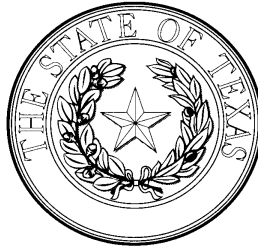


Opinion issued March 1, 2018



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-14-00279-CR

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**ALLEN BERNARD GIMS, Appellant**  
V.  
**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 176th District Court  
Harris County, Texas  
Trial Court Case No. 1262460**

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**MEMORANDUM OPINION**

A jury convicted appellant Allen Bernard Gims of capital murder.<sup>1</sup> The trial court sentenced him to life in prison without parole. At trial, Gims moved to suppress

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<sup>1</sup> See TEX. PENAL CODE § 19.03(a)(2).

a confession, arguing that it was legally involuntary as a result of custodial interrogation. On appeal, he challenges the trial court's denial of the motion because he suffered from "some form of mental illness" that rendered his statements involuntary, and the trial court made no specific findings about the voluntariness of the confession.

Because Gims raises different issues on appeal than the one he litigated at trial, we affirm.

### **Background**

Robert Jones lived in the front office space of an abandoned warehouse. One night before midnight, Shirley Faye Thompson, a former girlfriend, snuck into the warehouse through a hole in the garage door. She fell asleep, then later was awakened by a knock on the office door. Although Thompson could not see Jones answer the door from her vantage point, she heard him ask who it was, and she heard a man demand money and come inside. She crept closer and saw appellant Allen Bernard Gims, a man she had seen around the neighborhood. Gims pushed Jones into the room he used as his bedroom, forced him to the floor, and hit his head and torso with a long-handled sledgehammer.

Thompson bumped into a door, causing a doorbell to chime. Gims then saw her. He picked up a gun from the floor and told her to stop. Gims took Jones's wallet, mobile phone, and keys. He also took the gun he found on the floor, a sledgehammer,

and his duffel bag, and he forced Thompson to leave with him. He told her he would kill her and her children if she said anything.

They walked together for several blocks before Gims gave Thompson the wallet, phone, and keys, which she put in a bag as she walked away. Police investigating the murder later found the bag with Jones's wallet, phone, and keys under a pile of leaves near a house owned by Thompson's acquaintance, whom she had visited after the murder.

Several officers who responded to the scene of the murder testified at trial about the "extensive trauma" inflicted on Jones's body. Officer R. Gray, who was the first responder, testified that he saw Jones's teeth on the floor near his body. Sgt. Howard testified that the cause of death initially could not be determined because there was so much blood. Former Houston Police Officer D. Smith initially thought Jones had been shot based on the amount of blood, but he testified that evidence was "consistent with someone being hit with an object."

Sgt. Howard attended the autopsy and learned that the cause of death was "blunt force trauma," meaning that Jones was beaten to death. The assistant medical examiner testified that his wounds were consistent with being hit repeatedly with a stick, club, or sledgehammer. Sgt. Howard testified that the assailant must have been strong because Jones had skull fractures.

While investigating the murder, Sgt. Howard met Gims at his residence and asked him to come voluntarily to the police station to answer some questions. Gims agreed. Sgt. Howard and a police investigator drove Gims to the police station in an unmarked patrol car. Sgt. Howard testified that Gims was not under arrest, and neither officer displayed a weapon, made threats, or promised anything in exchange for a statement. Gims's first statement was not incriminating, and it was not admitted at trial. It is not challenged on appeal.

Three days after his first interview, Gims returned to the police station and took a polygraph test. This was recorded but not admitted into evidence at trial, and it also is not challenged on appeal. However, after the polygraph examination showed deception, Gims asked to speak to Sgt. Howard.

The ensuing recorded statement forms the basis of the challenges on appeal. Sgt. Howard watched on a video monitor as Gims was interviewed by Sgt. E. Cisneros. Before the interview began, Gims was given a meal from the onsite McDonald's. Sgt. Cisneros was dressed in plain clothes, and his revolver was not showing. Sgt. Howard testified that Gims was not handcuffed, arrested, threatened, or promised anything in exchange for his statement. He said that Gims was not subjected to coercion, threat, or intimidation. Sgt. Howard testified that Gims was free to leave, and if he had asked to terminate the interview he would have been taken home. Sgt. Cisneros similarly testified that Gims was not physically restrained,

was free to terminate the interview and leave, and was not told that he had to answer the questions or “give him something” in order to go home. At the beginning of the interview, Sgt. Cisneros told Gims that his statement was “on a voluntary basis.” According to Sgt. Howard, Gims did not appear to be under the influence of alcohol or drugs at that time, and he appeared to understand the questions Sgt. Cisneros asked him. Sgt. Cisneros denied that Gims appeared to have any inner turmoil or struggle with voices telling him what to do. Sgt. Cisneros agreed that he never gave any legal warnings or inquired about mental-health problems.

