IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. PD-0244-19 & PD-0245-19

ERLINDA LUJAN, Appellant

v.

THE STATE OF TEXAS

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

NEWELL, J., filed a concurring opinion.

We granted review to address whether the court of appeals improperly applied the "*Bible* factors" before holding that the second statement in this case was not a continuation of the first statement. The Court essentially agrees with the court of appeals and upholds the trial court's ruling suppressing Appellant's second statement out of deference to the trial court's factual determinations that Appellant did not

voluntarily waive her statutory rights. These findings are supported by the record, and our standard of review requires us to defer to them.[1] I join the Court's opinion.

I write separately because I believe the focus on the voluntariness of the waiver of rights and the State's focus on statutory compliance highlight the problems with *Bible v. State*.[2] It is unclear whether *Bible* focuses on the voluntariness of the statement, the issue of whether the second statement was a continuation of the first, or the effectiveness of a reference to warnings in an earlier statement upon a defendant's decision to make a later statement.[3] Even though I agree with the result

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[1] *See State v. Terrazas*, 4 S.W.3d 720, 725 (Tex. Crim. App. 1999).

[2] *Bible v. State*, 162 S.W.3d 234 (Tex. Crim. App. 2005).

[3] *Compare id.* at 242 ("Under these circumstances, we find that the two sessions were part of a single interview for the purpose of Article 38.22 and *Miranda*.") *with id.* ("But even if they were not considered part of the same interview, we would find that Trooper Whitmore's conduct under the circumstances was sufficient to constitute the administration of a 'fully effective equivalent' to the required warnings and was sufficient to satisfy *Miranda*."). Additionally, in *Bible*, we seemed to regard the requirements of Article 38.22 as a codification of *Miranda*, but similar statutory warnings—including the right to retain counsel, the right to request appointment of counsel, the right to not make a statement, and that any statement made by him may be used against him—existed as part of a magistrate's warning prior to the holding in *Miranda*. TEX. CODE CRIM. PROC. ANN., arts. 15.17, 38.22 (1965). Compliance with *Miranda* does not guarantee that a oral statement is admissible under Article 38.22. *See Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007) ("The warnings provided in Section 2(a) of Article 38.22 are virtually identical to the *Miranda* warnings, with one exception—the warning that an accused 'has the right to terminate the interview at any time' as set out in Section 2(a)(5) is not required by *Miranda*."); *see also Joseph v. State*, 309 S.W.3d 20, 27–28 (Tex. Crim. App. 2010) (Keller, P.J., concurring) ("Though [Appellant] combines a *Miranda* argument with his Article 38.22 argument, I would address the arguments separately because of the additional requirements of Article 38.22.").

in *Bible,* I remain unsure of the controlling rationale. The Court rightly criticizes this aspect of *Bible*, but ultimately, the Court just distinguishes this case from that one without clarifying the rationale behind the *Bible* factors.

If we are concerned with voluntariness generally, then I believe we should apply the same totality of the circumstances test we reserve for voluntariness inquiries rather than the balancing-of-factors test set out in *Bible*.[4] To the extent that the Court does so, I agree. Under this understanding of *Bible*, we can consider the complete absence of warnings in the second statement as well as possible deception as additional *Bible* factors.

And if the rational behind *Bible* is just answering whether a second statement is a continuation of a first statement under the statutory terms, we don't need a balancing-of-factors test to address what should be more discrete factual issues—such as whether the recording equipment failed—during one continuous statement rather than whether a second statement is part of a continuous interview process.[5] After all,

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[4] *See, e.g.*, *Joseph*, 309 S.W.3d at 26 ("The totality of the circumstances shows that Appellant did knowingly, intelligently, and voluntarily waive his rights under Article 38.22 and *Miranda*.").

