IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0956-19

ANTONIO LOPEZ, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE EIGHTH COURT OF APPEALS EL PASO COUNTY

HERVEY, J., delivered the opinion of the Court in which KELLER, P.J., KEASLER, RICHARDSON, NEWELL, WALKER, and SLAUGHTER, JJ., joined. YEARY and KEEL, JJ., concurred.

O P I N I O N

Antonio Lopez, Appellant, confessed to killing his 11-month-old foster child, J.B. He was indicted in two counts for capital murder and murder. He filed a motion to suppress, arguing that his confession was inadmissible because it was involuntary under the Due Process Clause and Article 38.21 of the Texas Code of Criminal Procedure. U.S. CONST. amend. XIV; TEX. CODE CRIM. PROC. art. 38.21 (statement of accused is inadmissible unless it was given "freely and voluntarily made without compulsion or

persuasion."). According to him, he confessed only after police told him that, if he did not, he and his wife might be arrested and that, if they were, Child Protective Services (CPS) might take away their other children. The trial court denied the motion and filed findings of fact and conclusions of law. A jury acquitted Lopez of capital murder, but convicted him of murder. The trial court sentenced him to 35 years' confinement based on the agreement of the parties.

On appeal, Lopez argued that the trial court should have granted the motion to suppress, but the court of appeals affirmed the lower court's ruling. It reasoned that a confession is voluntary under the Due Process Clause and articles 38.21 and 38.22 even when it is obtained by threatening to arrest a defendant's close family member, so long as the police had probable cause to arrest the family member when the threat was made. The court further concluded that the police had probable cause to arrest Lopez and his wife because they were the only two adults in the house when the injuries were inflicted, and the medical examiner told police that the injuries were intentionally inflicted by an adult, ruling out the possibility that one of the other children was responsible.

We agree that Lopez's confession was voluntary, but not based on the probable-cause analysis used by the court of appeals. Rather, we reach that result by examining the totality of the circumstances surrounding the confession. The existence of probable cause is only a factor in the analysis.

FACTS

The day of the offense, June 28, 2012, Lopez and his wife, Pearl Lopez, were at home with five children: their two biological daughters, who were two and four years old, J.B., a 13-year-old girl who they were supervising while her foster parents were on vacation, and Pearl's mother's 11-year-old foster child.[1] J.B. was placed with them about a month before the offense and was the family's first foster child.

Lopez told police that J.B.'s crib was in the master bedroom and that he had converted the master-bedroom walk-in closet into an office. He said he was in and out of the bedroom and his office and that he took care of J.B. almost all day except for when he would sometimes leave J.B. for a few minutes to check on his wife and the kids who were making a cake in the kitchen. In the afternoon, Lopez brought his two biological daughters into the master bedroom to watch television because Pearl said that they were bothering her. Lopez told police that he heard someone open the filing cabinet in the bedroom when he was in the office, and he assumed that it was Pearl, but asked his wife later, who denied that it was her. Lopez said that it was probably one of his daughters who liked to color and would sometimes get paper out of the filing cabinet.

Lopez first noticed something wrong with J.B. when he picked her up to change her diaper in the afternoon and saw that her eyes were crossed and rolling back into her head. Lopez called out for his wife, telling her that J.B. was non-responsive, and Pearl ran

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[1] This practice—when one foster family takes custody of another foster family's child for a short period of time—is referred to as respite care. Pearl testified that respite care is for when "the parents' want to take a vacation, they want a break, or . . . they want to go out . . . ."

into the bedroom. She could not rouse J.B. and told Lopez to call 911. He did, and an ambulance arrived a short time later. The paramedic transported J.B. to a nearby hospital where she died a short time later.

Detective Arturo Ruiz was dispatched to the scene and spoke to Lopez. Police had no reason to suspect foul play, but they still wanted to investigate because an infant had died, so Ruiz asked for and obtained consent to search the house. (Ruiz said that police took pictures of the area, took some bedding from the crib, and took measurements of the crib, among other things.) He also asked Lopez if he was willing to give a statement at the police station, and Lopez agreed. Lopez's car was not at the house, so Ruiz offered to give him a ride. Lopez accepted, and they drove to the station. When they arrived, they went into an interview room, and Ruiz and Detective Jerome Hinojos took Lopez's first statement.

a. First Statement

The interview began at about 10:15 p.m. Ruiz began it by reading Lopez his *Miranda* rights and informing him that he was not under arrest and was free to leave at any time. Lopez waived his rights and said that he wanted to cooperate with the investigation. He told them that he was home at the time of the offense with his wife, their two biological children, the 13-year-old girl they were providing respite care for, and his mother-in-law's 11-year-old foster daughter, and that the first time he noticed something wrong with J.B. was in the afternoon when he saw that her eyes were "kind of

crossed" and going back into her head.

