IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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

THE STATE OF TEXAS

v.

ERLINDA LUJAN, Appellee

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

KEEL, J., delivered the opinion of the court in which HERVEY, RICHARDSON, NEWELL, and WALKER, JJ., joined. YEARY and NEWELL, JJ., filed concurring opinions. KELLER, P.J., filed a dissenting opinion in which MCCLURE, J., joined. SLAUGHTER, J., dissented.

OPINION

The trial court suppressed two of Appellee's three recorded, custodial statements, and the State appealed those rulings. The court of appeals upheld the suppression of one of the statements. We granted the State's petition for discretionary review to decide whether the court of appeals erred in upholding the suppression of that one statement. We af firm the court of appeals' judgment because the statement at issue was not

"warned and waived."

I. Overview

El Paso Police detectives arrested Appellee in connection with their investigation into the murder of Anthony Trejo, and Appellee gave three recorded statements while she was in custody. The first and third recordings were made at the police station in an interrogation room equipped with recording equipment. The second recording was made on an iPad during and immediately after a car ride the detectives and Appellee took for the purpose of looking for Trejo's body. At issue here is the admissibility of the second recording, i.e., the in-car recording.

No warnings were given during the in-car recording, and the trial court ruled the statement inadmissible because Appellee was misled to believe that her statement in the car would not be used against her, and it was not a continuation of the first statement. The court of appeals agreed that the in-car statement was not a continuation of the first interrogation-room statement, and since it was unwarned, it held that it was inadmissible. *State v. Lujan*, 2018 WL 4660185 at *9, No. 08-17-00035 (Tex. App.—El Paso 2019) (not designated for publication).

The State argues that the court of appeals erred in its analysis of the continuation issue. But the continuation question is irrelevant given the trial court's supported finding that Appellee was misled about the nature of her in-car statement.

II. Custodial Statements

Article 38.22 Section 3(a)(2) prohibits the admission of an oral statement produced by custodial interrogation absent certain conditions having been met. Tex. Code Crim. P. art. 38.22 § 3(a)(2) ("Article 38.22 Section 3(a)(2)"). The two conditions pertinent here are (1) warnings given during the recording but before the statement and (2) a knowing, intelligent, and voluntary waiver of the rights they reference. The required order is to warn first, waive second, and confess third, and these three things "must appear in the recording itself." *Joseph v. State*, 309 S.W.3d 20, 28 (Tex. Crim. App. 2010) (Keller, P.J., concurring). Merely giving the warnings is insufficient; the defendant must waive the rights they reference. The burden of proof regarding the waiver rests with the State; it must prove by a preponderance of the evidence a knowing, intelligent, and voluntary waiver. *Id.* at 24. Only "warned and waived" custodial statements are admissible in evidence. *Oursbourn v. State*, 259 S.W.3d 159, 171 (Tex. Crim. App. 2008).

The waiver has two aspects: It must be '"the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Berghuis v. Thompkins*, 560 U.S. 370, 382–83 (2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). It is judged by the totality of the circumstances. *Joseph*, 309 S.W.3d at 25. "Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Id.* (quoting

Burbine, 475 U.S. at 421) (emphasis deleted). The totality-of-the-circumstances approach requires "inquiry into all the circumstances surrounding the interrogation." *Id.* at 25 n.7 (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). Under Article 38.22, the totality of the circumstances includes—but is not limited to—police overreach. *Oursbourn*, 259 S.W.3d at 172. It can also include "sweeping inquiries into the state of mind of a criminal defendant" that would not be relevant to due process claims. *Id.*

The waiver's validity depends on, among other things, a showing that the defendant "was aware of the State's intention to use his statements to secure a conviction[.]" *Burbine*, 475 U.S. at 422–23. Deception is relevant to the waiver inquiry if the deception "deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Id.* at 424. A waiver secured by deception is not voluntary. *See Leza v. State*, 351 S.W.3d 344, 350 (Tex. Crim. App. 2011).

