Opinion filed June 11, 2020

In The

Eleventh Court of Appeals

No. 11-18-00125-CR

CHRISTOPHER ROBIN EVANS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 385th District Court
Midland County, Texas
Trial Court Cause No. CR49125

M E M O R A N D U M O P I N I O N

Appellant, Christopher Robin Evans, stabbed and killed Craig Niedecken. The jury implicitly rejected Appellant's self-defense claim and found him guilty of murder. Appellant pleaded true to an enhancement allegation. The jury found that Appellant caused Niedecken's death while under the immediate influence of sudden passion that arose from adequate cause, and the jury assessed punishment at confinement for twenty-five years and a fine of $5,000. We affirm.

The evidence shows that somewhere between 11:30 p.m. and midnight on February 15, 2017, Appellant, Heather Dejacimo, and Tabitha Sorrell went to a friend's apartment and used methamphetamine. Some two hours or so later, Appellant, Dejacimo, and Sorrell went to Appellant's apartment.

Appellant shared an apartment with his girlfriend, Brittany Thames; Thames's toddler-aged daughter and Appellant's mother also lived at the apartment. When Appellant, Dejacimo, and Sorrell arrived at the apartment, Thames became upset that Appellant had brought Dejacimo and Sorrell home with him. Thames told Appellant that she was leaving; she did. There is some evidence that, after Thames left, the others continued to use methamphetamine and Xanex.

According to Thames, after she left, she picked up Niedecken. The two drove around for a while and then went to Thames's stepmother's house for a few hours. Thames was due to report for work at 10:00 a.m. at The Bar, the establishment at which she was employed; she needed clothes for work. Thames messaged Appellant to ask him if she could come to the apartment and get her "stuff."

Around 8:00 or 8:30 a.m., Thames and Niedecken went to the apartment. When they arrived, two females brought some clothing out to her but not the clothes that she needed. Thames went to the door of the apartment and knocked. Ultimately, Appellant came to the door; they argued; and Appellant put some more of Thames's clothes in a bag and began to walk with Thames to her vehicle.

As Appellant and Thames walked toward Thames's vehicle, Appellant noticed Niedecken, dropped Thames's clothes on the sidewalk, and walked away. Thames picked up her clothes, and she and Niedecken got in Thames's vehicle and Thames started to drive away. As Thames drove away, Niedecken started to get out of the vehicle, and Thames tried to pull him back in. Niedecken slapped Thames's hand "off him," got out of the vehicle, and started to talk "s--t" to Appellant. Thames

saw Niedecken going toward Appellant, saw them start to fight, and told Niedecken to "come on" because "he didn't need to get in any more trouble." Thames did not see what happened next, but Niedecken got back in Thames's vehicle and told her that he needed to go to the hospital.

Appellant testified at trial. He testified that, as Thames was driving away, Niedecken "hop[ped]" out of Thames's moving vehicle and charged him at a "[d]ead sprint." He saw that Niedecken had a knife, and Appellant took out his own knife. Niedecken hit Appellant in the face, and Appellant "swung wildly and stabbed [Niedecken]." Appellant testified that he did not intend to kill Niedecken but just meant to injure Niedecken to keep him from hurting or killing Appellant. The stab wound began in Niedecken's lower left chest just above the abdomen. The knife "perforated the muscles of the left side of the chest and abdominal wall, the left fifth and sixth ribs near the sternum, the pericardium, and the heart." Niedecken subsequently died from the stab wound.

In the first of five issues on appeal, Appellant claims that "the evidence was insufficient to prove the offense of murder and the evidence was legally insufficient to support the jury's rejection of self defense." We cannot agree.

We review a challenge to the sufficiency of the evidence, regardless of whether it is denominated as a legal or factual sufficiency challenge, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

When conducting a sufficiency review, we consider all the evidence admitted at trial, including evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.* The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. *See id.* When, as here, the trial court's charge authorized the jury to convict the defendant on more than one theory, the verdict of guilt will be upheld if the evidence is sufficient on any theory authorized by the charge. *See Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004) (citing *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992)).

Section 9.32 of the Texas Penal Code provides, in relevant part, that a person is justified in using deadly force against another (1) if he would be justified in using force under Section 9.31 and (2) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force. TEX. PENAL CODE ANN. § 9.32(a)(1), (a)(2)(A) (West 2019); *see id.* § 9.31 (self-defense).