Ruiz asked Lopez how he and his wife became foster parents, which Lopez explained. He also told Ruiz and Hinojos that J.B. was their first foster child and that she was placed with them just over a month before she was injured. Ruiz asked Lopez if J.B. had any medical conditions when she was placed with his family, and Lopez said no, that she was healthy.

Ruiz also briefly asked Lopez about J.B.'s crib, then concluded the interview at 10:55 p.m.

b. Autopsy Results

No autopsy report was entered into evidence at the suppression hearing, and the medical examiner did not testify. But Ruiz and Hinojos learned from the medical examiner that, given the severity of the injuries, they were intentionally inflicted by an adult, and the injuries were consistent with someone kicking or stomping on J.B., who died from internal bleeding. Her stomach was full of blood. She had a massive laceration to her liver, and the lining of her intestines were punctured, as was one of her lungs. The laceration was caused by J.B. being hit so hard in the stomach that the object pushed her stomach into her liver. She also had some broken ribs, and the back of her skull was fractured.

c. Second Statement

After receiving the results of the autopsy, Lopez was asked to give another

statement a few days later. That interview took place on July 31 and began approximately at 7:55 p.m. and ended at 10:08 p.m.

The second interview was conducted primarily by Hinojos. Hinojos began the interview by reading Lopez his *Miranda* rights and telling him that he was not under arrest and that he was free to leave at any time. Once again, Lopez waived his rights and agreed to speak to police. Lopez went over the day of the offense again, and when he was finished, Hinojos asked Lopez if he was a religious man. Lopez said that he was and that he felt like "we did everything we could for, you know, little [J.B.] even though we can't, you know, explain exactly what happened. But you know, we feel that our prayers are being heard" and that "God is on our side, you know, and it's not like anything intentional or nothing like that you know." Hinojos asked Lopez if he omitted anything during his first interview, or if he wanted to revise anything he had already told them, and Lopez said no. That is when the police confronted Lopez with the autopsy results and told Lopez that they did not think that he was being honest.

Hinojos told Lopez about the injuries J.B. sustained and that, in the medical examiner's opinion, the injuries were intentionally inflicted by an adult because a child could not have hit J.B. with the necessary force to cause the injuries. Hinojos then told Lopez that, "God may be on your side, but when God sees what science has to show, I don't think he's gonna be on your side very long, okay?" Lopez again denied that he was involved, and Hinojos told him that, "if you didn't do it, then that means that your wife

did it." Lopez denied that his wife could have hurt J.B., and Ruiz responded that, based on the evidence, "either that child suffered those injuries in your hands, in your wife's hands or both of your hands, okay?" Lopez said he was being honest, and Ruiz responded by asking Lopez how else J.B. could have been injured since they were the only adults in the house. Lopez said that he did not know. Hinojos then suggested that it might have been a heat-of-the-moment thing and that Lopez just snapped. Lopez denied that.

Throughout the interview, Hinojos and Ruiz returned to same question: "If you did not hurt her, and Pearl did not hurt her, how did she get those injuries?" Ruiz said multiple times that he just wanted a reasonable explanation, but Lopez repeatedly said that he did not know. At one point, Ruiz told Lopez that,

> But the thing is that that child suffered injuries at your hand or the hands of your wife or both, like I said. And there's not gonna be no way around it, okay? There's not gonna be no way around it. Now, if you don't want to give a pliable [sic] explanation, then let the courts decide, let them look at you as monsters, okay?

Ruiz asked Lopez what would he think if he had seen the injuries J.B. sustained, and Lopez responded that, "I would think that something was seriously wrong."

The questioning then turned back to who was at home the day of the offense. At one point, Lopez said that she might have been hurt while he was in the walk-in closet office, but Hinojos pointed out that even if he was, he would have heard if someone else hurt J.B. because he was only a few feet away, and the walls were thin. Lopez agreed. He said that, "I would have heard something. Yes, sir. I don't doubt that." Ruiz asked Lopez

again for a reasonable explanation, and Lopez said that he did not have one. Ruiz asked if maybe someone broke into the house and to "give me something that I can go on and verify." Lopez responded, "I don't have anything to give you."