III. Standard of Review

When a trial court suppresses a statement as involuntary, the appellate courts must view the evidence "in the light most favorable to the trial court's ruling[.]" *State v. Terrazas*, 4 S.W.3d 720, 725 (Tex. Crim. App. 1999). It should not "perform its own fact-finding mission, but" it should confine "its factual review to determining whether the trial court's findings were reasonable in light of the evidence presented." *Hereford v. State*, 339 S.W.3d 111, 118 (Tex. Crim. App. 2011) (footnote omitted). The appellate court must defer to a trial court's reasonable findings. *Id.* An appellate court "should

afford almost total deference to a trial court's determination of historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997).

The same, almost-total deference is owed "to trial courts' rulings on 'application of law to fact questions,' also known as 'mixed questions of law and fact,'" if they depend on credibility and demeanor. *Id.* at 89. Determining whether the requirements of Article 38.22 were met is an application-of-law-to-fact question that commands a view of the evidence that is most favorable to the trial court's ruling. *Gonzales v. State*, 190 S.W.3d 125, 129 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

The deference owed to a trial court's ruling on a mixed question of law and fact often depends on "which judicial actor is in a better position to decide the issue." *Guzman*, 955 S.W.2d at 87. If the issue depends on witness credibility, "compelling reasons exist for allowing the trial court to apply the law to the facts." *Id.* Conflicting evidence on the circumstances surrounding a custodial interrogation—like whether the police tortured the defendant—is a classic example of an issue that depends on credibility. *See Terrazas*, 4 S.W.3d at 726 n.5.

A trial court's dispositive fact finding that is supported by the record forecloses a *de novo* review of the ruling on appeal. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). And the trial court's ruling must be upheld on any applicable legal theory. *State v. Castanedanieto*, 607 S.W.3d 315, 327 (Tex. Crim. App. 2020).

The trial court here found that Appellee was misled into believing that her in-car statement would not be used against her. The finding is dispositive of the statement's admissibility because it means that the in-car statement was not a "warned and waived" statement under Article 38.22 Section 3. If that dispositive finding is supported by the evidence, then we must uphold the trial court's ruling without resort to a *de novo* review of it.

IV. The Evidence

At the beginning of the first recording, Appellee was sitting alone in the interrogation room handcuffed to her chair. About two minutes later Detectives Joe Ochoa and David Camacho entered the room, identified themselves, and asked her booking-type questions—e.g., name, birthdate, address. Ochoa explained that they were investigating and documenting everything under a specified case number pertaining to Anthony Trejo. He told Appellee that she was under arrest and that "this is a formal interview." He read her the warnings specified by Article 38.22, and she waived them. He asked her what she knew about Anthony Trejo, and she started talking.

Appellee knew Trejo as "Lazy." "Sean" and "Filero" wanted her to kill him, but she refused. She later heard that they had killed him. They tracked her down and told her she had to be part of it so that she would not snitch. They ordered her to tape up the bags that contained Trejo's remains in the back of an SUV. She and others caravanned to a dirt road off Railroad to dispose of Trejo's body, at which point Appellee and her companions abandoned the enterprise and left the caravan while the SUV containing

Trejo's body continued on the dirt road.

Appellee offered to tell the detectives where the body was, and Ochoa asked her if she wanted to show them where it was. She clarified that she could take them to the last point where she saw the SUV containing the body; "I can take you to where I know they drove to." After checking with a supervisor, the detectives accepted her offer. As they left the interrogation room to head for the car, Ochoa told Appellee that "when we come back, we can continue, if you like, okay?" Then they left the interrogation room.

Appellee was seated in the car, and Camacho activated the recording device outside of the car before joining her in the backseat. No warnings were given or referenced during this recording, and the detectives did not tell Appellee that she was being recorded.

The car ride lasted about three hours. During the ride Appellee gave a free-wheeling narrative about Trejo's death, the kidnappings of two other people, her drug use, drug smuggling, and prostitution, the "tweaker" lifestyle, and her underworld compatriots. The recording ended at the police station after Appellee was placed into a holding cell. A couple of hours later the detectives brought Appellee back to the interrogation room, warned her again in compliance with Article 38.22, and questioned her further about the things she had told them in the car.

V. The Trial Court's Finding

The trial court found that Appellee was misled into believing that her in-car statement would not be used against her. The trial court found, in effect, that there was

no valid waiver with respect to the in-car statement. That finding is supported by a most-favorable view of the evidence; specifically, (a) the differences between the in-room statements and the in-car statement, (b) the detectives' insistence on taking the car ride, (c) Ochoa's parting comment on the way to the car, and (d) the car ride itself with its ostensible body-finding purpose.

