Opinion issued July 27, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00774-CR

LUIS CARLOS RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Case No. 07-DCR-046309

MEMORANDUM OPINION ON REHEARING

We issued our original memorandum opinion in this case on March 7, 2017.

Appellant, Luis Carlos Rodriguez, filed motions for rehearing and reconsideration

en banc. We deny Rodriguez's motion for rehearing, withdraw our previous opinion, and issue this substitute opinion.[1] The disposition remains the same.

Rodriguez was convicted of capital murder and sentenced to confinement for life.[2] Rodriguez contends that the trial court erred in admitting his confession into evidence and in omitting from the jury charge certain instructions relating to his confession. We affirm.

Factual and Procedural Background

One evening, A. Aguilar met Alberto Ramos, Alonso Guerra, and Luis Rodriguez in a bar and invited them to his house for drinks. Once there, Ramos, Guerra, and Rodriguez beat Aguilar to death with a baseball bat and stole his vehicle, television, and speakers.

The next evening, Aguilar's relatives found his body at his house and called 911. When the police arrived, Aguilar's relatives told them that Aguilar's vehicle was missing. A few weeks later, the police located and stopped Aguilar's vehicle. The police questioned the vehicle's driver and two passengers, one of whom was Alberto Ramos. The police arrested Ramos and obtained a search warrant for Ramos's apartment, where Rodriguez also lived. At the apartment, the police

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1 The issuance of this memorandum opinion on rehearing moots Rodriguez's motion for en banc reconsideration.

2 TEX. PENAL CODE § 19.03.

found Aguilar's television and speakers. A warrant was issued for Rodriguez's arrest.

While investigating the case, Detective M. Kubricht learned that Rodriguez had been arrested and was being held at the Harris County jail. Kubricht and his partner, Detective E. Hargrave, drove to the jail to interrogate Rodriguez. The interrogation was videotaped.

Kubricht and Hargrave began the interrogation in English. At first, Rodriguez, a native Spanish-speaker, appeared to understand them. In English, Rodriguez told them his name and that he knew a murder warrant had been issued for his arrest. Kubricht asked Rodriguez if he wanted to talk to him about the case. The video of the interrogation shows that Rodriguez nodded his head affirmatively. Kubricht then told Rodriguez that they were going to read him his rights, and Rodriguez responded that his English was "not really, really good." Kubricht began to read Rodriguez his *Miranda* warnings in English. As Kubricht read Rodriguez the warnings, he asked Rodriguez whether he understood what was being said to him. Rodriguez responded that he did not understand and needed a translator.

Kubricht asked for a Spanish interpreter to assist with the interrogation. Detective M. Quintanilla was sent to assist.

When Quintanilla arrived at the interrogation room, he introduced himself to Rodriguez and read him the *Miranda* warnings in Spanish using a card issued by the district attorney. After Rodriguez confirmed that he understood his rights, the following exchange took place between Rodriguez and Quintanilla, again all in Spanish:

Quintanilla: So knowing your rights, do you still want to talk to us?

Rodriguez: Where's the attorney?

Quintanilla: Excuse me?

Rodriguez: Where's the attorney?

Quintanilla: Ah, well, you have to get one if . . . are [unintelligible].

Rodriguez: And if I don't have one, the State can give me one, right?

Quintanilla: You want to talk with us or . . . ? You are here voluntarily? Do you want to talk with us?

Rodriguez: Ah . . . it's okay.

Quintanilla: Yes?

Rodriguez: [Nodding head]

Quintanilla: Okay.

Rodriguez: Nah, either way you already have me here.

After the exchange, Quintanilla told Kubricht that Rodriguez had waived his rights. He did not, however, inform Kubricht that Rodriguez had asked questions about an attorney.

Kubricht and Hargrave then proceeded to interrogate Rodriguez, with Quintanilla serving as the translator. Kubricht and Hargrave asked questions in English, and Quintanilla translated their questions from English into Spanish and Rodriguez's answers from Spanish into English. Quintanilla also asked additional questions in Spanish, and Rodriguez gave some of his answers in English. During the interrogation, Rodriguez admitted multiple times to participating in Aguilar's beating and murder and drew a diagram of the murder scene.

Rodriguez was indicted for capital murder. After an unsuccessful attempt to suppress his confession, Rodriguez was tried by a jury, convicted, and sentenced to confinement for life. Rodriguez appeals.