In the face of Lopez's repeated denials that he assaulted J.B., Hinojos and Ruiz again told him that, if it was not him, it must have been his wife, or maybe he was lying, and they were both involved: "And then it's going to be both of you. . . . And your kids can go to foster care." Later, the following exchange took place,

> [RUIZ]: All I'm asking is for a reasonable explanation as to how that baby ended up like that.
>
> [LOPEZ]: I don't know. But I can honestly say I did not do anything.
>
> DETECTIVE HINOJOS: (Unintelligible.)
>
> [RUIZ]: And I can honestly tell you that that child suffered those injuries while it was under your care and your wife's care.
>
> [LOPEZ]: No, no, no, no.
>
> [RUIZ]: I can honestly tell you that, okay? Now who did it? I don't know. But you know what? If we need to take this to court, okay, if you need to go to jail and wait for the courts to decide for both of you to be locked up, then we'll do it, okay? But I can tell you right now, okay, that that child suffered those injuries under your hand --
>
> [LOPEZ]: No.
>
> [RUIZ]: -- or your wife's hand. Period. Period. Okay? Its[] not a mysterious injury, okay? It's not -- you can't even offer me an explanation like, okay, maybe she crawled out of the crib and fell head first.

Ruiz also suggested again that Lopez might have "lost his cool" and snapped, but Lopez denied it. Hinojos told Lopez that they did not think that his wife injured J.B. because everyone agreed that she was in the kitchen with the kids making a cake and that he needed to be honest. Lopez responded that,

> [LOPEZ]: I didn't -- my wife wouldn't do it. I wouldn't do it.
>
> [RUIZ]: I know your wife didn't do it. But unfortunately, if she has to answer for it, then she's gonna have to answer for it, too.
>
> [LOPEZ]: We would never do anything like that. Ever.
>
> [RUIZ]: Somebody did. And you guys were the only ones taking care of her.
>
> [LOPEZ]: We're not capable of doing something like that.
>
> [RUIZ]: Like I said, sometimes people do thing that they're not necessarily capable of.

Hinojos then left the room for about 20 minutes, and when he returned, he asked Lopez if he wanted some water. Lopez said no, and Hinojos told him that "I'm just going back and forth because we're talking to Pearl a[t] the same time and it's just like -- just kinda trying to find an explanation for it all, you know?" He also appealed to Lopez's faith again before ending the interview at approximately 10:08 p.m. Hinojos asked Lopez after the interview if he needed to "go to the restroom or anything," and Lopez said that

he wanted some water. Hinojos took Lopez to get some water. Lopez then left the station with Pearl in their own vehicle.[2]

d. Events Following the Second Statement

At the motion-to-suppress hearing, Pearl testified that they stopped in a hotel parking lot to talk after they left the station and that she asked Lopez if he hurt J.B. Lopez denied it, and Pearl said, "I told [the detective] you didn't do it. I didn't do it, but we're both going to go to the jail. The officer clearly said we're both going in . . . ." Describing the investigator's statements to defense counsel, she said that,

> They told me that there were going to remove o[u]r kids. They were going to go to CPS, that's what the officer told me, and that -- the detective, I'm sorry. And that they were going to go to foster care, that they were not going to go with a family member because most likely -- that our family members were gonna -- were protecting us so that they weren't gonna go with anybody else, only foster care.

At that point, Pearl testified, Lopez told her that he was going to turn himself in, though he reiterated to Pearl that he did not hurt J.B. Pearl testified that, from there, she drove to her parent's house, where they had been staying since the offense, then took Lopez to their home. She said that she dropped off Lopez then returned to her parent's house and called one of the detectives (she could not remember which one) and left a message that Lopez was going to turn himself in. Pearl testified that Lopez confessed to her when he told her that he was going to turn himself in, but she later testified that he did

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[2] Ruiz testified at the motion-to-suppress hearing that Lopez was not denied basic necessities.

not confess. Hinojos, who received Pearl's voicemail, testified that she said in the message that, "I'm calling to let you know that [Lopez] had confessed to me that he did it and can you call me [] back, please." He also testified that Pearl asked multiple times, "Why did this happen?"

