**Affirm and Memorandum Opinion filed October 20, 2016.**

**In The**

**Fourteenth Court of Appeals**

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**NO. 14-15-00209-CR**

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**ERICK EDUARDO HERNANDEZ, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 184th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1392161**

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# MEMORANDUM OPINION

Appellant Erick Eduardo Hernandez was charged with capital murder and convicted of the lesser-included offense of murder. He was sentenced by the jury to imprisonment for life. Appellant appeals his conviction, raising two issues. Appellant contends in his first issue that the trial court abused its discretion in admitting appellant's recorded statement because it was the product of custodial interrogation and was illegally obtained after appellant invoked his Fifth

Amendment right to counsel. We conclude appellant failed to unambiguously invoke his Fifth Amendment right to counsel.

In his second issue, appellant asserts that the trial court erred when it denied his request for an instruction to the jury under Article 38.22, section 6, of the Texas Code of Criminal Procedure regarding the voluntariness of his recorded statement. We overrule this issue because appellant did not litigate before the jury the issue of voluntariness; thus, no reasonable jury could have found from the evidence that the statement was involuntary. We therefore affirm the judgment.

## BACKGROUND

### A. The complainant's murder

The complainant, Celestino (Tino) Flores, was a man in his seventies who worked as a courtesy shuttle driver at a car dealership in Houston. On the morning of June 17, 2013, the complainant drove his green Ford Explorer to work and parked it in the lot. Around 8:00 a.m., the complainant was dispatched to pick up a customer and left in the company shuttle van. Shortly after he left, the customer cancelled the ride and the complainant called his manager, David Hill, stating he was on his way back. When the complainant did not return timely to the dealership or answer his cell phone, Hill and another employee went to his home, which was nearby, to check on him. They observed the company shuttle van parked in the complainant's driveway. When they knocked on the front door, it opened. They did not go inside; instead, they called 911.

Police were dispatched to the complainant's Harris County home. First responders found the complainant dead, his body lying partly inside the bathroom and partly in the main hallway. His pockets had been emptied and his jewelry stolen. They completed a search of the premises and secured the crime scene

around 2:15 p.m. The autopsy report indicated that the complainant had been beaten and stabbed, dying of multiple blunt-and sharp-force injuries.

The back door to the house had been damaged. Officers believed it had been kicked in. Investigators attempted to collect fingerprints from the back door, but no usable prints were found. The house was neat and orderly except that one bedroom was unkempt. DNA samples taken from the crime scene and potential murder weapons were not helpful to the investigation.

The complainant's vehicle was discovered to be missing from the employee parking lot. A "be on the lookout" alert, or BOLO, was issued for the complainant's green Ford Explorer, stating that the vehicle was "stolen" and wanted in connection with an active Houston Police Department homicide investigation. An employee of the dealership, Edwin Sanchez, saw three young males (one black, one white, and one Hispanic) walking through the employee parking lot the morning of the complainant's murder. Sanchez could not identify any of the men, however.

Around 1:00 a.m. on June 18, Officer Cary Fullen of the City of Alvin Police Department in Brazoria County saw a green Ford Explorer driving in a city park well after hours.[1] Fullen stopped the vehicle. As Fullen approached, he smelled the odor of marijuana emanating from the driver's partially lowered window. Fullen asked the driver to roll the window down completely so they could talk. As the driver rolled the window down, the odor or burnt marijuana intensified; Fullen asked the driver for his identification. He identified the driver

[1] Fullen testified that being in the park after hours was a violation of an Alvin city ordinance.

as Gregary Flores (the complainant's grandson),[2] the front passenger as Terelle Johnson, and the rear right-side passenger as appellant.

Another officer arrived as backup and all three people were removed from the vehicle and detained in handcuffs. With the assistance of a dog, Fullen searched the vehicle and discovered 3.3 grams of marijuana in five separate packages, 8 blunts (rolled marijuana cigarettes) including one still lit in the center console, 150 grams of synthetic marijuana ("cush pink" and "Scooby snacks"), and a loaded pistol under appellant's seat.

Fullen arrested appellant for possession of marijuana and for unlawfully carrying a weapon, and he arrested Flores and Johnson for possession of marijuana. At about 2:15 a.m., while still at the scene of the arrests, Fullen received a notification on his patrol car computer that the Explorer was wanted in an active homicide investigation in Houston.

Around 2:30 a.m., Detective Sergeant Thaddeus Pool of the Houston Police Department Homicide Division was advised that three people had been found inside the complainant's vehicle and detained on other charges by the Alvin Police Department. Pool advised Fullen that no charges related to the complainant's murder were pending against the individuals. Pool requested that an investigative hold be placed on the men so he could interview them.