During this interview, Gims said that Jones sold “bootleg alcohol” from his home in an abandoned warehouse, and he admitted that he was an occasional customer. Gims said that on the night of the murder, Jones met him at the door with a gun. Gims said that to protect himself, he pushed Jones backward and down. Gims confessed to hitting Jones on the head multiple times with a metal “stick.” He said this was done in self-defense. He said he did not believe that Jones was dead when he left. Before he left, he wrapped the bloody end of the stick in newspaper that he found in the warehouse, and he took two bottles of whiskey and a gun he found on the floor. He denied having taken Jones’s wallet, phone, or keys. After the interview, Gims was allowed to leave. Another officer drove him to a location at his direction. Three hours later, Gims was arrested pursuant to a warrant.

Before trial, Gims's appointed counsel filed a motion to suppress "all statements made by the Defendant to the police" on the grounds that they were "not knowingly and voluntarily made," and that they were illegally obtained. In the written motion, Gims contended that at the time of "various conversations with certain police officers and others," he was "either under arrest or deprived substantially of his freedom by the attendant presence of the officers and surrounding circumstances." He further argued that he was interrogated while "in custody, without the assistance of counsel, and without having been taken before a magistrate," thus rendering his statements "not legally knowing and voluntary." The written motion to suppress made no specific reference to mental incapacity, nor did it suggest that any statement was involuntary for that particular reason.

The trial court held a hearing on the motion to suppress. At the beginning of the hearing, the judge noted that Gims previously had been examined by an independent psychiatrist, who concluded he was competent to stand trial. Before the court began to receive evidence on the motion, Gims interjected to voice a litany of complaints about his appointed counsel. In the midst of this soliloquy, he noted that defense counsel argued in the motion that he was "in the custody of HPD during interrogation," but he insisted that "wasn't in custody during the interrogation" and that he "wasn't in handcuffs." Ultimately the trial judge interrupted, and she explained that the purpose of the hearing was to "examine some of those claims that

you've made." The judge further stated: "As far as you being in custody, we're here today for me to make that legal decision. Okay? Your input is helpful, but I'm still going to hear all the facts and circumstances before I make a legal decision." She then invited the lawyers to present evidence.

The only witness on the first day of the hearing was Sgt. Howard, who testified that Gims was not in custody at the time of his statement, and that he confessed voluntarily without being subjected to any threat, coercion, or promise. The State then rested, but the hearing was continued to allow defense counsel to subpoena records.

When the hearing resumed over five months later, the first witness was Gims. Defense counsel began by asking whether, when he made his statement to the police, he was "there voluntarily." Gims testified that he was forced by Sgt. Howard to cooperate. He testified that Sgt. Howard threatened him with jail, and that Sgt. Cisneros threatened him by saying that he had to "give him something" or he would not be allowed to leave the police station. Gims claimed he believed that he had to implicate himself in Jones's murder in order to be allowed to leave. He alleged that Sgt. Cisneros gave him information about the murder to assist with his self-incriminating statement. Gims also said that he heard "voices" telling him to "give [Cisneros] something" because "that's the only way you going to go home." He testified that he had been hearing voices for about 30 years, since he was a

teenager, and that when he hears them he feels like he must do what they say. After a discussion of his history of mental-health issues, including hearing voices, the questioning returned to the circumstances surrounding his confession. The cross-examination focused on Gims's voluntary appearance to answer questions, to tell Sgt. Howard "he had the wrong person," and to take a polygraph test. Gims denied telling the polygraph operator that he had no "health issues."

After this testimony, both Sgt. Howard and Sgt. Cisneros testified to reiterate that Gims was not in custody and that he confessed voluntarily and without threat, coercion, or promise.

After the close of evidence on the motion to suppress, the hearing concluded without any further argument. Ultimately the trial court denied the motion to suppress, finding that the statements were made voluntarily, and that "the defendant was not in custody at the time that they were made since he left the police station after making the statements."

The recorded confession was admitted into evidence at trial. Shirley Faye Thompson, the eyewitness to the murder, also testified. She explained how she came to be present at the time of the murder. She testified that she saw Gims push Jones into his bedroom and hit him several times on the head with a sledgehammer. When Gims saw her, he stopped, picked up a gun from the floor, and took some items from



the room, including a wallet, phone, and keys. Thompson testified that Gims threatened to kill her and her children to obtain her silence.