(a) Differences between the in-room and in-car statements

The in-room interrogations were official and formal, included the Article 38.22 warnings, and were conspicuously memorialized. By contrast, the in-car recording was unceremonious and indecorous, made no reference to the Article 38.22 warnings, and was recorded surreptitiously. Although Article 38.22 does not require decorum or formality or prohibit surreptitious recordings, these differences between the interrogation-room statements, on the one hand, and the in-car statement, on the other, support a finding that Appellee was misled about the nature of her in-car statement.

The first in-room interrogation began with Detectives Ochoa and Camacho identifying themselves by name and badge number and Ochoa telling Appellee that the police department was "documenting everything" under a specified case number. He explained, "The reason I'm telling you that is because this is now a formal interview. We're taking notes and we're gonna go ahead and ask you questions pertaining to this case." The detectives are seen taking notes in the video. Ochoa identified the case under investigation and told Appellee that she was a suspect and that she was under arrest. Appellee was then advised of her Article 38.22 rights, and she agreed to waive them.

The interview lasted about twelve more minutes before the detectives and Appellee decamped for the car.

But in the car the detectives did not identify themselves or announce that this was a formal interview, a continuation of an earlier interview, or any kind of an interview. They did not remind Appellee that she was under arrest, and they did not mention any Article 38.22 warnings or her earlier waiver of her rights. Unlike in the interview room, there was no mention of notetaking or documentation. It was apparent that neither detective was taking notes in the car because at one point Appellee asked, "You have a pen?" Appellee was not told she was being recorded in the car, and the recording device was started and stopped outside of her immediate presence. The recording continued even while Appellee was in the restroom after the car ride was over, underscoring its surreptitiousness and informality. As she entered the restroom, she was recorded saying, "No peeking," and minutes later the sound of a commode flushing can be heard. In addition, Appellee's volunteered and non-responsive self-incrimination in the car suggested that her guard was down.

The second in-room recording shared the same features as the first in-room recording: formal, cautious, warned, and conspicuously recorded. Since it followed the in-car interrogation, it could have had no impact on Appellee's belief about whether the in-car statement was off the record, but it is relevant to our analysis as a circumstance surrounding the in-car statement.

At the beginning of the second in-room interrogation, Camacho identified himself

and Ochoa by name again and told Appellee that he had "to take thorough notes on what has transpired and what we've done, okay?" The logical—but false—implication was that he had to memorialize the car ride then because no one had done it earlier. He perpetuated the impression that the car ride had not been a real interview by explaining, "This is a continuation of our interview that we had taken before," and reminding Appellee that she was "still at 911 North Raynor" and still under arrest. In other words, it was a continuation of the interview taken in the building, not the car-ride conversation. Camacho repeated that this was "the continuation of our interview" and said he wanted to "recap." The Article 38.22 warnings were read to Appellee again, and she waived her rights again. About eleven minutes into the interview, Camacho reminded Appellee, "We're still documenting this on the same case number[,]" reinforcing the notion that the interrogation-room interview, unlike the in-car interrogation, was official and documented. As with the first interview, Camacho and Ochoa are seen taking notes in the interrogation room.

(b) Detectives insisted on the car ride

The detectives testified that Appellee insisted on the car ride, but the trial court found their testimony on this point not credible. That credibility finding is supported by the video recording of the first interview which suggests that they insisted on the car ride, but Appellee was reluctant to take it. The following excerpts, with emphasis added to the comments most relevant to the credibility finding, demonstrate why this is so:

> [Appellee]: I can't snitch them out. Like why? I cannot do this. **I just -- can't I just tell you where the body's at? Please.**

[Ochoa redirects her attention to Sean and Filero.]

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Q. Let's go back a little bit. If you -- I know this is hard for you to talk, okay?

A. I just -- I know where the body is. I don't care if I go to jail for it.

[Camacho]: How is the body there?

[Appellee]: 'Cause I saw them take it.

[Camacho]: Okay. Is it on the side of the road? Where is it at?

[Appellee]: I didn't see where they dropped it. I just know there's a hole where they said that they had a hole ready for it. (Unintelligible.)