**B. Appellant's interview**

At about 7:00 p.m. on June 18, Sergeant Pool and his partner Detective Todd Tyler arrived at the Alvin city jail to interview appellant. At that time, there were no pending charges against appellant for homicide or any other offense, and Pool

[2] Gregary was having trouble with his immediate family, so the complainant allowed Gregary to stay in his home for a few months.

and Tyler testified that they were uncertain whether appellant was a suspect in the murder or merely a witness.

An Alvin police officer brought appellant to an interview room where Pool and Tyler were waiting. It was a small room furnished with a table and several chairs, but it did not have metal bars or otherwise appear to be a jail cell. Neither Pool nor Tyler displayed any type of weapon during the interview, and they did not handcuff or restrain appellant in any way. The interview, which was recorded, lasted two and a half hours.

At the beginning of the interview, Pool and Tyler greeted appellant and quickly identified themselves as "Houston homicide" police officers. Pool asked appellant if he needed anything and offered him water; when appellant expressed that he was thirsty and would like some water, Tyler immediately left the room and returned with a cup of water for appellant. Pool then asked appellant if he knew why he was in jail in Alvin. Appellant answered that he thought he, Flores, and Johnson were stopped "because of the illegal substances that were in the car," but that another officer "informed [appellant] that someone got killed"; appellant said he did not know anything more than that.

Pool told appellant that the officers would "go through a few formalities" with appellant and then stated that Pool and Tyler were there to talk to appellant about something that happened in Houston. After obtaining some background information from appellant (*e.g.*, name, date of birth, and address), Pool reiterated that he and Tyler were there to talk to appellant about a murder case in Houston and told appellant, "We believe you may be a witness to what happened."

Pool then advised appellant of his legal rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and Article 38.22, section 3, of the Texas Code of Criminal Procedure, by reading those rights from a card. While Pool read

appellant's rights to him, appellant affirmatively nodded after each sentence and stated, "Yes, sir." Pool asked appellant if he understood his rights and appellant again nodded affirmatively and answered, "Yes, sir." The conversation continued as follows:

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| Pool: | Okay, so do you want to waive those rights and talk to us? |
| Appellant: | Well, can I get me a lawyer for my case? |
| Pool: | Which case are you talking about? |
| Appellant: | Well, the -- the case where we got stopped for illegal substances. |
| Pool: | You see, we don't want to talk to you about, uh, we don't want to talk to you about the dope. Uh, we're not worried about all that. We're talking about . . . |
| Appellant: | Oh, y'all worried about that -- that stabbing? |
| Pool: | Yeah, we're -- we're homicide investigators. |
| Tyler: | Yeah, Erick, we're not here to talk to you about whatever you were, you know, picked up for by Alvin on as far as the dope or whatever it was. |
| Appellant: | Yes, sir. |
| Tyler: | None of that. |
| Appellant: | Yes, sir. |

Tyler resumed asking appellant general questions about his education and family, and then the questioning shifted to appellant's association with Flores and Johnson and the events surrounding the complainant's murder.

Appellant eventually implicated himself in the murder, confessing that: he knew Flores and Johnson intended to kill the complainant; Flores knew the

complainant would have money, and he, Flores, and Johnson had "talked about taking [the complainant's] money"; after Johnson struck the complainant with a pickaxe, he handed Johnson an axe and then a knife, which Johnson used to stab the complainant repeatedly; he helped move the complainant's body so that Johnson could go through the complainant's pockets; he hid the axe under a car in the complainant's back yard because he was afraid that the axe had his fingerprints on it; he accompanied Flores and Johnson to the dealership, where they stole the complainant's vehicle; and he remained with Flores and Johnson throughout the day until they were stopped and arrested in Alvin.

### C. Appellant's trial

Appellant was charged with capital murder. Appellant filed a pre-trial motion to suppress his recorded statement on the grounds that it was involuntary and taken in violation of his right to counsel. The trial court conducted a hearing in which Officers Fullen, Pool, and Tyler testified. Pool, in particular, testified about the interview and administering appellant's Miranda warnings. Pool stated that he learned that appellant was in custody on a weapons charge and drug charges. Pool explained that when appellant asked if he could have a lawyer for "my case," he asked him which case because he thought he was talking about the weapon case. But appellant stated that it was the illegal substances case. Pool clarified that there were no charges pending against appellant for murder at that time; Pool stated that Appellant was a potential witness to the murder and that he thought Flores might have "relayed some details to him." The trial court denied the motion and held appellant's recorded statement admissible. The court later signed findings of fact and conclusions of law, including a conclusion that Appellant's question about obtaining a lawyer "for my case" was not an

unambiguous and unequivocal request for counsel for the interview on the homicide investigation.

