IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1034-20

TERRY MARTIN, Appellant

v.

THE STATE OF TEXAS

**ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SEVENTH COURT OF APPEALS
LUBBOCK COUNTY**

McCLURE, J., delivered the opinion of the Court in which HERVEY, RICHARDSON, NEWELL, WALKER, and SLAUGHTER, JJ., joined. YEARY, J., filed a concurring opinion. KELLER, P.J., and KEEL, J., concurred in the result.

O P I N I O N

We granted the State Prosecuting Attorney's petition for discretionary review to decide whether the unlawful carrying of a weapon by a gang member, Tex. Penal

Code § 46.02(a-1)(2)(C),[1] requires proof the defendant was continuously or regularly committing gang crimes. The court of appeals found that the language of the statute plainly did, relying on the holding from the Fourteenth Court of Appeals in *Ex parte Flores*. We agree and adopt and apply the holding from *Ex parte Flores* in that, to be a gang member for purposes of prosecution under § 46.02(a-1)(2)(C), an individual must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and must also continuously or regularly associate in the commission of criminal activities.

Background

On April 17, 2018, Terry Martin ("Appellant") was stopped for multiple traffic violations while riding a motorcycle on U.S. Highway 87 in Lubbock County. During the stop, Corporal Michael Macias observed that Appellant was wearing a motorcycle vest, or "cut," that read "Cossacks MC." After patting him down, Officer Macias asked if Appellant had any firearms on him, to which Appellant responded that he had a pistol inside his vest. Officer Macias placed Martin in handcuffs while stating "I take it by your cut you're a Cossack?" Appellant answered, "Yes, sir." Appellant's motorcycle "cut" contained Sergeant's stripes and a portion that said

[1] Since the granting of this petition, the 87th Legislature has repealed subsection (a-1)(2)(C), effective September 1, 2021, and moved the subsection to its own statute, creating a standalone offense. Because this statute was enacted after the granting of this petition, we will not address it at this time.

"Cossacks MC, Lubbock County, Mid-Cities, Texas." Corporal Macias believed, based on his training and experience, that the Cossacks were a criminal street gang. Appellant was ultimately charged with unlawfully carrying a weapon (UCW) as a member of a criminal street gang, a Class A misdemeanor.

At trial, the State presented testimony from Deputy Joshua Cisneros of the Lubbock County Sheriff's Office in the street crimes unit. As part of the Texas Anti-gang Center, Deputy Cisneros worked to disrupt the activity of criminal street gangs. Deputy Cisneros testified that law enforcement uses a statewide database known as TxGANG to identify and keep track of gang members. He explained that certain factors, which are set forth in the Texas Code of Criminal Procedure, are used to determine whether someone is a gang member. Two of these factors, namely a judicial finding and self-identification during a judicial proceeding, are standalone criteria, meaning an individual can be entered into the TxGANG system upon a showing of either one. [2]

[2] Deputy Cisneros further testified that a determination of gang membership can also be made if any two of the following criteria are met: a nonjudicial self-admission; identification by a reliable informant; a corroborated identification by an informant of unknown reliability; evidence the individual uses technology to recruit new members; evidence the individual uses street gang dress, hand signals, tattoos, or symbols; or evidence that the individual has been arrested with known gang members for an offense or conduct consistent with gang activity. Finally, a determination can be made if there is evidence of any one of the preceding factors plus evidence that the individual visited gang members while they were imprisoned and frequented known gang areas and associated with known gang members.

Deputy Cisneros then testified specifically about the Cossack Motorcycle Club. Cisneros testified that he was familiar with the Cossacks and that they were a nationwide outlaw motorcycle gang. The Cossacks had gang colors (yellow and gold), a gang symbol (the "ugly man"), and an organizational structure. Groups would obtain permission from the Cossack national leadership to organize a local chapter. Members paid dues to the national organization, earned patches to wear on their vests upon obtaining full membership, and had to return Cossack insignia upon resignation or "excommunication." Deputy Cisneros further testified that members of the Cossacks continuously and regularly engaged in assaults, threats of violence, intimidation, and illegal firearms possession.

