interrogation.

[4] In order to be admissible as such an admission, a statement made by a defendant after being placed under arrest must also satisfy the statutory requirements of article 38.22, if it is applicable. *Kimball v. State*, 24 S.W.3d 555, 563 (Tex. App.—Waco 2000, no pet.). However, appellant does not challenge the admissibility of his statement with regard to article 38.22. Moreover, a statement, such as his, which was made while the defendant was in custody, but which was not the product of a custodial interrogation, is not subject to the requirements of article 38.22. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22(5).

statement did not meet the requirements for an excited utterance. Accordingly, appellant's third issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 6, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.[5] (Yates, J. concurs in result only.)

Do Not Publish — TEX. R. APP. P. 47.3(b).

[5] Senior Justice Don Wittig sitting by assignment.