[Camacho]: Okay.

[Appellee]: (Unintelligible.) I don't care. I just want it done.

Q. [Ochoa]: You want us to take you where the body is at?

A. I can take you to where I know they drove to.

[Detectives express concern that Appellee is going to throw up.]

A. No, I just want to get this over with, please. I'll take you wherever you want.

[Ochoa wants to get her a trash can and shows her some pictures]

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Q. Hold on. It's 4:41p.m. And then let me see if -- if our supervisor just wants us to go down there where you're saying --

A. (Unintelligible.)

Q. Okay.

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[Ochoa]: Okay. Give us a second, okay?

(Both detectives exit the room . Detective Ochoa returns to the room and the interview resumes as follows upon his return.)

Q. [Ochoa]: Yeah, our supervisors would rather have us go right now. It's 4:42 p.m. right now, okay? Let's do it now 'cause it's --

A. Are you gonna -- (unintelligible) -- you said you found him?

Q. Yes.

A. Why?

Q. No, no, no, no. We're --

A. They're gonna know.

Q. **Let' s see what we can find out there, okay. And we'll go from there. Let's take you down there right now 'cause it's -- it's starting to get a little dark outside. We 'd rather go out and see if you can just point out, if that's what you want to do.**

We'll put them [handcuffs] in the front here.

And when we come back, we can continue, if you like, okay?

(Detective Ochoa and the witness exit the room .)

(End of video .)

To summarize, Appellee offered to "tell" the detectives where the body was, said she knew where it was, said she could take them to the location where she had seen it driven, and said she would take them wherever they wanted. But instead of eagerness to take the car ride, she expressed fearfulness. The meaning of her last comment in the interrogation room—"They're gonna know"—became apparent when she insisted on a car with tinted windows and later said, "If anybody sees me here—" By contrast with

Appellee's reluctance, the detectives asked her if she wanted to take them to the body, said their supervisors wanted them to go immediately, and acted like it was urgent because of impending darkness. In short, the evidence supports the trial court's rejection of the detectives' claim that Appellee insisted on the car ride.

(c) Ochoa's parting remark

Ochoa's parting remark at the end of the first interview—"when we come back, we can continue if you like"—marked a break from the formal interrogation and suggested a difference between the interrogation that had just transpired and what would follow in the car.

The State challenges the court of appeals' reliance on Ochoa's remark as support for the trial court's ruling. It argues that the comment did not signify a "change in the character of the interrogation" that would compel a re-administration of the warnings and that requiring repeated warnings would render them "a formalistic ritual" instead of "a procedural safeguard to inform a suspect of her rights and to ensure a continuous opportunity to exercise them." But Ochoa's remark was only one circumstance of several that supported the trial court's ruling. The misunderstanding might have been prevented in any of several ways, including by repeating the warnings, but that does not undermine *Miranda*. Regardless, Article 38.22 § 3(a) arguably is a "time- and location-specific formalistic ritual" in that it prohibits the admission of a recorded custodial statement unless "prior to the statement but during the recording" the required warnings are given and waived.

The State also argues that Ochoa's remark meant that the interrogation would be ongoing—rather than suspended—in the car. But the evidence neither compels the State's interpretation of the remark nor forecloses the trial court's interpretation of it. On the contrary, the trial court's interpretation is supported by other circumstances like the differences between the in-car interrogation and the in-room interrogations, as noted above, and the car ride itself, as discussed below.

(d) The car ride

Leaving the interrogation room reified the notion that the official interrogation was suspended in the car. And the ostensible goal of the car ride—to look for the body—disguised the confessional aspect of the trip.

Thus, the totality of the circumstances supported the trial court's finding that Appellee was led to believe that her in-car statement would not be used against her. That finding is dispositive of the statement's admissibility because it means that Appellee did not knowingly waive her rights.

But the State maintains that the finding is irrelevant and that the real issue is whether the in-car statement was a continuation of the first in-room statement under *Bible v. State*, 162 S.W.3d 234 (Tex. Crim. App. 2005). But the supported finding that Appellee thought her in-car statement would not be used against her renders the continuation question irrelevant.