Thompson conceded that she had several prior felony convictions, and that her first of two statements to police was false. She initially told police that Gims told her he shot Jones and gave her his belongings. She explained that she had lied because she feared for her life and her children's lives. Her second statement to police was consistent with her trial testimony. On cross-examination, the defense attorney asked why Thompson initially lied to the police:

Q. So the first time you give a statement, you admit was false?

A. Yes, because I was scared. I didn't want my kids hurt. I'm not ready to die, and I didn't want my kids hurt.

Q. But you were scared you'd be arrested, too, maybe charged with accomplice to murder?

A. No. That never crossed my mind because I know who killed him. He killed him.

(Witness pointing at defendant.)

Although there was no DNA evidence connecting Gims to the crime scene, photographs, the autopsy report, and testimony from the medical examiners and law enforcement officers who responded to the initial call, all support a conclusion that Jones died from blunt force trauma to the head and torso, consistent with being struck with a large stick or a sledgehammer.

Through questioning throughout the trial and witnesses whose testimony created minor discrepancies, the defense attorney attempted to advance a theory that Thompson was either unreliable or involved in the crime. Gims eventually testified on his own behalf. He denied involvement with Jones's death, and he asserted that his recorded confession was false, coerced, and coached by Sgt. Cisneros. He also claimed an alibi, saying he was in jail at the time of the murder. He further asserted that he was the target of a conspiracy and the only witness telling the truth.

In rebuttal, an investigator for the district attorney testified that Gims had been in jail overnight five days after the murder but not at the time of the murder.

The jury rejected the defensive theories and convicted Gims, who appealed.

### **Analysis**

Before trial, Gims moved to suppress his confession on the grounds that it "was not knowingly and voluntarily made." The written motion to suppress referenced the Fifth, Sixth, and Fourteenth Amendments,<sup>2</sup> Sections 10 and 19 of the

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<sup>2</sup> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence." *Id.* amend. VI. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1.

Texas Bill of Rights,<sup>3</sup> and “Articles 38.10, 38.22, and 38.23 of the Texas Code of Criminal Procedure.”<sup>4</sup> The record shows that Sgt. Cisneros did not inform Gims of his rights before he began questioning him at the police station. If Gims was in custody at the time of his confession, then use of it at trial would have been prohibited by *Miranda v. Arizona*<sup>5</sup> and article 38.22 of the Code of Criminal Procedure.<sup>6</sup> The trial court expressly found that Gims “was not in custody at the time” of the confession, denied the motion to suppress, and allowed the statement to be admitted.

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<sup>3</sup> “In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him . . . .” TEX. CONST. art. I, § 10. “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” *Id.* art. I, § 19.

<sup>4</sup> Article 38.10 describes exceptions to the privilege against adverse spousal testimony. Article 38.22 specifies procedures for custodial interrogations. Article 38.23 prohibits the use of illegally obtained evidence.

<sup>5</sup> 384 U.S. 436, 86 S. Ct. 1602 (1966).

<sup>6</sup> The requirements of *Miranda* and of article 38.22 apply only to statements made as the result of custodial interrogation. *See, e.g., Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007); *Ervin v. State*, 333 S.W.3d 187, 204 (Tex. App.—Houston [1st Dist.] 2010, pet. ref’d). A statement made at a police station may be a voluntary statement and thus not the result of custodial interrogation. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492, 495–96, 97 S. Ct. 711, 714 (1977); *Ervin*, 333 S.W.3d at 211–12.

On appeal, Gims challenges the trial court's admission of his statement into evidence, including a challenge to the adequacy of the findings of fact and conclusions of law in connection with the denial of his motion to suppress.

### **I. Admission of recorded confession**

A motion to suppress is a specialized objection to the admissibility of evidence.<sup>7</sup> In reviewing a trial court's ruling on a motion to suppress evidence, we apply a bifurcated standard of review.<sup>8</sup> We give almost total deference to the trial court's determinations on all fact questions and on questions of application of law to fact that turn on an evaluation of credibility and demeanor.<sup>9</sup> We review a trial court's rulings on the admissibility of evidence under an abuse of discretion standard, and we will uphold the trial court's decision if it was within the zone of reasonable disagreement and was correct under any theory of law applicable to the case.<sup>10</sup>

To preserve a complaint for appellate review, a defendant must present to the trial court a timely objection, request, or motion stating the specific grounds for the

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<sup>7</sup> See *Black v. State*, 362 S.W.3d 626, 633 (Tex. Crim. App. 2012).

<sup>8</sup> *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000).

<sup>9</sup> *Johnson v. State*, 68 S.W.3d 644, 652 (Tex. Crim. App. 2002).