Admission of Rodriguez's Confession

In his first issue, Rodriguez argues that the trial court erred in denying his motion to suppress because he invoked his right to counsel before making his confession and did not "knowingly, intelligently, and voluntarily" waive his rights after receiving his *Miranda* warnings. Rodriguez further argues that the trial court erred in admitting a copy of the recording of his interrogation into evidence because the copy did not comply with certain requirements of Article 38.22 of the Code of Criminal Procedure.

A. Denial of motion to suppress

Rodriguez contends that the trial court's denial of his motion to suppress was erroneous for two reasons. First, Rodriguez contends he invoked his right to counsel by asking two questions—"Where's the attorney?" and "[I]f I don't have one, the State can give me one, right?"—after receiving his *Miranda* warnings. Second, Rodriguez argues that his waiver was invalid because he was deceived by "police overreaching" and confused throughout the interrogation.

1. Applicable law and standard of review

Under Texas criminal law, a statement made by a defendant during a custodial interrogation is inadmissible unless two elements are satisfied. *Joseph v. State*, 309 S.W.3d 20, 24 (Tex. Crim. App. 2010). First, before beginning the interrogation, the police must give the defendant the proper *Miranda* warnings. TEX. CODE CRIM. PROC. art. 38.22 §2(a); *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). Second, after receiving the warnings, the defendant must "knowingly, intelligently, and voluntarily" waive his rights. TEX. CODE CRIM. PROC. art. 38.22 §2(b); *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. The waiver does not have to assume any particular form and may be inferred from the defendant's actions and words. *Joseph*, 309 S.W.3d at 24–25.

If the defendant effectively waives his right to counsel after receiving the warnings, the police are free to question him. *Davis v. United States*, 512 U.S. 452,

458, 114 S. Ct. 2350, 2354–55 (1994). But if the defendant invokes his right to counsel, the police may not question him until a lawyer has been made available or the defendant himself reinitiates conversation. *Id.*; *Mbugua v. State*, 312 S.W.3d 657, 663–64 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

We review a trial court's denial of a motion to suppress a statement made during a custodial interrogation under a bifurcated standard. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013); *Warren v. State*, 377 S.W.3d 9, 15 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). We review the trial court's factual findings for an abuse of discretion, affording almost total deference to the trial court's rulings on questions of historical fact and mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Turrubiate*, 399 S.W.3d at 150; *Warren*, 377 S.W.3d at 15. We review de novo the trial court's rulings on questions of law and mixed questions of law and fact that do not turn on evaluation of credibility and demeanor. *Turrubiate*, 399 S.W.3d at 150; *Warren*, 377 S.W.3d at 15.

If the trial court makes express factual findings, we view the evidence in the light most favorable to the ruling and determine whether the evidence supports the findings. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). If the trial court does not make express factual findings, we view the evidence in the light most favorable to the ruling and assume that the trial court made implicit factual

findings that support the ruling as long as such findings are supported by the record. *Id.* We will sustain the trial court's ruling if that ruling is "reasonably supported by the record and is correct on any theory of law applicable to the case." *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

2. Invocation of right to counsel

Rodriguez argues that the trial court erred in denying his motion to suppress because he invoked his right to counsel before the interrogation began but was never provided a lawyer before or during questioning. The State responds that Rodriguez never made any statement that rose to the level of a clear invocation of the right to counsel.

To invoke the right to counsel, a defendant "must unambiguously request counsel." *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355; *see Mbugua*, 312 S.W.3d at 664. Simply mentioning the word "attorney" or "lawyer," or making a conditional statement related to the appointment of counsel, is not enough to invoke the right. *Dickins v. State*, 894 S.W.2d 330, 351 (Tex. Crim. App. 1995); *Reed v. State*, 227 S.W.3d 111, 116 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). Neither is it enough for the defendant to make an ambiguous or equivocal statement concerning the right to counsel. *Berghuis v. Thompkins*, 560 U.S. 370, 381, 130 S. Ct. 2250, 2259–60 (2010); *Mbugua*, 312 S.W.3d at 664. The police are not required to ask questions to clarify whether the defendant wants to invoke the right when faced

with an ambiguous statement. *Berghuis*, 560 U.S. at 381, 130 S. Ct. at 2259–60; *Mbugua*, 312 S.W.3d at 664.