The case proceeded to trial, and appellant objected on the same grounds when the State sought to admit his recorded statement. The trial court overruled appellant's objection and admitted his recorded statement into evidence. At the conclusion of the State's evidence, appellant rested without testifying or calling any witnesses.

At the charge conference, appellant objected to the court's proposed charge and requested a general voluntariness instruction under Article 38.22, section 6, of the Texas Code of Criminal Procedure. The trial court refused appellant's request, explaining that there were no facts in evidence that were in dispute that the jury would need to decide regarding whether appellant's statement was voluntary.

The jury found appellant guilty of the lesser-included offense of murder and sentenced him to life in prison. This appeal followed.

## ANALYSIS

### I. The trial court did not abuse its discretion when it denied appellant's motion to suppress his recorded statement.

In his first issue, appellant contends that the trial court abused its discretion when it denied his motion to suppress and admitted into evidence a recorded statement he gave to the detectives investigating the complainant's murder. Appellant argues that the trial court should have excluded the statement he made because officers continued to question him in violation of his Fifth Amendment right to counsel.

### A. Standard of review

In reviewing a trial court's ruling on a motion to suppress, we apply an abuse-of-discretion standard and overturn the trial court's ruling only if it is outside the zone of reasonable disagreement. *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011). We view the evidence in the light most favorable to the trial court's ruling. *Weide v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007).

At a suppression hearing, the trial judge is the sole trier of fact and assesses the witnesses' credibility and decides the weight to give to that testimony. *Weide,* 214 S.W.3d at 24–25. When, as here, the trial court makes explicit findings of fact, we determine whether the evidence, viewed in the light most favorable to the ruling, supports those findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). We then review the trial court's legal rulings de novo unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id*. We uphold the ruling if it is supported by the record and correct under any theory of the law applicable to the case. *Hereford v. State*, 339 S.W.3d 111, 117–18 (Tex. Crim. App. 2011).

### B. Appellant did not unambiguously invoke his Fifth Amendment right to counsel.

Appellant contends that suppression of his recorded statement was required because he was in custody and invoked his Fifth Amendment right to counsel, which rendered any statements made thereafter inadmissible. We disagree that the detectives' handling of the interview violated appellant's Fifth Amendment right to counsel.

Under *Miranda* and Article 38.22 of the Texas Code of Criminal Procedure, a suspect must be advised of various rights, including the right to counsel, and must waive those rights in order for any oral statement he makes in a custodial

interrogation to be admissible. 384 U.S. at 444; Tex. Code Crim. Proc. Ann. art. 38.22 § 3(a). The Fifth Amendment right to have an attorney present during custodial police interrogation applies to any offense about which the police might want to question the suspect. *State v. Gobert*, 275 S.W.3d 888, 892 (Tex. Crim. App. 2009).[3] The suspect may waive this right implicitly by answering questions after hearing his rights and indicating that he understood them. *Turner v. State*, 252 S.W.3d 571, 583–84 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). If the suspect invokes his Fifth Amendment right to counsel at any time, however, police interrogation must cease until counsel has been provided or the suspect himself reinitiates the dialogue. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981); *Gobert*, 275 S.W.3d at 892.

Not every mention of a lawyer by a suspect will suffice to invoke the Fifth Amendment right to the presence of counsel during questioning. *Gobert*, 275 S.W.3d at 892. An ambiguous or equivocal statement with respect to counsel does not even require officers to seek clarification, much less halt their interrogation. *Id.* Whether the mention of a lawyer clearly invokes the right to counsel depends on the statement itself and the totality of the circumstances. *Id.*

In its written findings and conclusions, the trial court concluded that appellant's "statement, 'Well, can I get me a lawyer for my case?' was not an unambiguous and unequivocal request for counsel." The record and the trial court's findings support this conclusion. Appellant was advised of his right to counsel. He indicated that he understood his rights by nodding affirmatively and answering "yes." When appellant asked if he could get a lawyer for his case,

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[3] In contrast, the Sixth Amendment right to counsel is offense specific and does not apply until the defendant appears before a judicial officer and is told of the formal accusation against him. *Rubalcado v. State*, 424 S.W.3d 560, 570 (Tex. Crim. App. 2014). At the time appellant made his statement, he had been arraigned on the Brazoria County charges but not on the Harris County homicide charge.

