Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00406-CR

JOSE SANTOS FLORES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 831,300

O P I N I O N

A jury found appellant, Jose Santos Flores, guilty of the offense of felony murder and assessed his punishment at life imprisonment in the Texas Department of Criminal Justice, Institutional Division, and a $10,000.00 fine. On appeal, appellant raises six points of error. In his first two points of error, appellant complains that the evidence was legally and factually insufficient to support his murder conviction. In point of error three, appellant argues that a material variance between the indictment and the proof at trial existed which warrants reversal. In his fourth point of error, appellant complains that the trial court erred in denying his motion to suppress his pre-trial statements. In point of error five, appellant argues that the trial court

improperly commented on the weight of the evidence during voir dire. Finally, in his sixth point of error, appellant argues that the state failed to prove that he committed an extraneous offense introduced during the punishment phase. We affirm.

I. Background

On June 6, 1998, appellant participated in a drive-by shooting of rival gang members at the Prestwood Apartments. In attendance at this drive-by shooting were appellant, also known as "Spookey," Juan Carlos Alvarez ("El Chuco"), Michael Reyes ("Reyes"), and approximately eleven other individuals in a caravan of five or six cars. As the vehicles proceeded down Prestwood street, with their headlights off, occupants within the vehicles opened fire on a crowd of men, women, and children outside the apartments. The cars then turned around, drove back in front of the apartments, and started shooting again. In total, eight individuals were hit; one man, Michael Aquirre, died at the scene, and his brother, Adrian Aquirre, died approximately two days later.

Appellant does not deny he was at the scene of the shooting, but contends that he was not involved in the shooting. According to appellant, he had exited the car he was driving to fight a rival gang member, when he heard gunshots coming from a red Nissan containing El Chuco and an individual known as "Smokey." Appellant asserts that El Chuco and Smokey did all the shooting. Appellant, however, concedes that he knew that El Chuco was "going to shoot and try to kill the guy who shot and killed Piapa." Further, appellant admits that he engaged in conversations with other individuals about doing the drive-by shooting.

Additionally, Miguel Reyes ("Reyes"), a passenger in one of the cars that participated in the drive-by shooting, testified that contrary to appellant's statement, appellant and El Chuco were the ones who did the shooting at the apartments.

II. Accomplice Testimony

Appellant frames his first two points of error as a legal and factual sufficiency review of the evidence. Specifically, appellant argues that Reyes's testimony was uncorroborated

accomplice testimony, and without such testimony the evidence is legally and factually insufficient to support his conviction. In essence, appellant improperly seeks a legal and factual sufficiency review of the accomplice testimony. *See Cathey v. State*, 992 S.W.2d 460, 462-63 (Tex. Crim. App. 1999) (declining to extend legal and factual sufficiency standards to a review of accomplice witness testimony).

The accomplice witness rule under article 38.14 is a statutorily imposed sufficiency review and is not derived from federal or state constitutional principles that define the legal and factual sufficiency standard. *Cathey*, 992 S.W.2d at 462-63; *Malik v. State*, 953 S.W.2d 234, 240 n.6 (Tex. Crim. App. 1997). Article 38.14 requires that accomplice witness testimony be corroborated by other evidence tending to connect the defendant with the offense. *Cathey*, 992 S.W.2 d at 462. The corroborating evidence need not directly connect the defendant to the crime, nor be sufficient by itself to establish guilt. *Id*. If the combined weight of the non-accomplice evidence tends to connect the defendant to the offense, the requirement of Article 38.14 has been fulfilled. *Id*.

Appellant, in his statement to the police, admits that on the day of the drive-by shooting he spoke with El Chuco about doing a drive-by shooting at the Prestwood Apartments. Appellant further admits that a caravan of vehicles converged on the Prestwood Apartments to do the drive-by shooting. Appellant stated that he drove the lead car, and El Chuco and Smokey fired out of the last car. Appellant maintained in his statement that he had exited his vehicle to fight a rival gang member when the shooting started, yet no other witnesses to the shooting testified that they saw anyone exit the vehicles as they drove by the apartments. Additionally, appellant stated that after the first shots were fired, he left the scene and El Chuco and Smokey went back for a second drive-by shooting. Again, this is contradicted by witnesses at the scene who testified that the same group of cars went by the apartments twice, shooting both times. Lastly, appellant describes the weapons used as a .380 and an AK-47. The .380 pistol that was used in the shooting was found in a car in which appellant was a passenger.

Appellant argues that this evidence merely establishes that he was present at the

shooting. We disagree. The evidence at trial, not including the accomplice witness testimony, tends to establish that appellant participated in the planning of the drive-by shooting. By his own admission, appellant drove the lead car which took the caravan on the murderous journey. Furthermore, testimony from witnesses established that the vehicles drove by the apartment complex twice, shooting both times, in clear contradiction to appellant's assertion that he left the scene after the first shooting. Such testimony tends to establish that appellant willingly participated in the drive-by shooting. Lastly, as mentioned earlier, the .380 pistol which was used in the shooting was found in a vehicle in which appellant was a passenger, a circumstance which tends to connect appellant to the drive-by shooting.