Whether a particular statement clearly invokes the rights to counsel "depends on the statement itself and the totality of the surrounding circumstances." *Mbugua*, 312 S.W.3d at 664. "The test is an objective one: 'whether a reasonable police officer, under similar circumstances, would have understood the statement to be a request for an attorney or merely one that *might* be invoking the right to counsel.'" *Id.* (quoting *Reed*, 227 S.W.3d at 116).

Before the interrogation began, Quintanilla read Rodriguez his *Miranda* warnings. After reading the warnings, Quintanilla asked, "So knowing your rights, do you still want to talk to us?" Rodriguez responded by asking, "Where's the attorney?" Quintanilla said, "Excuse me?" And Rodriguez asked again, "Where's the attorney?" Quintanilla began to answer, stating, "Ah, well, you have to get one if . . ." But before Quintanilla could finish, Rodriguez interrupted, asking, "And if I don't have one, the State can give me one, right?"

Instead of answering Rodriguez's question, Quintanilla then asked, "You want to talk to us or . . . ? You are here voluntarily? Do you want to talk with us?" Rodriguez responded, "Ah . . . it's okay." Quintanilla asked Rodriguez to clarify whether that meant he wanted to speak with them. Rodriguez nodded his head affirmatively, and then said, "[E]ither way you already have me here."

Kubricht then asked Quintanilla whether Rodriguez had waived his rights, and Quintanilla responded, "Yes, he said it's okay." Kubricht then asked Rodriguez in English, "It's okay? You going to talk to us?" Rodriguez responded, "Yeah." Then, without mentioning an attorney again or asking to terminate the interview, Rodriguez spoke with the detectives at length and confessed to participating in the murder of Aguilar.

Rodriguez's questions about an attorney did not constitute clear and unambiguous requests for counsel. *Compare Mbugua*, 312 S.W.3d at 665 (defendant did not invoke right to counsel by asking, "Can I wait until my lawyer gets here?"), *and Reed*, 227 S.W.3d at 116 (defendant did not invoke right by asking whether "he could get a lawyer if he wanted one"), *with Smith v. Illinois*, 469 U.S. 91, 93, 105 S. Ct. 490, 491 (1984) (defendant invoked right when, in response to officer's warning that he had right to consult with lawyer, defendant stated, "I'd like to do that."), *and State v. Gobert*, 275 S.W.3d 888, 892–93 (Tex. Crim. App. 2009) (defendant invoked right by stating "I don't want to give up any right."); *see also In re H.V.*, 252 S.W.3d 319, 325 (Tex. 2008) (noting that defendant does not invoke right to counsel by saying, "Maybe I should talk to a lawyer," "I might want to talk a lawyer," "I think I need a lawyer," "Do you think I need an attorney here?" or "I can't afford a lawyer but is there any way I can get one?").

Both questions of Rodriguez's questions—"Where's the attorney?" and "[I]f I don't have one, the State can give me one, right?"—could be understood as "inquir[ies] about the interview process and [his] options in regard to that process." *See Mbugua*, 312 S.W.3d at 665. Additionally, the second question was conditional on Rodriguez not hiring a lawyer himself. *See Reed*, 227 S.W.3d at 116. It was not, as Rodriguez claims, an unambiguous request for the State to appoint him a lawyer before continuing the interrogation. We hold that Rodriguez did not "unambiguously and unequivocally invoke his right to counsel . . . ." *Mbugua*, 312 S.W.3d at 664.

3. Waiver of rights

Rodriguez next argues that the trial court erred in denying his motion to suppress because the State did not prove that he "knowingly, intelligently, and voluntarily" waive his rights. TEX. CODE CRIM. PROC. art. 38.22 §2(b). Specifically, Rodriguez contends that Quintanilla's failure to answer Rodriguez's questions or to inform the other detectives of what Rodriguez had asked amounted to "intimidation, coercion, and deception," which rendered Rodriguez's waiver involuntary. Rodriguez further contends that some of his statements during the interrogation indicate that he was confused and did not understand the gravity of confessing to the murder, which, in turn, indicates that he did not waive his rights knowingly and intelligently.