Deputy Cisneros testified that he was familiar with local criminal activity involving the Cossacks. In one incident, on April 15th, 2018, several members of a motorcycle club were assaulted. One victim said that the suspects were wearing Cossack Motorcycle Club cuts and Kinfolk Motorcycle Club cuts. A second incident occurred in a parking lot and involved members of the Villistas, Bandidos, and Cossacks motorcycle clubs. In this incident, a ranking member of the Bandidos Motorcycle Club was reportedly knocked out, carried into a van, and taken from the scene. Deputy Cisneros acknowledged that there had been no arrests from either incident. He also testified that he knew of no criminal charges filed against Cossacks in the area.

Deputy Cisneros expressed the opinion that Appellant was a member of the Cossacks Motorcycle Club because he gave a nonjudicial self-admission to Corporal Macias, he had already been entered into TxGANG as a Cossacks member by two different agencies at the time of the traffic stop, and he was wearing the cuts and various colors for the Cossacks. Deputy Cisneros also testified that Appellant was formerly a Sergeant-at-Arms for the Dallas chapter of the Cossacks. In that role, he reported directly to the president of the chapter and was a bodyguard to the president of the chapter. He was also the "enforcer" for the chapter, "meaning they can deal out the punishment for a member breaking the rules." The "punishment" could range from a "physical punishment" to a fine. Appellant was also involved in the "Twin Peaks Waco incident" where a fight broke out in the parking lot between members of the Bandidos and members of the Cossacks, which turned into a shootout where several people were killed.

Appellant testified on his own behalf. He stated that he had been a member of the Cossacks for four years but that he did not believe that Cossacks were a criminal street gang. He testified that he had never been convicted of a felony or a misdemeanor,[3] other than traffic violations. Appellant admitted to being at the Twin Peaks Waco shootout involving Cossacks, Bandidos, and law enforcement that

[3] The clerk's record indicates that on August 11, 2000, in Cause No. M-0040146 in the County Criminal Court No. 4 of Dallas County, Texas, the defendant was charged with the misdemeanor offense of assault and placed on deferred adjudication.

resulted in nine deaths. At the shootout, Appellant did not have a weapon on his person, although he had one in his vehicle. He was arrested and detained, along with some 170 others who were present, and charged with criminal organization. These charges were later dismissed. Appellant testified that his best friend was one of seven Cossacks who died in the shooting, and he knew the others. He added tattoos to his body in their memory. To his knowledge, no Cossacks had been convicted for the Twin Peaks incident.

Appellant testified that there were six Cossacks in Lubbock, and they were mechanics and city employees, not criminals, although he acknowledged that law enforcement officers could not join. He and the other Cossacks paid dues to a national organization, and they had common colors, a logo, and a motto. Appellant testified that he and the other five Cossacks in Lubbock did not plot crimes together, and he denied personally assaulting anyone with other members. He testified he did not participate in any bar fights or agree with other Cossacks to beat up Bandidos.

The jury found Appellant guilty of the offense of UCW and set his punishment at a fine of $400.00 with no term of confinement.

Direct Appeal

On appeal, Appellant claimed that the evidence was insufficient to show that he was a member of a criminal street gang.[4] Appellant admitted that he was factually a Cossacks member but denied that he was legally a Cossacks member because the State failed to prove that he personally was a criminal. For this, he relied on the Fourteenth Court of Appeals' interpretation in *Ex parte Flores* that a "member" is one of the three or more persons who continuously or regularly associate in crime. *Ex parte Flores*, 483 S.W.3d 632, 645 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

The Seventh Court of Appeals agreed, accepted the interpretation of the statute from *Ex parte Flores*, and held: "To be a gang member for purposes of prosecution under the statute, 'an individual must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and *must also* continuously or regularly associate in the commission of criminal activities.'" *Martin v. State*, No. 07-19-00082-CR, 2020 WL 5790424, at *4 (Tex. App.—Amarillo Sept. 28, 2020) (mem. op., not designated for publication) (quoting *Ex parte Flores*, 483 S.W.3d at 648). The court of appeals held that, under *Flores*, both

[4] Appellant also challenged the constitutionality of this statutory framework, both facially and as applied to him. Because those grounds were not preserved for appellate review because Appellant did not raise any such challenges at the trial court level, the court of appeals overruled those grounds.

gang membership and a connection to criminal conduct are required and the record is "devoid of evidence" showing that Appellant associated in the commission of criminal activities. *Id*. The court noted that Appellant's arrest at Twin Peaks on charges that were later dismissed does not establish that he continuously or regularly associated in the commission of criminal activities. *Id*. Therefore, the court of appeals held that the evidence was insufficient to show that Martin himself regularly or continuously engaged in criminal activity pursuant to his membership in a gang. *Id*.