When a defendant challenges the legal sufficiency of the evidence to support rejection of a defense such as self-defense, we examine all the evidence in the light most favorable to the verdict to determine whether a rational jury could have found the accused guilty of all essential elements of the offense beyond a reasonable doubt and also could have found against the accused on the self-defense issue beyond a reasonable doubt. *See Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). The defendant has the burden of producing some evidence to support a claim of self-defense. *Zuliani v. State*, 97 S.W.3d 589, 594–95 (Tex. Crim. App. 2003). Once the defendant produces that evidence, the State then bears the burden of persuasion to disprove the raised defense. *Id.* The burden of persuasion does not require the State to produce evidence to disprove the defense; it requires only that the State prove its case beyond a reasonable doubt. *Id.* A determination of guilt by the factfinder implies a finding against the defensive theory. *Id.* The issue of self-defense is a fact issue to be determined by the jury, and the jury is free to accept or reject the defensive issue. *Saxton*, 804 S.W.2d at 912 n.3.

Thames testified that she never saw Niedecken with a knife and did not see one in her vehicle either before or after Niedecken was removed from the vehicle after Appellant stabbed him. An individual with the Midland Crime Scene Unit searched Thames's vehicle after the incident and did not find a knife. Neither did

that individual find a knife in Niedecken's personal things. No weapons were found on Niedecken's person.

From the evidence presented at trial, a rational jury could have found that Appellant's use of deadly force was not justified. A rational jury could have disbelieved Appellant's version of the events—that Niedecken had attempted to use a knife against him. As we have noted, there is no testimony or evidence from any source, except Appellant, that Niedecken had a knife.

After reviewing all the evidence, we hold that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against Appellant on the self-defense issue beyond a reasonable doubt. We overrule Appellant's first issue on appeal.

During the punishment phase of the trial, Niedecken's wife, Tiffany, testified. Tiffany testified that she and Niedecken had children together and that, without him, she "had to do everything on [her] own." Further, Tiffany testified, "I [have] had to play both roles that sometimes a mom can't be a dad." She also said, "The love of my life is gone."

Appellant then attempted to introduce evidence that Niedecken was under indictment in Midland County for aggravated assault with a deadly weapon; Niedecken's wife, Tiffany, was the alleged victim. The State objected to the evidence on relevance grounds, and the trial court sustained the objection. In his second issue on appeal, Appellant maintains that the trial court abused its discretion when it sustained the State's objection. Appellant contends on appeal that Tiffany had painted a false impression of her and Niedecken's married life and that it was Appellant's actions that had rendered her a single mother. It is Appellant's position on appeal that he was entitled to rebut that with evidence of the pending charge against Niedecken.

The State maintains that Appellant made a different argument at trial than he has on appeal and has, therefore, waived any error. The thrust of Appellant's argument in the trial court was that it was incongruous for the State, on one hand, to present evidence about how Niedecken's family would suffer in his absence and, on the other hand, to try to take him away from that family by putting him in prison on the aggravated assault charge. We agree with the State that that is a different position than the one that Appellant presents on appeal.

Under Rule 33.1(a)(1)(A) of the Texas Rules of Appellate Procedure, before a party can be said to have preserved an appellate complaint, that party must, with sufficient specificity, have made the trial court aware of the ruling that it seeks. TEX. R. APP. P. 33.1(a)(1)(A). In *Reyna*, the court noted that the issue is whether the complaining party on appeal made the trial court aware of the complaint that the party is making on appeal. *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). In this case, Appellant never made the trial court aware of the relevance argument that he now presents on appeal, and he has waived the issue.

Even if we were to find that Appellant had not waived the issue and that the trial court abused its discretion when it refused to admit the evidence, Appellant has not shown that he was harmed. Under Rule 44.2(b) of the Texas Rules of Appellate Procedure, a nonconstitutional error "that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). Generally, substantial rights are not affected by erroneous evidentiary rulings "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001) (quoting *Reese v. State*, 33 S.W.3d 238, 243 (Tex. Crim. App. 2000)).

On appeal, Appellant asserts that the evidence of the pending charge against Niedecken was relevant to rebut testimony that Appellant claims painted Niedecken

as a devoted family man. The State counters that the testimony as to Niedecken's family life did not portray him as the model husband and father. The State contends that Niedecken "was not shown to be a good father; he did not live with his wife and children, and was apparently not that close to his children."

The record shows that Niedecken and Tiffany had two children together. The two children were ages two and one at the time of trial. The younger child was about one and one-half months old when Niedecken died; Niedecken had seen him only once. Another woman and Niedecken had twin boys who were nine years old at the time of trial. During trial, Tiffany was asked whether Niedecken was close to the twins, and she replied, "A little bit."

We have examined the record as a whole. We determine that we have a fair assurance that, even if the trial court erred when it refused to admit evidence of the aggravated assault charge during the punishment phase of the trial, the exclusion of the evidence did not influence the jury, or had but a slight effect.