[5] *Compare* TEX. CODE CRIM. PROC. art. 38.22, § (3), *with Bible*, 162 S.W.3d at 242 ("Under these circumstances, we find that the two sessions were part of a single interview

Article 38.22 requires a warning at the outset of any "statement" not any "interview."[6] In fact, Article 38.22 repeatedly refers to a "statement" rather than an "interview" as it describes both the recording itself and evaluating the compliance with the warning requirements.[7] And the statutory reference to each "recording" suggests that Article 38.22 contemplates a discrete oral recitation of a completed statement that is electronically recorded rather than a back-and-forth interrogation that takes place over multiple locations. Our decision in *Bible* does not come to terms with these statutory provisions or the statutory history of Article

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for the purpose of Article 38.22 and *Miranda*."); *see, e.g.*, *Flores v. State*, No. PD-1189-15, 2018 WL 2327162 (Tex. Crim. App. May 23, 2018) (not designated for publication) (Determining that two separate recordings constituted one interview for purposes of article 38.22, and holding that the absence of 30 minutes of recording, due to a technical issue, rendered the recording inaccurate and thus inadmissible under article 38.22.). Indeed, focusing on who conducted the interview and whether it was on a different subject doesn't make something any less a "statement" even if it might show how an interview process is continuous. *Cf. Bible*, 162 S.W.3d at 242 ("Although different officers conducted questioning during each session and each session focused on a different set of crimes, the same officers were present during both sessions.").

[6] TEX. CODE CRIM. PROC. art. 38.22, § (3) ("No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless: (1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement; (2) *prior to the statement* but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning; (3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered; (4) all voices on the recording are identified[. . .]") (emphasis added). In *Bible* we seem to have assumed that "statement" means "interview."

[7] TEX. CODE CRIM. PROC. art. 38.22, §§ (3)(a)(1), (e) ("an electronic recording, which may include motion picture, videotape, or other visual recording, is made of the *statement* [. . .] The courts of the state shall strictly construe Subsection (a) of this section and may not interpret subsection (a) as making admissible a *statement* unless all requirements of the subsection have been satisfied by the state.") (emphasis added).

38.22, which suggests that the statute has always been focused on a defendant's "confession" rather than an officer's "interview."[8]

But if all we are concerned with under *Bible* is whether statutory warnings given in a second statement are a "fully effective equivalent" of statutory warnings given in the first, then this case is, as the Court observes, easily distinguishable from *Bible*.[9] In *Bible*, there was at least some effort to warn the defendant before a second recorded statement by the interviewing officer's reference to the statutory warnings given in a previous statement.[10] Similarly, *Franks v. State*, which we relied upon in our analysis in *Bible,* featured at least some reference to statutory

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[8] *See* TEX. CODE CRIM. PROC. ANN., art. 662 (1856) ("The confession shall not be used, if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, *unless such confession be made in the voluntary statement of the accused*, taken before an examining Court in accordance with law, or be made voluntarily after having been first cautioned that it may be used against him.") (emphasis added); TEX. CODE CRIM. PROC. ANN., art. 810 (1907) ("When confession shall not be used.—The confession shall not be used, if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, *unless made in the voluntary statement of accused*, taken before an examining court in accordance with law, *or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made*: First, [. . .]") (emphasis added); TEX. CODE CRIM. PROC. ANN., art. 38.22(a) (1965) ("The confession shall not be admissible if the defendant was in jail or other place of confinement or in the custody of an officer at the time it was made, unless: (1) *It be shown to be the voluntary statement of the accused taken before an examining court* in accordance with law, or (2) *It be made in writing and signed by the accused* and shows that the accused has at some time prior to the making thereof received the warning provided in Article 15.17. [. . .]") (emphasis added).

[9] *See Bible*, 162 S.W.3d at 242.

[10] *Id*. at 239–40.

warnings given in a previous statement.[11] But in this case, there was no "fully effective equivalent" warning because the officers did not, in the second statement, reference the warnings given during the first statement. On that basis alone, we can reach a different conclusion than the one in *Bible* because "no warning at all" cannot be a "fully effective equivalent" of the statutorily required warnings. Under this understanding of *Bible,* a re-evaluation of the *Bible* factors is unnecessary.

With these thoughts, I join the Court's opinion.

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[11] *Franks v. State*, 712 S.W.2d 858, 860–61 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd) (holding that the second phase of an interrogation was merely a continuation of the interrogation process and that there was not such a "break" in the interrogation proceeding as to require the giving of new warnings because the appellant had been properly admonished at the beginning of the interrogation and acknowledged that he had been admonished at the time the second phase started).