VI. Continuation Irrelevant

The continuation question was addressed by *Bible*, 162 S.W.3d at 241–42. But the

facts of *Bible* are so idiosyncratic that its four-four factor analysis is largely irrelevant here, and its formula fails to accommodate the unique facts of this case.

Bible committed a capital murder in Harris County in 1979, but the case was unsolved for a long time. *Id.* at 238. In 1998 he was arrested in Florida and extradited to Baton Rouge, Louisiana, for an aggravated rape. *Id.* at 238 and n.13. There he gave a series of statements over a period of about two weeks concerning his various crimes, and four of his recorded statements were admitted at his Harris County capital murder trial. *Id.* at 238–39.

Bible claimed on appeal that the trial court erred to admit those four confessions because the warnings that preceded them were not worded exactly as prescribed by Article 38.22, and the warnings given in one of them, State's Exhibit 4, omitted several of the required warnings. *Id.* at 237. *Bible* held that the warnings given in Louisiana and memorialized in the other three recordings were the "fully effective equivalent" of the warnings required by Article 38.22. *Id.* at 240–41.

State's Exhibit 4, however, omitted a "used against" warning, did not advise that an attorney could be consulted before interrogation, and did not advise that an attorney would be appointed if Bible could not afford one. *Id.* at 241. But we declined to examine State's Exhibit 4 "in isolation" and considered four factors in addressing its admissibility: passage of time between the warnings given in the immediately preceding statement and the beginning of State's Exhibit 4; reminders about the warnings during State's Exhibit 4; the identities of the interrogators across recordings; and the subject

matter of the interrogations. *Id*.

The interview that produced State's Exhibit 4 began within three hours of the beginning of the preceding recording which reflected the necessary warnings. *Id.* The same two officers were present for both interviews. *Id.* One of the officers reminded Bible of his earlier waiver of rights and briefly reminded him of his rights to remain silent, obtain counsel, and terminate the interview, and he secured Bible's consent to continue the interview; and Bible acknowledged that he had been warned earlier. *Id.*

Besides that, every day started with reading to Bible the Article 38.22-equivalent rights and with Bible signing a form that memorialized the reading. *Id.* at 239. He signed the form four times over three days before State's Exhibit 4 was recorded. *Id.* at 239 n.18. Under these circumstances it was apparent that Bible knew he was waiving his rights and giving a recorded confession that could be used against him when he gave the interview recorded in State's Exhibit 4. That scenario contrasts with this case.

Unlike this case, deception and waiver were not at issue in *Bible*, and the interviews that produced Bible's statements were more like Appellee's interrogation-room statements than her in-car statement. That is, Bible's interview sessions were characterized by Article 38.22-equivalent warnings and reminders of them. *Id.* But Appellee's in-car session omitted any reference to the warnings, and the other surrounding circumstances conjured an off-the-record atmosphere that played no part in *Bible*.

If Appellee's second statement was not warned and waived, then the four *Bible*

factors are irrelevant. It would not matter how recent the warnings were, or whether the interrogators or the topics were the same if, as found by the trial court, Appellee was misled to believe that her in-car statement would not be used against her. It is incongruous to ask such questions in the face of a supported finding that Appellee was misled about the nature of the in-car interview.

VI. But Appellee Did Not Testify

The State argues that, because Appellee did not testify, the trial court's finding that Appellee believed that her in-car statement would not be used against her was unsupported. It suggests that Appellee's subjective state of mind could not be proven circumstantially. But a subjective state of mind—including a knowing waiver required by Article 38.22—may be and often is proven by circumstantial evidence. *E.g.*, *Joseph*, 309 S.W.3d at 25 (looking to the totality of the circumstances to determine whether defendant's waiver was "a free and deliberate choice without intimidation, coercion, or deception."); *Warren v. State*, 797 S.W.2d 161, 164 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (noting that a "culpable state of mind nearly always is proved by circumstantial evidence."). Furthermore, the trial court found, in effect, that the State failed to meet its burden of proof on the waiver. Given the competing inferences raised by the evidence, the trial court did not abuse its discretion in so finding.

VII. Conclusion

The court of appeals correctly upheld the trial court's ruling with respect to the in-car statement. We affirm the judgment of the court of appeals and remand the case to the

trial court.

Delivered: September 15, 2021

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