As noted above, a defendant's statement made during a custodial interrogation is inadmissible unless the State proves by a preponderance of the evidence that the defendant "knowingly, intelligently, and voluntarily" waived his rights before making the statement. *Berghuis*, 560 U.S. at 382, 130 S. Ct. at 2260; *Joseph*, 309 S.W.3d at 24. In determining whether a waiver was valid, we consider the totality of the circumstances, including the defendant's experience, background, and conduct. *Leza v. State*, 351 S.W.3d 344, 352 (Tex. Crim. App. 2011); *Joseph*, 309 S.W.3d at 25; *Juarez v. State*, 409 S.W.3d 156, 165 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

To show that a defendant "knowingly, intelligently, and voluntarily" waived his rights, the State must prove two elements. First, the State must show that the waiver was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Joseph*, 309 S.W.3d at 25; *Juarez*, 409 S.W.3d at 164–65. Second, the State must show that the waiver was "made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Joseph*, 309 S.W.3d at 25. The State may satisfy the second element by showing that the defendant "has been made aware, and fully comprehends, that he has the right to remain silent in the face of police interrogation and to discontinue the dialogue at any time, and that the

consequence of his waiver is that his words may be used against him later in a court of law." *Leza*, 351 S.W.3d at 350.

"As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis*, 560 U.S. at 385, 130 S. Ct. at 2262. A valid waiver, therefore, does not have to be explicit or in writing, but rather may be inferred from the defendant's actions and words. *Joseph*, 309 S.W.3d at 24; *see Berghuis*, 560 U.S. at 383, 130 S. Ct. at 2261. Thus, if the State provided the defendant with the proper warnings, and the defendant understood them, then the defendant's uncoerced statement following the warnings establishes an implied waiver of his rights. *See Berghuis*, 560 U.S. at 384, 130 S. Ct. at 2262.

Rodriguez contends that the State failed to meet its burden of proving that his waiver was made voluntarily. According to Rodriguez, Quintanilla promised him that he would translate his statements for the other detectives but then failed to answer Rodriguez's questions about counsel or inform the other detectives that Rodriguez had asked questions about counsel. This, Rodriguez claims, amounted to "police overreaching," which rendered his waiver involuntary.

If a waiver is caused by "police overreaching" or some other type of "coercive police activity[,]" then a waiver is not voluntary. *Oursbourn v. State*, 259

S.W.3d 159, 169–70 (Tex. Crim. App. 2008). But Quintanilla's conduct is not analogous to prior instances in which Texas courts have found police overreaching, which include cases in which the suspect:

- was subjected to a four-hour interrogation while incapacitated and sedated in an intensive-care unit;
- was interrogated for over eighteen hours without access to food, his prescribed blood-pressure medication, or sleep;
- had a gun held to his head by the police;
- was interrogated intermittently for sixteen days using coercive tactics while he was held incommunicado in a closed cell without windows and was given only limited food;
- was held for four days with inadequate food and medical attention until he confessed;
- was held incommunicado for three days with little food, and the confession was obtained only after the officers informed him that their chief was preparing to admit a lynch mob into the jail; and
- was questioned by relays of officers for thirty-six hours without sleep.

Id. at 170–71.

Quintanilla did not threaten Rodriguez. He did not promise him leniency for cooperating or otherwise trick him into confessing. Rodriguez himself stated that he understood the detectives were not promising him anything for making the statement. Nor did the period of time between the reading of Rodriguez's rights and his confession indicate coercive tactics to elicit a confession. We hold that the

trial court did not abuse its discretion by finding that Rodriguez's confession was voluntarily made.

Rodriguez further contends that the State failed to meet its burden of proving that his waiver was made knowingly and intelligently. According to Rodriguez, during his interrogation, he made comments that demonstrated he was confused and did not understand the gravity of confessing to murdering Aguilar. These comments, Rodriguez argues, show that he did not make his waiver knowingly and intelligently.

Rodriguez may have not realized that his confession might lead to a life sentence, but that was not required for him to "knowingly and intelligently" waive his rights. Rather, all that was required was that he understand that his words might be used against him later in a court of law. *See Leza*, 351 S.W.3d at 350 (emphasizing that when defendant acknowledges that he understands his rights, he agrees that "anything" may be used against him). And this, Rodriguez understood. After Quintanilla warned Rodriguez, in Spanish, that any statement he made could be used as evidence against him in court, Rodriguez responded, in Spanish, that he knew his rights and he nodded his head, further indicating that he understood.