State's Petition and Arguments

The State Prosecuting Attorney's Office filed a petition for discretionary review with this Court, arguing that the court of appeals erred because *Ex parte Flores*'s interpretation is contrary to the plain language of the statute. Specifically, in holding that a "gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities," *Ex parte Flores* and the court of appeals collapse the two requirements into one, contrary to the plain language. Instead, according to the State Prosecuting Attorney (SPA), in determining gang membership for UCW, two requirements are clear from sections 46.02(a-1)(2)(C) and 71.01(d): (1) the defendant must be a member of the group, and (2) the group, among other things, must continuously or regularly associate in the commission of crime.

The SPA also argues that the court of appeals went beyond *Ex parte Flores,* requiring direct participation in crime. Specifically, the State complains that the court did not address the significance of Appellant's four-year membership, monetary contributions from dues, or past leadership role, although all of these things facilitated the Cossacks' primary activities (committing assaults, according to the State's expert). Instead, the State complains that the court looked only to evidence that Appellant was physically and personally involved in crime. Accordingly, the SPA argues that the court erred by finding the evidence to be insufficient for conviction.

Unlawfully Carrying a Weapon and Criminal Street Gang Statute

Texas Penal Code section 46.02(a-1)(2)(C) provides that

> A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which:
> . . . .
> (2) the person is:
> . . . .
> (C) a member of a criminal street gang, as defined by section 71.01.

"Member" is not defined, but section 71.01 defines a criminal street gang as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Tex. Penal Code § 71.01(d).

Ex parte Flores

In *Ex parte Flores*, the appellant argued that "the term 'criminal street gang,' which section 46.02(a-1)(2)(C) borrows from section 71.01(d) of the Penal Code, is overbroad and criminalizes constitutionally protected conduct." 483 S.W.3d at 643. Flores also argued that section 46.02(a-1)(2)(C) uses the overbroad term "member" in defining who may not carry a handgun in a vehicle. *Id*. at 645.

First, the *Flores* court analyzed the construction of the term "criminal street gang." *Id.* at 643–45. According to Flores, the term "criminal street gang" means "three or more persons having either (1) a common identifying sign, (2) a common identifying symbol, or (3) an identifiable leadership who continuously or regularly associate in the commission of criminal activities." *Id.* at 643–44. Therefore, three or more persons qualify as a criminal street gang if they have a common identifying sign or symbol. *Id*. at 644. In the appellant's view, under this interpretation, the three or more persons need not continuously or regularly associate in the commission of criminal activities. *Id*. As a result, the statute prohibits "a wide array of constitutionally protected conduct by prohibiting groups of people from meeting, congregating, or assembling, and having an identifying sign or symbol." *Id*. This would lead to absurd results, such as the application of the term "criminal street gang" to members of the Boy Scouts of America. *Id*.

The *Flores* court disagreed and held that three or more persons meet the definition of a criminal street gang "only when they—in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities. The statute does not apply to three or more persons solely because they have a common identifying sign or symbol." *Id.* at 644. Flores argued that the court's interpretation added language to the statute, but the court disagreed and instead insisted that its construction "gives the statute its proper grammatical interpretation" and "gives effect to its plain language." *Id.* (holding that the group of words "having a common identifying sign or symbol or an identifiable leadership" was a participial phrase acting as an adjective that modified the noun "persons").

Second, the court analyzed the construction of the term "member." *Id.* at 645. The court determined that the term "member," when read together with the definition of "criminal street gang," indicates that "a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities." *Id.* Therefore, a person is a "member" of a criminal street gang only when the gang member is "one of the three or more persons who continuously or regularly associate in the commission of criminal activities" based on reading both terms ("member" and "criminal street gang") *together as opposed to separately*. *See id.* at 645.