We find that the totality of non-accomplice evidence tends to connect appellant to the offense committed and corroborates Reyes's testimony. Accordingly, appellant's first two points of error are overruled.

III. A Material Variance in the Indictment

In his third point of error, appellant argues that there was a material and fatal variance in the indictment which should result in a reversal of his conviction. Specifically, appellant asserts that while the indictment alleged that he caused the death of "M. Agguire," the state only proved the death of "Michael Aguirre," or "Mike Agguire." We disagree that such a distinction constitutes a material and fatal variance.

"In alleging the name of the defendant, or of any person necessary to be stated in the indictment, it shall be sufficient to state one or more of the initials of the given name and the surname." TEX. CODE CRIM. PROC. ANN. art. 21.07 (Vernon Supp. 2001); *see Chambless v. State*, 776 S.W.2d 718, 720-21 (Tex. App.—Corpus Christi 1989, no writ) (holding that the variance between Paul A. Goike and P. Goike is not material). Such is our present situation: the state alleged M. Agguire and proved Michael Agguire. We find that the indictment was in conformity with article 21.07 of the Texas Code of Criminal Procedure and that the proof offered of the complainant's identity did not constitute a material and fatal variance. We overrule appellant's third point of error.

IV. Motion to Suppress

Appellant, in his fourth point of error, complains that the trial court erred in denying his motion to suppress his statements. Specifically, appellant claims that his statements in English were unreliable because he spoke very little English and could not read or write the English language.

In a hearing on a motion to suppress, the trial judge is the sole and exclusive trier of fact and judge of the credibility of the witnesses, as well as, the weight to be given to their testimony. *Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex. Crim. App. 1997); *Green v. State*, 934 S.W.2d 92, 98 (Tex. Crim. App. 1996); *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *McAllister v. State*, 34 S.W.3d 346, 350 (Tex. App.—Texarkana 2000, pet. ref'd); *Graham v. State*, 893 S.W.2d 4, 6 (Tex. App.—Dallas 1994, no pet.); *Campbell v. State*, 864 S.W.2d 223, 225 (Tex. App.—Waco 1993, pet. ref'd). If the court's resolution of a controverted issue is supported by the record, a reviewing court should not disturb that decision. *Muniz v. State*, 851 S.W.2d 238, 252 (Tex. Crim. App. 1993); *Campbell*, 864 S.W.2d at 225.

The question of whether appellant could read, write, and/or speak English was entirely a fact determination which the trial court resolved against appellant. At the hearing on appellant's motion to suppress, the trial court heard testimony from four officers who stated that appellant could read and speak English. Appellant, on the other hand, testified that he is originally from El Salvador, has lived in Houston for only about four years, and while he can speak a little English, he could not read or write English. The trial court was in the best position to judge the credibility of the witnesses. Accordingly, the trial court did not err in denying appellant's motion to suppress. We overrule appellant's fourth point of error.

V. Comment on the Weight of the Evidence

In his fifth point of error, appellant complains that the trial court improperly commented on the weight of the evidence during voir dire. Specifically, appellant complains of the trial court's hypothetical of a mercy killing as being the type of case that is worthy of

probation. Appellant has failed to preserve this error for our review.

To preserve a complaint concerning a trial judge's comments for appellate review, counsel must object to the judge's comment or the objection is waived. *Sharpe v. State*, 648 S.W.2d 705, 706 (Tex. Crim. App. 1983). Counsel failed to lodge an objection to the trial court's hypothetical. Accordingly, appellant has waived this point of error. We overrule appellant's fifth point of error.

VI. Extraneous Offense

Lastly, in appellant's sixth point of error, he contends that the State failed to prove beyond a reasonable doubt that he committed the unadjudicated extraneous offense introduced during the punishment phase. Again, appellant failed to preserve this error for our review.

To preserve error in the admission of extraneous offenses under the rules of evidence, the opponent of extraneous offense evidence must first object under rule 404(b). *Harrell v. State*, 884 S.W.2d 154, 161 n.14 (Tex. Crim. App.1994); *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990); *Saldivar v. State*, 980 S.W.2d 475, 491 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). The State must then "show the proffered evidence is relevant apart from its tendency to show that the defendant is a criminal." *Harrell*, 884 S.W.2d at 161 n.14. At the defendant's request, the trial court should then require the State to articulate the limited purpose for which the evidence is offered. *Id*. In making a determination as to the relevancy of the evidence, the trial court must determine, "at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Id*. at 160.

Appellant made no objection to the admission of the extraneous offense evidence. Consequently, appellant failed to preserve this error for our review. Appellant's sixth point of error is overruled.

VII. 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 26, 2001.

Panel consists of Justices Hudson, Seymore, and Murphy.[*]

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

[*] Senior Chief Justice Paul C. Murphy sitting by assignment.