Finally, Rodriguez contends that if his questions regarding counsel were ambiguous, then his waiver was also ambiguous and therefore invalid. We disagree. By asking questions concerning counsel, Rodriguez demonstrated that he

understood he had a right to have counsel present during his interrogation. Then, by agreeing to continue speaking with the detectives anyway, Rodriguez impliedly waived those rights. Rodriguez's waiver was implicit, but not ambiguous. We hold that Rodriguez "knowingly and intelligently" waived his rights.

B. Compliance with Article 38.22

Rodriguez next argues that the trial court erred in admitting the DVD copy of the recording of his interrogation because the copy did not satisfy the requirements of Article 38.22 of the Code of Criminal Procedure. Specifically, Rodriguez contends that the recording did not satisfy the requirements of Sections 3(a) and 3(b).

Section 3(a) of Article 38.22 provides than an electronic recording of a statement made by a defendant during a custodial interrogation is inadmissible unless it is established that "the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered . . . ." TEX. CODE CRIM. PROC. art. 38.22, § 3(a)(3). Section 3(b) further provides that any such electronic recording "must be preserved until such time as the defendant's conviction for any offense relating thereto is final, all direct appeals therefrom are exhausted, or the prosecution of such offenses is barred by law." *Id.* § 3(b).

Rodriguez's interrogation was originally recorded on a VHS tape. After the interrogation, the original VHS tape was copied onto another VHS tape, which was copied onto several DVDs. At some point after the copies were made, the original VHS tape was lost. One of the DVD copies of the recording was used to prepare a two-column transcript of the interrogation, with the original Spanish portions of the interrogation transcribed in one column and translated into English in the other. However, that initial transcript included numerous errors—both in the transcription of the original Spanish and in its translation into English—and had to be revised. Because the VHS tape was no longer available and the translation had to be redone, at the suppression hearing and at trial, the State offered into evidence a DVD copy of the recorded interrogation (not the original VHS tape) and a revised transcript of the interrogation, which corrected the various errors in the first. The State presented the uncontroverted testimony of Quintanilla to establish the accuracy of both the DVD copy and the revised transcript.

Rodriguez argues that the DVD copy of the recording did not satisfy the requirements of Section 3(a) because there were differences between the first and second transcripts of the interrogation. According to Rodriguez, these differences show that the VHS recording device was not capable of making an accurate recording, the operator was not competent, or the recording itself was inaccurate. *See* TEX. CODE CRIM. PROC. art. 38.22, § 3(a)(3). We disagree.

Quintanilla's uncontroverted testimony was that he reviewed the DVD copy that was used to prepare the second transcript and that it was a true and accurate copy of the recording of Rodriguez's interrogation. This indicates that the differences between the first and second transcripts were not caused by a problem with the recording device, operator, or recording but were rather caused by something else, such as errors made by the person who prepared the first transcript. We hold that the discrepancies between the two transcripts do not show that there was a problem with the recording device, operator, or recording itself.

Rodriguez next argues that the copy did not satisfy the requirements Section 3(b) because the State lost the original VHS tape. Again, we disagree. Section 3(b) requires the State to preserve "[e]very electronic recording of any statement made by an accused during a custodial interrogation . . . ." *Id.* § 3(b). But it does not expressly require the State to preserve the original. *See id.* In this case, the State "preserved" the "electronic recording" of Rodriguez's statements by making copies of the original VHS tape. Rodriguez does cite any case law construing Section 3(b) as requiring the preservation of the original electronic recording, and we are aware of none. We hold that the DVD copy of the recording satisfied the requirements of Section 3(a) and 3(b) of Article 38.22.

Having rejected each of Rodriguez's arguments challenging the denial of his motion to suppress, we overrule Rodriguez's first issue.

Omission of Charge Instructions

Rodriguez's second and third issues concern the omission of certain instructions from the jury charge. Specifically, in his second issue, Rodriguez contends that the trial court erred in refusing to submit the following instruction to the jurors:

> The statement of the defendant has been admitted in evidence before you. You are instructed that unless you, the jury, believe beyond a reasonable doubt that the statement was intelligently, knowingly, and voluntarily made, and prior to and during the making of the statement, the defendant intelligently, knowingly, and voluntarily waived his Constitutional Rights as said Constitutional Rights were read to defendant, you, the jury shall not consider such statement for any purpose [nor] any evidence obtained as a result thereof.