e. 911 Call

At 1:31 a.m.—about three and one-half hours after the second statement concluded—Lopez called 911 and told the dispatcher that he was confessing that he had committed a homicide a few days earlier and that he wanted an officer to come to his house and arrest him. Officer Albert Gandara responded. He arrived at about 1:49 a.m. Lopez told him that he called 911 because he committed the homicide at his house. Gandara transported Lopez to the police station, at which time Lopez gave a third statement.

f. Third Statement

Lopez's third interview began at approximately 3:17 a.m. Lopez was warned and waived his rights. He told Ruiz that everything he said about the day of the offense was true except that, about 10 to 15 minutes before he called 911, and while his two daughters were not in the bedroom, he "put [J.B.] down on the floor and stomped on her like two times; two, three time[s]." He demonstrated for police how he stomped on J.B. Lopez said that he did not kick her as police had suggested in earlier interviews because he had in-grown toenails. Lopez could not really articulate why he did it. He said that he was not

frustrated with J.B., but he later said that he was and that it was "a spur-of-the-moment" mistake. He told Ruiz and Hinojos that he denied it so he could see his wife and girls one more time.

At about 3:36 a.m., Lopez asked if he could lay down somewhere. Ruiz terminated the interview at 3:43 a.m., and he took Lopez to a cell, where Lopez fell asleep.

g. Testimony Relevant to Lopez's Statements

Ruiz and Hinojos testified about each statement Lopez gave. During the cross-examination of Ruiz, the following exchange took place,

> [DEFENSE]: And that also includes, no fewer than 17 times telling him, when he denied doing this, that it must be, therefore the case, that his wife did it?
>
> [RUIZ]: That is correct.
>
> [DEFENSE]: Okay. What did you mean to have him think by that?
>
> [RUIZ]: I just wanted him to rethink what he was telling us.
>
> [DEFENSE]: All right. Did you mean to have them think that if he did not confess and tell you what you knew to be the truth, that his wife would also be held responsible for this?
>
> [RUIZ]: I believe he was told that at one point.
>
> [DEFENSE]: He was told that his wife would be held responsible for it if he didn't confess?
>
> [RUIZ]: I don't believe we told him if he didn't confess.

* * *

> [DEFENSE]: And why are you telling him something about his wife to help him to reconsider?
>
> [RUIZ]: I was trying to make him look at the overall picture, sir.
>
> [DEFENSE]: Why particularly his wife?
>
> [RUIZ]: Because there are two people in the house, two adults, capable of causing those kind of injuries.

h. Findings of Fact and Conclusions of Law

The trial court found that Lopez was Mirandized and that he waived those rights before giving each statement; that he was told that he was not under arrest and that he could leave at any time; and that Lopez was cooperative. It also found that "at no time did police coerce or threaten [Lopez] into giving a statement," that he was not under the influence of drugs or alcohol, and that he never asked to terminate the interviews or asked for an attorney.

Based on this, the trial court concluded that Lopez's statements were freely and voluntarily made without compulsion or persuasion under Article 38.21 and the Due Process Clause.

APPEAL

Lopez argued on appeal that the trial court should have granted his motion to suppress. According to him, Ruiz and Hinojos overreached during the second interview when they told him that they might arrest him and his wife and that CPS might remove their children if Lopez did not confess. *Lopez v. State*, No. 08-17-00039-CR, 2019 WL

3812377, at *6 (Tex. App. Aug. 14, 2019). The court of appeals found no overreaching. It said that "police are entitled to make truthful statements to an accused that accurately reflect the potential consequences that an accused and his family member are facing," and the detective's statements were truthful because the police had probable cause to arrest Lopez and his wife and that CPS could remove their children if they were both arrested.

In finding that the inquiry turned only on the truth or falsity of the statement, and in this case, whether probable cause existed, the court of appeals relied on its own unpublished decision and federal precedent. *Id.* (citing *State v. Luna*, No. 08-16-00273-CR, 2019 WL 1925004 (Tex. App.—El Paso Apr. 30, 2019, no pet.) (not designated for publication) (citing *United States v. Phillips*, 230 Fed. App'x. 520, 524–25 (6th Cir. 2007); *United States v. Gallardo-Marquez*, 253 F.3d 1121, 1123 (8th Cir. 2001); *United States v. Braxton*, 112 F.3d 777, 782 (4th Cir. 1997); *Hernandez v. State*, 421 S.W.3d 712, 720 (Tex. App.—Amarillo 2014, pet. ref'd)).