For all the above reasons, we overrule Appellant's second issue on appeal.

In his third issue on appeal, Appellant claims that the trial court erred when it denied his motion to suppress evidence of a recorded phone conversation between Appellant and his friend Alexandra James. After Appellant had stabbed Niedecken and had left the scene, Detective Jennie Alonzo talked with James. James lived at the apartments where the stabbing occurred and had been in the parking lot at the time of the stabbing. However, James had turned to go back to her apartment and did not see the altercation. While James was talking with Detective Alonzo, Appellant called James. Detective Alonzo did not allow James to answer because the detective was trying to find out what had happened. Later, Detective Alonzo asked James to return the call to Appellant. Appellant and James had a telephone conversation. At the time of the conversation, Appellant was away from the scene,

and Detective Alonzo had no control over Appellant or his movement. Detective Alonzo was present with James during the call; they were in Detective Alonzo's police vehicle. James placed her phone in "speakerphone" mode, and Detective Alonzo recorded the conversation. It is that recording that Appellant claims the trial court should have suppressed.

We review a trial court's ruling on a motion to suppress for an abuse of discretion. *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011); *Lujan v. State*, 331 S.W.3d 768, 771 (Tex. Crim. App. 2011). When we review a ruling on a motion to suppress, we apply a bifurcated standard of review. *Martinez*, 348 S.W.3d at 922–23; *Hubert v. State*, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010). We afford almost total deference to the trial court's determination of historical facts and of mixed questions of law and fact that turn on the weight or credibility of the evidence. *Martinez*, 348 S.W.3d at 922–23; *Lujan*, 331 S.W.3d at 771. We review de novo the trial court's determination of pure questions of law and mixed questions of law and fact that do not depend on credibility determinations. *Martinez*, 348 S.W.3d at 923.

The gist of Appellant's argument is, first, that because Appellant was on parole at the time of the phone conversation with James, he was in the legal custody of the State of Texas and, inasmuch as he was in the legal custody of the State of Texas, he should have been properly warned before the telephone conversation began. Appellant cites to the Texas Code of Criminal Procedure and to *Miranda*. *See* TEX. CODE CRIM. PROC. ANN. §§ 38.22, 38.23 (West 2018); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

Appellant contends that he was in legal custody by virtue of the Texas Government Code, Section 508.143. That section provides: "(a) A releasee while on parole is in the legal custody of the division. (b) A releasee while on mandatory supervision is in the legal custody of the state." TEX. GOV'T CODE ANN. § 508.143

(West 2012). Because Appellant was in the "legal custody" of the State as far as parole law is concerned, he urges us to hold that appropriate warnings should have been given to him before his conversation with James was admissible. We decline to follow his urging. Appellant also invites us to hold that James was an agent of the State during the telephone conversation. We likewise decline that invitation.

The State shoulders no burden to show that it has complied with *Miranda* or with Article 38.22 warnings until such time as "the defendant proves that the statements he wishes to exclude were the product of custodial interrogation." *Wilkerson v. State*, 173 S.W.3d 521, 532 (Tex. Crim. App. 2005). Therefore, unless the record clearly shows that the statement was the "product of custodial interrogation by an agent for law enforcement," the State bears no burden in this regard. *Id.*

Parole is a form of constructive custody. *Ex parte Peel*, 626 S.W.2d 767, 768 (Tex. Crim. App. 1982). However, it is not the type of custody that entitles a parolee to good time or trusty time. *Id.* On the other hand, in *Werner*, the court held that "custody" as used in Article 44.04(h) of the Texas Code of Criminal Procedure means any form of custody, including parole, and that, under that statute, the defendant was "entitled to release on reasonable bail." *Werner v. State*, 445 S.W.3d 301, 304 (Tex. App. 2013); *see* CRIM. PROC. art. 44.04(h). These two cases are instructive in that they lead us to the question: What type of custody is involved in a *Miranda* issue?

"Custodial interrogation" has been defined as "questioning initiated by *law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Wilkerson*, 173 S.W.3d at 526 (quoting *Miranda*, 384 U.S. at 444). The purpose behind the rule is to avoid the danger of compulsion inherent in an "incommunicado interrogation of individuals

in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Id.* at 527 (quoting *Miranda*, 384 U.S. at 445). The purpose of the *Miranda* rule, then, is to protect "against coercive custodial questioning by police; it protects a suspect from the possibility of physical or psychological 'third degree' procedures." *Id.* (quoting *Cobb v. State*, 85 S.W.3d 258, 263 (Tex. Crim. App. 2002)).