In his third issue, Rodriguez contends that the trial court erred in failing to instruct the jurors that they could not consider the statement he made during his custodial interrogation unless they first found that Rodriguez did not invoke his right to counsel before making the statement.[3]

Rodriguez argues that he was entitled to these instructions under Section 7 of Article 38.22 of the Code of Criminal Procedure because the evidence raised the issues of whether he was properly warned, he invoked his right to counsel, and he waived his rights. The State responds that Rodriguez was not entitled to

[3] Rodriguez did not submit such an instruction at the charge conference.

instructions on whether he was properly warned or invoked his right to counsel because he failed to present affirmative evidence raising these issues.

A. Applicable law and standard of review

Under Article 38.22 of the Code of Criminal Procedure, there are two types of jury instructions that relate to whether a jury may consider a statement made by a defendant during a custodial interrogation: (1) a voluntariness instruction under Section 6;[4] and (2) a warnings instruction under Section 7.[5] *Oursbourn*, 259 S.W.3d at 173. Rodriguez contends he was entitled to the latter type of instruction—a warnings instruction under Section 7.

A Section 7 warnings instruction focuses on whether the defendant (1) was adequately warned of his rights and (2) knowingly, intelligently, and voluntarily waived his rights. TEX. CODE CRIM. PROC. art. 38.22, § 7; *see id.* §§ 2–3; *Oursbourn*, 259 S.W.3d at 173–76. Section 7 states that, "[w]hen the issue is raised

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[4] The trial court included the following general voluntariness instruction in the charge: "The statement of the defendant has been admitted in evidence before you. You are instructed that unless you, the jury, believe beyond a reasonable doubt that the statement was voluntarily made, you, the jury, shall not consider such statement for any purpose nor any evidence obtained as a result thereof."

[5] Under Article 38.23, there is a third type of instruction—an exclusionary rule instruction—that "is a fact-based instruction that is narrowly focused on the specific tactic used to obtain a statement and whether that tactic was illegal, thereby destroying the statement's voluntariness." *Alas v. State*, No. 01–15–00569–CR, 2016 WL 4055580, at *5 (Tex. App.—Houston [1st Dist.] July 28, 2016, no pet.) (mem. op., not designated for publication); *see* TEX. CODE CRIM. PROC. art. 38.23(a).

by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement." TEX. CODE CRIM. PROC. art. 38.22, § 7. Thus, a defendant is entitled to a Section 7 warnings instruction when the issue of whether the defendant received the proper warnings and waived his rights is "raised by the evidence . . . ." *Id.* § 7; *see Oursbourn*, 259 S.W.3d at 176.

The issue is "raised by the evidence" only if there is "a genuine factual dispute" as to whether the defendant received the proper warnings and waived his rights. *Oursbourn*, 259 S.W.3d at 176–77. A genuine factual dispute is created by affirmative evidence. *Haynes v. State*, No. 01–09–00380–CR, 2010 WL 5250881, at *6 (Tex. App.—Houston [1st Dist.] Dec. 9, 2010, pet. ref'd) (mem. op., not designated for publication). A genuine factual dispute cannot be created by the mere argument of counsel or cross-examination questions. *Oursbourn*, 259 S.W.3d at 177; *Haynes*, 2010 WL 5250881, at *6.

If there is no disputed factual issue, the trial court must determine the adequacy of the warnings or a defendant's invocation of the right to counsel as a matter of law and "no jury instruction is necessary." *Little v. State*, No. 04–14–00618–CR, 2015 WL 5838082, at *3 (Tex. App.—San Antonio Oct. 7, 2015, no pet.) (mem. op., not designated for publication); *see Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012) ("Where the issue raised by the evidence at trial does not involve controverted historical facts, but only the proper application of the

law to undisputed facts, that issue is properly left to the determination of the trial court.").

In reviewing a jury-charge issue, we first determine whether error exists. *Sakil v. State*, 287 S.W.3d 23, 25 (Tex. Crim. App. 2009); *Tottenham v. State*, 285 S.W.3d 19, 30 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). If it does, then we consider harm. *Sakil*, 287 S.W.3d at 25–26; *Tottenham*, 285 S.W.3d at 30.