STANDARD OF REVIEW

We afford almost total deference to the trial court's findings of historical facts that are reasonably supported by the record and to its resolution of mixed questions that turn on credibility or demeanor when reviewing a ruling on a motion to suppress. *Guzman v. State*, 955 S.W.2d 85, 87–91 (Tex. Crim. App. 1997). We review de novo a trial court's legal conclusions and its resolution of mixed questions that do not turn on credibility or demeanor. Id.

APPLICABLE LAW

Under the Due Process Clause and articles 38.21 and 38.22 of the Texas Code of Criminal Procedure, a confession must be "voluntary" to be admissible. TEX. CODE CRIM. PROC. arts. 38.21 and 38.22. Involuntariness is reviewed under the Due Process Clause and articles 38.21 and 38.22 by examining the totality of the circumstances surrounding the confession. *Smith v. State*, 779 S.W.2d 417, 427 (Tex. Crim. App. 1989).

a. Due Process

To prevail on a due-process "involuntary confession" claim, a defendant must show (1) that police engaged in activity that was objectively coercive, (2) that the statement is causally related to the coercive government misconduct, and (3) that the coercion overbore the defendant's will. *Contreras v. State*, 312 S.W.3d 566, 574 (Tex. Crim. App. 2010); *Oursbourn v. State*, 259 S.W.3d 159, 170–71 (Tex. Crim. App. 2008); *see Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

The importance of the coercive-conduct requirement was illustrated in *Connelly*. In that case, the Supreme Court held that Connelly's confession was voluntary even though his mental condition was seriously impaired; he suffered from chronic schizophrenia and was "in a psychotic state following the 'voice of God' at the time he confesse[d]." *Oursbourn*, 259 S.W.3d at 170. The Supreme Court found no overreach because the police never engaged in tactics to overbear Connelly's will. *Id.* (citing *Connelly*, 479 U.S. at 164). The Court acknowledged that "[a] statement rendered by one

in the condition of [Connelly] might be proved to be quite unreliable," but it said that "the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence." *Connelly*, 479 U.S. at 167.

b. State Law

Article 38.21 states that, "[a] statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed." TEX. CODE CRIM. PROC. art. 38.21. Article 38.22 contains those prescribed rules. *Id.* art. 38.22, § 6. This case involves only Section 6, the "general voluntariness" provision of Article 38.22, so we address only it.[3]

Section 6 states in relevant part that,[4]

> In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions.
>
> If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause.

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[3] Defense counsel said that his only argument was that Lopez's confession was inadmissible because it was the product of police coercion.

[4] Because Section 6 of Article 38.22 is written in a single, large paragraph, two paragraph breaks have been added to assist the reader.

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> Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof.

* * *

Id.

"Claims of involuntariness under Article 38.22 can be, but need not be, predicated on police overreaching." They can also involve "'sweeping inquiries into the state of mind of a criminal defendant who has confessed' . . . that are not of themselves relevant to due process claims." *Oursbourn*, 259 S.W.3d at 172. This is because Section 6 protects suspects from themselves, not only police overreach, as does the Due Process Clause. Thus, for example, we have said that "[a] confession given under the duress of hallucinations, illness, medications, or even a private threat . . . could be involuntary under Article 38.21 and the Texas confession statute." *Id.* at 172 (footnotes omitted). Had Connelly confessed in Texas, we noted, he might have had a viable claim under Article 38.22. *Id.* at 172; *see* 24A TEX. JUR. 3d CRIM. PROC.: TRIAL § 691 (2017) ("A statement that is 'involuntary' as a matter of [federal] constitutional law is also 'involuntary' under the State 'Confession Statute,' but the converse need not be true.").

APPLICATION

Because police overreach is a predicate to due-process relief, and Lopez's Article

38.23 claim is based on only police overreach, the threshold issue is whether Ruiz and Hinojos objectively engaged in coercive tactics.[5] Lopez argues that threatening to throw a man's wife in jail is inherently coercive and that it "is just the type of thing that is likely to overbear a person's will." The trial court and court of appeals found no overreach. The court of appeals pointed out that "a confession is not rendered inadmissible in every instance in which the police have made statements regarding the potential liability of an accused and his family members," and it concluded that Ruiz and Hinojos did not overreach because they had probable cause to arrest Pearl. *Lopez*, 2019 WL 3812377, at *6. The court did not, however, account for any other circumstance surrounding the confession.