Sergeant Pool asked which case appellant was talking about, and appellant responded "the case with that stuff, the illegal substances." Pool informed appellant that they were not worried about appellant's Brazoria County cases, to which appellant responded, "Oh, y'all worried about – that stabbing?" Pool reiterated that they were homicide investigators, and Detective Tyler repeated that they were not there to talk about "whatever [appellant] got picked up for by Alvin police." Appellant did not mention a lawyer again and continued answering general questions.

Based on the totality of the circumstances, including appellant's use of the words "can I" and "for my case" in asking whether he could get a lawyer and the prompt clarification that he was referring to the Brazoria County cases pending against him that were not the subject of the interrogation, we hold that the trial court acted within its discretion in concluding that appellant did not unambiguously and unequivocally invoke his right to have counsel for the interrogation. *See Davis v. United States*, 512 U.S. 452, 462 (1994) (holding that statement "Maybe I should talk to a lawyer" was not request for counsel); *Russell v. State*, 727 S.W.2d 573, 576 (Tex. Crim. App. 1987) (holding "appellant's inquiry into the officer's opinion as to the necessity of counsel being present during interrogation cannot be viewed as a clear invocation of his right to counsel"); *Collins v. State*, 727 S.W, 2d 565, 569-70 (Tex. Crim. App. 1987) (holding appellant's inquiry as to whether he would receive counsel was not an invocation of right to counsel).[4] Because appellant's question did not clearly and

[4] *See also Smith v. State*, No. 14-13-00595-CR, 2015 WL 3751776, at *13 (Tex. App.—Houston [14th Dist.] Oct. 14, 2015, pet. ref'd) (mem. op., not designated for publication) (holding that question "I got a lawyer?" was not clear and unequivocal invocation of right to counsel); *Gutierrez v. State*, 150 S.W.3d 827, 832 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that question "Can I have [my attorney] present now?", considered in context with the entire record, was ambiguous and did not clearly and unequivocally invoke right to counsel); *Halbrook v. State*, 31 S.W.3d 301, 304 (Tex. App.—Fort Worth 2000, pet. ref'd) (holding that

unambiguously invoke his right to counsel, the detectives were under no obligation to halt the interview or seek clarification from appellant. *Gobert*, 275 S.W.3d at 892. Accordingly, we overrule appellant's first issue.

## II. The trial court did not err in failing to instruct the jury on voluntariness.

Turning to his second issue, appellant argues that the trial court erred when it refused to include in the jury charge a general voluntariness instruction pursuant to Article 38.22, section 6, of the Texas Code of Criminal Procedure. We conclude the trial court did not err because appellant failed to actually litigate the question of voluntariness before the jury.

### A. Standard of review and applicable law

When reviewing claims of jury-charge error, we use a two-step process. First, we determine whether error actually exists in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Then, if error exists, we determine whether it is harmful using the framework outlined in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). *See also Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009).

A trial judge has the absolute duty to prepare a jury charge that accurately sets out the law applicable to the case. Tex. Code Crim. Proc. art. 36.14; *Oursbourn v. State*, 259 S.W.3d 159, 179–80 (Tex. Crim. App. 2008). When a rule or statute requires an instruction under the particular circumstances, that instruction is the law applicable to the case, and the trial court must instruct the jury on whatever the statute or rule requires. *Id*. at 180.

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question "Do I get an opportunity to have my attorney present?" did not constitute clear and unambiguous invocation of right to counsel); *Flores v. State*, 30 S.W.3d 29, 34 (Tex. App.—San Antonio 2000, pet. ref'd) (holding that question "Will you allow me to speak to my attorney before?" was not clear and unambiguous invocation of right to counsel).

A defendant's statement may be used as evidence against him if it appears that the statement was freely and voluntarily made without compulsion or persuasion. Tex. Code Crim. Proc. art. 38.21. Article 38.22, section 6, of the Code of Criminal Procedure governs the admissibility of an accused's custodial and non-custodial statements. This section becomes the law applicable to the case once a question is raised and actually litigated as to the general voluntariness of an accused's statement. *Aldaba v. State*, 382 S.W.3d 424, 429 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

The ordinary sequence of events contemplated by Section 6 is that: (1) a party or the trial judge raises a question sua sponte whether the defendant's statement was voluntary; (2) the trial judge holds a hearing outside the presence of the jury; (3) the trial judge decides whether the statement was voluntary; (4) if the trial judge decides the statement was voluntarily made, it will be admitted into evidence and the defendant may offer evidence before the jury suggesting that the statement was not, in fact, voluntary; (5) if such evidence is offered before the jury, the trial judge then must give the jury a general voluntariness instruction. *Oursbourn*, 259 S.W.3d at 175. To be entitled to a Section 6 instruction, a defendant must first "actually litigate" the issue of voluntariness before the trial court by completing the first three steps listed above. *Morales v. State*, 371 S.W.3d 576, 583 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (citing *Oursbourn*, 259 S.W.3d at 175).