B. Failure to present evidence creating a genuine factual dispute

Rodriguez argues that he was entitled to his proposed warnings instruction under Section 7 because "[f]act issues were raised as to whether [he] was properly warned, whether he invoked or waived his right to counsel, and whether he knowingly, intelligently, and voluntarily waived his rights." Rodriguez concedes that he did not present affirmative evidence raising the issues. He nevertheless maintains that he was entitled to the instructions because the issues were "raised by the State's affirmative evidence and defense cross-examinations." We disagree.

Rodriguez cites to testimony from State witnesses Quintanilla and Kubricht and excerpts from his interrogation, arguing that this evidence raises the issues of whether he knowingly and intelligently waived his rights. But all this evidence shows is that Rodriguez received the proper warnings and then responded that he knew his rights and nodded his head, indicating that he understood that his words might be used against him later but that he nevertheless wanted to talk. In other

words, all the evidence shows is that Rodriguez knowingly and intelligently waived his rights.

Rodriguez has not shown that Quintanilla's or Kubricht's direct-examination testimony was inconsistent with their cross-examination testimony. Nor has he shown that any part of their testimony conflicted with the recording of his interrogation. Rodriguez has failed to show this evidence created a genuine factual dispute as to whether his waiver was knowingly and intelligently made.

Rodriguez also cites extensively to the arguments he made to the trial judge outside the presence of the jury, but a genuine factual dispute cannot be raised by the mere argument of counsel. *Oursbourn*, 259 S.W.3d at 177.

We hold that Rodriguez did not present evidence to affirmatively raise the issue to be entitled to a Section 7 warnings instruction. We overrule Rodriguez's second and third issues.

Motion to Abate

Rodriguez has moved for an abatement of the appeal, arguing that the case must be remanded to the trial court for a de novo hearing on the voluntariness of his statement.

Before trial, the trial court, the Honorable Thomas Culver, III, presiding, heard Rodriguez's motion to suppress. At the hearing, Rodriguez did not testify, present evidence, or otherwise controvert the evidence presented by the State. The

trial court denied Rodriguez's motion to suppress but did not enter findings of fact and conclusions of law, as required by Code of Criminal Procedure Article 38.22, Section 6. *See* TEX. CODE CRIM. PROC. art. 38.22 § 6. After denying Rodriguez's pre-trial motion to suppress, Judge Culver retired and later died, and a visiting retired judge, the Honorable F. Lee Duggan, Jr., presided over the remaining trial court proceedings, including the actual trial and sentencing. As ordered by this Court after Judge Culver's death, Judge Duggan entered the required findings of fact and conclusions of law.

Rodriguez argues that he is entitled to a de novo suppression hearing because the trial judge who entered the required findings and conclusions (Judge Duggan) is not the trial judge who actually heard and denied his motion to suppress (Judge Culver). *See Garcia v. State*, 15 S.W.3d 533, 535–36 (Tex. Crim. App. 2000) (holding that defendant was entitled to de novo hearing rather than review of record of first hearing when judge who presided over first hearing was no longer available and judge's determination was based on direct evaluation of defendant's and officer's credibility and demeanor). We disagree.

The situation here—an original trial judge who has passed away and a pre-trial suppression hearing at which the defendant failed to present any controverting evidence—constitutes one of those rare situations in which a successor trial judge may enter the required findings and conclusions. *See Velez v. State*, No. AP-

76,051, 2012 WL 2130890, at *13–14 (Tex. Crim. App. June 13, 2012) (not designated for publication) (recognizing exception to general rule for "rare situation" in which "the prior judge cannot be appointed to prepare findings of fact and conclusions of law because of unavailability or ineligibility"); *see also Pavon-Maldonado v. State*, No. 14-13-00944-CR, 2015 WL 1456523, *4 n.5 (Tex. App.—Houston [14th Dist.] Mar. 26, 2015, no pet.) (mem. op., not designated for publication) (noting *Velez* and accepting findings of fact and conclusions of law signed by successor judge when hearing judge had resigned and agreed to be disqualified). Rodriguez's motion is therefore denied.

Conclusion

We affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.

Do not publish. TEX. R. APP. P. 47.2(b).