Ex parte Flores's interpretation is not contrary to the plain language of the statute, and it protects constitutional rights.

All statutory construction questions are questions of law, so we review them de novo. *Alfaro-Jimenez v. State*, 577 S.W.3d 240, 244 (Tex. Crim. App. 2019). When interpreting a statute, we look to the literal text of the statute for its meaning. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). We ordinarily give effect to that plain meaning unless application of the statute's plain language would lead to absurd consequences that the Legislature could not possibly have intended or the plain language is ambiguous. *Id*.

The *Flores* court did just that: it interpreted the statute in accordance with the plain meaning of its language and did so by following the rules of statutory construction in analyzing the term "member" and in applying a reasonable construction of the statute to the issues on appeal. By reading the terms "member" and "criminal street gang" *together as opposed to separately,* the court held that a person is a "member" of a criminal street gang only when he is "one of the three or more persons who continuously or regularly associate in the commission of criminal activities." *Ex parte Flores,* 483 S.W.3d at 645.

The SPA asks this Court to read sections 46.02(a-1)(2)(C) and 71.01(d) differently from the *Flores* court. Under the SPA's interpretation of the statute, sections 46.02(a-1)(2)(C) and 71.01(d) only require that (1) the defendant must be a member of the group, and (2) the group, among other things, must continuously or

regularly associate in the commission of crime. The SPA argues that the court of appeals collapsed these two requirements into one, requiring direct participation in the crime, contrary to the plain language of the statute.

The SPA's reading of the statute would allow for the conviction of a person who is unaware of the gang's criminal activities and who has not personally committed a crime or associated in the commission of a crime. In other words, a broad interpretation of the term "member," as the SPA posits, would trigger the culpability of an otherwise innocent person merely by joining or participating in an organization deemed to be a criminal street gang with or without knowledge of that organization's criminal activity.

This absurd result is precisely what happened in this case: Though not a criminal for purposes of carrying a firearm, Appellant became one simply by riding his motorcycle while wearing his cut. This very fact scenario is what the court of appeals in *Flores* was trying to avoid in its interpretation. The *Flores* court was clear that law enforcement may not arrest a person under this section merely because they recognize gang signs or symbols. *Ex parte Flores,* 483 S.W.3d at 644. Instead, law enforcement must also determine whether the person is carrying a handgun in a vehicle and whether he or she continuously or regularly associates in the commission of criminal activity. *Id*. at 647.

Although the constitutionality of the statute is not challenged in this proceeding, we cannot ignore the unconstitutional implications of the SPA's interpretation. *See Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978) (holding that a reviewing court is to apply an interpretation that sustains its validity and upholds the statute if a reasonable construction will render it constitutional).

The *Flores* court recognized that without requiring direct participation in the organization's criminal activity, the statute cannot withstand constitutional scrutiny. *See Ex parte Flores*, 483 S.W.3d at 645. This is because an interpretation without direct participation requires neither criminal *mens rea* nor *actus reus* by the accused unlawful weapon carrier. Instead, it would only require the accused to join an association in which criminal activity occurs regularly among three or more individuals—even if the accused is unaware of such conduct. We have previously held that where otherwise innocent behavior becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances. *See McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989) (citing *McClain v. State*, 687 S.W.2d 350 (Tex. Crim. App. 1985)).

Applicable to the present case, a person commits unlawful carry if he "intentionally, knowingly, or recklessly carries on or about his person a handgun" while being a member of a criminal street gang. TEX. PENAL CODE §§ 46.02(a-1), 71.01. According to the SPA, to prove the second portion of the offense—that the

same individual is a member of a criminal street gang—the State need only show that the accused is listed in the statewide gang database, and it is not necessary prove that he has any knowledge of the commission of criminal activities of the organization. We disagree. The Legislature must surely have intended that, to be a member of a criminal street gang, the actor "must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership *and must also* continuously or regularly associate in the commission of criminal activities." Otherwise, the statute would attach a *mens rea* to nothing more than membership in an organization. Membership alone does not make conduct criminal, and in fact, the First Amendment to the United States Constitution specifically protects the freedom of association.