Police threats to arrest a defendant's close family member can constitute objective coercive conduct depending on the facts of each case. *Id.* The difference between a threat to arrest a defendant's close family member that weighs in favor of finding police overreach versus one that does not can be a fine line. And courts must carefully consider, not only the complained-of statements, but also the context in which they were made, including the demeanor of the person who made them and the truth or falsity of the statements.

Context is crucial because it informs what the police meant when they made the

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[5] As we noted earlier, a defendant can prove that his confession was involuntary based on his state of mind even in the absence of police overreach under articles 38.21 and 38.22, but defense counsel expressly stated that he was alleging only police coercion.

complained-of statements. For example, one officer might mean that police *could* arrest a suspect's close family member "right then" because police had probable cause to do so when the statement was made. Another officer might mean that they *could* arrest the family member in the future because he is a legitimate suspect, although police do not yet have probable cause. Yet another might mean that they *could* arrest the close family member even though the family member is not suspected of wrongdoing to coerce the suspect into confessing. That is why the totality-of-the-circumstances standard is particularly suited for this type of analysis—it already requires courts to consider all the circumstances surrounding the confession[6]—but reliance on only the truth or falsity of the statements, and in this case, whether police had probable cause, can lead to unintended consequences. *Smith*, 779 S.W.2d at 427 (totality-of-the-circumstances analysis applies to "involuntary" confession claims under both the Due Process Clause and articles 38.21 and 38.22). For example, what if police obtain a confession directly after threatening to arrest a close family member who they had probable cause to arrest, but before that, police deprived the accused of food and sleep and interrogated him for hours on end? We do not mean to say that such a statement is involuntary. Those facts are not before us. Rather, the example is meant to illustrate the difficulty in trying to examine police conduct in a vacuum and the importance of examining all the circumstances. Under the court of

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[6] Although dealing with *Miranda*, we note that the United States Supreme Court declined to adopt a different standard for juveniles who waive their *Miranda* rights than adults. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). It said that the totality-of-the-circumstance approach already requires "inquiry into all the circumstances surrounding the interrogation . . . ." *Id.*

appeals's analysis, the only circumstances that would matter are whether the statements were true and whether police had probable cause to arrest the close family member when the threat was made.

It appears that the court of appeals used the probable-cause analysis, at least in part, based on our short discussion of it in *Contreras*. In that case, however, we merely observed that some jurisdictions had used the analysis, but that we did not need to decide whether to do so because police did not have probable cause to arrest Contreras's wife. We were not foreshadowing our eventual adoption of the probable-cause analysis by merely discussing it. And now, squarely presented with the issue, we decline to adopt it. We will continue to apply the totality-of-the-circumstances standard when determining the voluntariness of a confession. For the same reason that the court of appeals in this case erred in relying on our dicta in *Contreras*, it erred when it reached the same conclusion in its earlier unpublished *Luna* decision. *Luna* (relying on *Contreras*, 312 S.W.3d at 574; *Diaz v. State*, No. 13-14-00675-CR, 2017 WL 4987665, at *5 (Tex. App.—Corpus Christi Nov. 2, 2017, pet. ref'd) (mem. op., not designated for publication)).

After reviewing the transcript of the suppression hearing, the transcript of Lopez's statements, listening to the interviews, and viewing the record in the light most favorable to the trial court's ruling, we conclude that Ruiz's and Hinojos's statements did not cross the line into objectively coercive conduct. The record supports the trial court's findings

that Lopez voluntarily went to the police station to give the second statement; that he was Mirandized, but waived those rights; that he was told that he was not under arrest; that he was not placed in handcuffs; and that he was told that he could leave at any time. It also found that Lopez was told that he could ask for an attorney and end the interview at any time, but he did neither. The complained-of interview, the second one, lasted only about 2 hours and 15 minutes, part of which consisted of Lopez sitting in the interview room alone. He was also offered a drink but declined.