The type of custody contemplated by the legislature in Section 508.143 is not the genre of custody targeted by *Miranda* and Article 38.22 of the Texas Code of Criminal Procedure. Simply being in the "legal custody" of the State does not create the type of police-dominated coercive atmosphere against which the principles of *Miranda* are designed to provide protection. Moreover, in this case, there was no "coercive custodial questioning" by law enforcement. Appellant was engaged in a telephone conversation with a friend and fellow drug user and was under no compulsion from law enforcement to make any of the statements that he made during his telephone conversation with James. The contents of the telephone conversation were not the result of custodial interrogation, and the trial court did not err when it denied Appellant's motion to suppress. In view of our holding, we need not address Appellant's argument that James was an agent of the police at the time of the telephone conversation. We overrule Appellant's third issue on appeal.

In his fourth issue on appeal, Appellant maintains that the trial court violated Appellant's rights to confrontation when it admitted into evidence certain out-of-court statements. Denise Paredes testified that, on the morning of the stabbing, she and her parents had stopped at Kent Kwik to get gas for their vehicle. While there, her dad noticed "a girl" (Thames) who was in hysterics. Paredes went to help. When she looked in Thames's vehicle, she saw a man "hunched over," and she heard a child crying; the child was in the backseat. Thames handed the child to Paredes.

The child "was crying for mommy." The child appeared to be about three years old. Over hearsay and constitutional confrontation clause objections, the trial court allowed Paredes to testify that the child told her, "Chris hurt Craig." It is that testimony that is the subject of Appellant's fourth issue on appeal.

We review a trial court's decision regarding the admissibility of evidence under an abuse of discretion standard. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007). Appellate courts will uphold a trial court's admissibility decision when that decision is within the zone of reasonable disagreement because trial courts are in the best position to decide questions of admissibility. *Id.* An appellate court may not reverse a trial court's decision regarding the admissibility of evidence solely because the appellate court disagrees with the decision. *Id.* A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991).

Under *Crawford*, the admission of a hearsay statement made by a nontestifying declarant results in a violation of the Sixth Amendment if the statement was testimonial and the defendant lacked a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). That is true even if the statement falls under a hearsay exception. *Id.*

"[T]estimonial statements are those 'that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013) (quoting *Crawford*, 541 U.S. at 52). It is difficult for us to understand how a three-year-old toddler "would intend [her] statements to be a substitute for trial testimony." *See Ohio v. Clark*, 576 U.S. 237, (2015) (admission into evidence of three-year-old child's statement to teacher as to who hurt the child did not offend the Confrontation Clause). Upon this record, the toddler's statement

clearly did not have as its primary purpose the creation of evidence for use in Appellant's prosecution. The evidence was nontestimonial and there was no Confrontation Clause violation. The trial court did not err when it admitted the child's statement. We overrule Appellant's fourth issue on appeal.

Finally, in his fifth issue on appeal, Appellant takes the position that the trial court erred when it refused to allow Appellant to ask the jury panel: "People who start fights deserve what happens to them, from a scale of 1 to 4, strongly disagree or strongly agree." The State objected that the question would not lead to a challenge for cause, that the question was "getting into specific facts of the case because we are talking about a fight," and that it "might be improperly committing the jurors at this time, Your Honor, without hearing other facts." The State further pointed out that the question was not a correct statement of the law. After presenting arguments at the bench, the trial court stated, "I am going to sustain the objection." The State leveled several objections, and Appellant has not pointed out which objection is "the" objection that trial court sustained.

Nevertheless, in his brief, Appellant generally discusses the law regarding the nature of commitment questions. Then, he maintains that he was entitled to ask the question because "[i]t was vital for the defense to know whether a juror could not follow the law regarding self-defense." Appellant went on to say, "Basically, the question asked if the venireman thought someone stated [sic] a fight that person would not follow the law."

A trial court is given broad discretion over the jury selection process. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). "We leave to the trial court's discretion the propriety of a particular question and the trial court's discretion will not be disturbed absent an abuse of discretion." *Id.* A trial court abuses its discretion only if it prohibits a proper question about a proper area of inquiry. *Id.*

A defendant may challenge a veniremember for cause if, among other things, he possesses a bias against a phase of the law upon which the defendant is entitled to rely. CRIM. PROC. art. 35.16(c)(2) (West 2006); *Barajas*, 93 S.W.3d at 39. Whether "people who start fights deserve what happens to them" is not a phase of the law upon which a defendant is entitled to rely. The trial court did not abuse its discretion when it refused to allow Appellant to ask the question of the panel. We overrule Appellant's fifth issue on appeal.

We affirm the judgment of the trial court.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

June 11, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.