The defendant then must introduce some evidence before the jury to support a finding that the facts, disputed or not, rendered the defendant unable to make a voluntary statement. *Morales*, 371 S.W.3d at 583; *see Vasquez v. State*, 225 S.W.3d 541, 545 (Tex. Crim. App. 2007) (explaining that the standard for Section 6 requires the defendant "to introduce evidence at trial from which a reasonable

jury could conclude that the [defendant's] statement was not voluntary" and that, absent such evidence, the trial court does not err in refusing to include a Section 6 instruction). A general voluntariness instruction must be given if a reasonable jury, viewing the totality of the circumstances, could have found that the statement was not voluntarily made. *Morales*, 371 S.W.3d at 583. The ultimate question is whether the suspect's will was overborne. *Creager v. State*, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997).

### B. A voluntariness jury instruction was not warranted because appellant did not actually litigate voluntariness before the jury.

In this case, appellant filed a motion to suppress and objected at trial to the admission of his recorded statement on grounds including that it was involuntarily given. The trial court denied appellant's motion to suppress and overruled his objection to the introduction of the statement at trial.

The court later signed findings of fact and conclusions of law determining that appellant's recorded statement was freely and voluntarily made. The court found, among other things, that appellant's recorded statement was not obtained via duress, coercion, persuasion, misdirection, or promises of any kind, and that appellant was not under the influence of drugs or other intoxicating substances at the time of his interview with Pool and Tyler. The court noted that although appellant was unsteady on his feet and had slurred speech and bloodshot eyes when Officer Fullen encountered him shortly after 1:00 a.m. on June 18, appellant was coherent, lucid, and responsive when Sergeant Pool and Detective Tyler interviewed him at 5:00 or 6:00 p.m. that evening.

At the charge conference, appellant requested a jury instruction under Article 38.22. The trial court refused appellant's request, explaining that there were no facts in evidence suggesting that appellant's statement was not voluntary.

Having examined the record, we agree that appellant did not litigate the voluntariness of his confession before the jury. Counsel's cross-examination of the State's witnesses did not pertain to whether appellant's statement was voluntary and free from compulsion or persuasion, but rather addressed only the separate and distinct issues of whether Fullen lawfully stopped appellant and appellant's codefendants in the complainant's vehicle; whether appellant was in custody; whether the officers faithfully complied with the requirements of Miranda and Article 38.22, section 2; whether appellant invoked his Fifth Amendment right to counsel, or merely his Sixth Amendment right to counsel, regarding appellant's Brazoria County cases; whether the officers had any obligation to re-Mirandize appellant once he began confessing his role in the complainant's murder; and whether there was sufficient evidence of burglary to support the State's theory of capital murder. Appellant then rested his case-in-chief without testifying or calling any witnesses in his defense, and he offered no evidence or otherwise litigated before the jury regarding whether appellant's statement was voluntary.

Accordingly, viewing the record as a whole, there is no evidence from which a reasonable jury could find that appellant's confession was involuntary. Thus, the trial court did not err in refusing to submit a general voluntariness jury instruction under Article 38.22, section 6. *See Morales*, 371 S.W.3d at 589 (concluding that, under the totality of the circumstances, no evidence raised the issue of the voluntariness of the defendant's confession, so trial court did not err in refusing a Section 6 general voluntariness jury instruction).[5] We overrule appellant's second issue.

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[5] *See also Zuniga-Duarte v. State*, No. 14-10-00967-CR, 2012 WL 1205170, at *10 (Tex. App.—Houston [14th Dist.] Apr. 10, 2012, pet. ref'd) (mem. op., not designated for publication) (holding that section 6 general voluntariness instruction was unwarranted when defendant failed to actually litigate the question of voluntariness before the jury); *Pierce v. State*, No. 14-11-

## CONCLUSION

Having overruled each of appellant's issues, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Christopher, McCally, and Busby.
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00319-CR, 2012 WL 1964584, at*3-4 (Tex. App.—Houston [14th Dist.] May 31, 2012, no pet.) (mem. op., not designated for publication) (concluding that section 6 general voluntariness instruction was not warranted when the defendant did not actually litigate voluntariness before the jury and, instead, the evidence showed the contrary: "On the recording [of the defendant's statement], [the defendant] sounds lucid, polite, and articulate.").