The State argues that a close reading of the record shows that neither Ruiz nor Hinojos threatened Lopez, only that they told him how things might unfold. We agree. Ruiz and Hinojos told Lopez that if he and his wife denied involvement that they could arrest both of them and let the courts "sort it out" and that, if that happened, their "kids [could] go to foster care."[7] This accurately reflects the state of the investigation: Lopez admitted that he watched J.B. that day and rarely left her, and he agreed that his wife was in the kitchen with the kids making and decorating a cake except when he brought his two young daughters in the bedroom to watch television. So police believed that Lopez acted

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[7] Pearl testified that the CPS comments directed at her went further and that she was told that, not only could they lose their children if they were both arrested, but also that a close family member would probably not get custody if they supported Lopez and Pearl.

Even if those statements were made to Pearl, it would not matter for purposes of our due-process analysis because they do not inform whether *police* overreached in the complained-of interview with Lopez. On the other hand, what Pearl said might be relevant to an Article 38.22 claim because we have held that a private actor's conduct can render a confession involuntary, but we do not address that possibility because Lopez specifically predicated his claim on only police overreach.

alone, but they could not rule out the possibilities that (1) Pearl acted alone, (2) Lopez and Pearl acted together, probably one as a party covering up the offense, or (3) that someone broke into the house and injured J.B. Even Lopez recognized the dilemma based on the medical evidence and his story that neither he nor his wife hurt J.B. and that no one broke into the house. Similarly, Ruiz and Hinojos did not tell Lopez that CPS would remove their children if he and Pearl were arrested, just that they could be removed.

Lopez contends that police did not have probable cause to arrest Pearl based on the outlined evidence, but we disagree. "Probable cause requires an evaluation of probabilities, and probabilities 'are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). An evaluation of the probabilities here based on the known evidence shows that either Lopez, his wife, or both were involved in injuring J.B.

Lopez also argues that his confession was inadmissible because Ruiz's and Hinojos's threats were of the kind that would likely induce a false confession. He directs us to *Coleman v. State*, 440 S.W.3d 218, 223 (Tex. App.—Houston [14th Dist.] 2013, no pet.) to support his argument. That language refers to our line of cases holding that a confession might be inadmissible if the accused can show that an affirmative promise of some benefit was made or sanctioned by a person in authority and that the promise was likely to influence the defendant to speak untruthfully. *Fisher v. State*, 379 S.W.2d 900,

902 (Tex. Crim. App. 1964) (relying on A.R. STOUT, 1 BRANCH'S ANNOTATED PENAL CODE OF TEXAS § 88.1, at 95 (2d 1956)). Even if we applied that test here, as we have already explained, the record supports the trial court's finding that no affirmative threats were made.

Lopez maintains that this case is like *Tovar v. State*, 709 S.W.2d 25, 29 (Tex. App.—Corpus Christi 1986, no pet.), in which the court held that Tovar's confession was involuntary, but it is distinguishable. In that case, Tovar was driving his wife's vehicle when police stopped him. He was found to have marijuana in his possession, and he later confessed when police told him that his wife would not be charged if he "took the wrap," but that she would be if he did not. *Id.* Tovar's wife was not in the car when police stopped Tovar, and there was no evidence suggesting that his wife knew about the marijuana, much less that she had care, custody, or control of it. *Lopez*, 2019 WL 3812377, at *8. Lopez also cites *Roberts v. State*, 545 S.W.2d 157, 159–60 (Tex. Crim. App. 1977), in which Roberts and his wife were stopped in their vehicle by police after police observed Roberts purchasing heroin. *Id.* at 159–60.

First, unlike *Tovar* (where the confession was found to be involuntary), but like *Roberts* (where the confession was found to be voluntary), Lopez and Pearl were legitimate suspects, and police had probable cause to arrest both at the time that the statements were made. Second, there was a *quid pro quo* in *Tovar* that his wife would not be charged if he confessed, but there was no such bargain in *Roberts* or this case. *Roberts*,

545 S.W.3d at 161 (emphasis added) (stating that "[a] threat made by police officers to arrest or punish a close relative or a promise to free a relative of a prisoner *in exchange for* a confession *may* render the prisoner's subsequently made confession inadmissible in evidence").

After considering the totality of the circumstances, we agree with the trial court and court of appeals that Lopez's statements were voluntary under the Due Process Clause and articles 38.21 and 38.22.

HARM

Lopez also questions the court of appeals's harm analysis, which held that any error in admitting his confession was harmless because he also confessed to a CPS investigator who testified without objection. We do not address that analysis, however, because we agree that the trial court did not err in denying the motion to suppress.

CONCLUSION

We affirm the judgment of the court of appeals upholding the ruling of the trial court.

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