The *Flores* court properly clarified what conduct makes an individual a member of a criminal street gang: individual participation in crime. *Ex parte Flores*, 483 S.W.3d at 645. This interpretation of section 46.02(a–1)(2)(C) does not prevent gang members from gathering to engage in any activities protected by the First Amendment. It does not deem a person to be a "member" of a criminal street gang simply by associating with a group that has three or more members who continuously or regularly associate in the commission of criminal activities. Therefore, it does not implicate the constitutional right to freedom of association or authorize state action based on the doctrine of guilt by association.

With this in mind, we now turn to the second part of the SPA's argument that the court of appeals erred in holding that the evidence is legally insufficient to show that Appellant was one of the "members" who regularly or continuously engaged in criminal activity.

The evidence is insufficient to prove that Martin associated in the commission of criminal activities by the Cossacks. In assessing the legal sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). A reviewing court must "defer to the jury's credibility and weight determinations because the jury is the 'sole judge' of witnesses' credibility and the weight to be given testimony." *Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012).

In some cases, sufficiency of the evidence also turns on the meaning of the statute under which the defendant has been prosecuted. *Alfaro-Jimenez*, 577 S.W.3d at 244. In other words, a reviewing court must perform a statutory analysis to determine the elements of the offense before reviewing the evidence presented. *Id*. In this case, that statutory analysis is provided above.

The State presented evidence at trial that Appellant had been involved with the Cossacks Motorcycle Club. Appellant said he was a member for four years. Appellant admitted to the arresting officer that he was a Cossack and was wearing "gang attire" at the time of his arrest. Appellant had previously been arrested with gang members for a gang-related offense. Appellant was formerly a Sergeant-at-Arms and enforcer for the Dallas chapter of the Cossacks. He reported directly to the president of the chapter and served as the chapter president's bodyguard.

Deputy Cisneros testified that the Cossacks were a nationwide criminal street gang known to engage in criminal activities, but he knew of no criminal charges filed against Cossacks in the area. Appellant denied that the Cossacks were a criminal street gang and denied that he was aware of any criminal activity occurring within the gang. He also testified that he had never been convicted of a felony or misdemeanor, except traffic violations. At the Twin Peaks restaurant shoot-out in Waco, he was arrested and charged with criminal organization, but the charges were later dismissed. Further, a later report from the Waco Police Department revealed that police ran a background check and did not find anything that would prohibit Appellant from legally possessing a handgun, and the Waco Police Department returned Appellant's gun to him.

According to the statutory analysis in *Flores*, to be a "member," an individual "must be one of three or more persons with a common identifying sign, symbol, or

identifiable leadership and must also continuously or regularly associate in the commission of criminal activities." *Ex parte Flores*, 483 S.W.3d at 648. Here, the court of appeals held that while the evidence presented at trial satisfied the first half of the inquiry, i.e., that Appellant was part of the Cossack Motorcycle Club, the record lacked evidence of the second half, i.e., a showing that he associated in the commission of criminal activities. *Martin*, 2020 WL 5790424, at *4.

We agree with the court of appeals in holding that the evidence was insufficient to support Appellant's conviction for unlawful carry by a gang member beyond a reasonable doubt. There is no evidence in the record from which one may fairly infer that Appellant was aware of any criminal activities by the Cossacks. Appellant's mere presence at the Twin Peaks shooting does not establish that appellant continuously or regularly associated in the commission of criminal activities. Nor can one reasonably conclude that Appellant was involved in any criminal activity pursuant to his membership in the Cossacks. That being so, Appellant did not come within the purview of Texas Penal Code sections 46.02(a-1)(2)(C) or 71.01(d).

Conclusion

For the foregoing reasons, we adopt the Fourteenth Court of Appeals' analysis of Texas Penal Code sections 46.02(a–1)(2)(C) and 71.01(d) in *Ex parte Flores* in interpreting Appellant's issues on appeal. We agree with the Seventh Court of

Appeals that the evidence was insufficient to uphold Appellant's conviction for unlawful carry under section 46.02(a-1)(2)(C) of the Texas Penal Code. Accordingly, we affirm the judgment of the Seventh Court of Appeals and render a judgment of acquittal.

DELIVERED: December 15, 2021

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