<sup>10</sup> *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007).

ruling that he seeks “unless the specific grounds were apparent from the context.”<sup>11</sup> “An objection in the trial court stating one legal theory may not be used to support a different legal theory on appeal.”<sup>12</sup> The Court of Criminal Appeals has “long eschewed hyper-technical requirements for error preservation,” holding instead that ordinarily it is sufficient for a party to “let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him.”<sup>13</sup> But an appellant must be clear; “a general or imprecise objection will not preserve error for appeal unless ‘the legal basis for the objection is *obvious* to the court and to opposing counsel.’”<sup>14</sup> In addition, the argument made on appeal must correspond with the objection made at trial.<sup>15</sup>

On appeal, Gims argues that the confession was involuntary because the record is replete with examples that suggest he was suffering from “some form of mental illness.” But he offers no argument to suggest that his mental capacity, which

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<sup>11</sup> TEX. R. APP. P. 33.1(a).

<sup>12</sup> *Hallmark v. State*, No. PD-1118-16, 2017 WL 5180524, at \*9 (Tex. Crim. App. Nov. 8, 2017).

<sup>13</sup> *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016).

<sup>14</sup> *Id.* (quoting *Buchanan v. State*, 207 S.W.3d 772, 775 (Tex. Crim. App. 2006) (emphasis in original)).

<sup>15</sup> *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995).

already had been the subject of proceedings to determine his competency to stand trial, was the basis for his evidentiary challenge in the trial court. There was no mention of that issue in the motion to suppress, and counsel made no argument to that effect during the suppression hearing.<sup>16</sup> Nothing in record indicates that opposing counsel or the court understood that Gims's complaint about the voluntariness of his confession related to his mental capacity, as opposed to the lack of legal warnings due in connection with a custodial interrogation.

Moreover, four months before his attorney filed the motion to suppress, a court-ordered competency evaluation found that Gims was able to stand trial and to assist with his defense. In the absence of an explicit finding of fact on the issue, we may assume that the trial court made an implicit fact finding, supported by the record, that he was competent to provide his statement voluntarily.<sup>17</sup>

The evidence at the suppression hearing implicated Gims's mental health, but the appellate record reflects no argument in the trial court that his mental health

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<sup>16</sup> Gims filed pro se motions to suppress before his attorney filed a written motion to suppress. Because he was represented by counsel and was not entitled to hybrid representation, the trial court was free to disregard the pro se motions. *See, e.g., Robinson v. State*, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007). None of the motions raised his mental capacity or mental health as a basis for the involuntariness of his confession.

<sup>17</sup> *See Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007).

rendered his confession involuntary. Article 38.22, section 6 governs evidentiary challenges when a “question” is raised about the voluntariness of a statement of an accused, but the mere introduction of evidence is not enough to “raise a question” about voluntariness of a confession under that provision.<sup>18</sup>

No obvious objection to the voluntariness of Gims’s confession based on mental incapacity was made in the trial court.<sup>19</sup> Thus the issue raised on appeal, a mental-health based challenge to the voluntariness of the confession, differs from the objection raised in the trial court, and the issue was not preserved for appeal.<sup>20</sup> We overrule the first issue.

## **II. Sufficiency and adequacy of findings and conclusions**

In his remaining issues, Gims argues that because the trial court’s findings of fact and conclusions of law did not specifically address the voluntariness of his confession in light of his mental state, they were insufficient and inadequate to allow for meaningful review of his argument on appeal.<sup>21</sup> Because Gims’s mental state was not the basis of the motion to suppress urged in the trial court, that was not addressed

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<sup>18</sup> See *Oursbourn v. State*, 259 S.W.3d 159, 175 (Tex. Crim. App. 2008).

<sup>19</sup> See *Vasquez*, 483 S.W.3d at 554; *Buchanan*, 207 S.W.3d at 775.

<sup>20</sup> See TEX. R. APP. P. 33.1(a).

<sup>21</sup> See TEX. CODE CRIM. PROC. art. 38.22, § 6.

by the trial court's findings of fact and conclusions of law. Instead, the trial court resolved the challenge that was made at trial by addressing the question that was raised at trial, by specifically finding that Gims was not in custody at the time of his confession.

Gims waived a challenge to the voluntariness of his statement due to his mental state by failing to raise it in the trial court. That holding is dispositive of this appeal. His mental state was not the subject of the motion to suppress; therefore findings about his mental state were not necessary to explain the basis for the ruling on the objection at trial.<sup>22</sup>

To the extent our dissenting colleague suggests procedural error in the trial court's failing to "enter an order" with a "specific finding of facts," it is well established that an oral recitation by the trial judge can be sufficient for these purposes.<sup>23</sup> Even if the trial judge's oral statement was insufficiently specific to explain the basis of the ruling, an abatement and remand for fact findings could result only in more detail about the issue that was actually litigated: whether Gims was in custody at the time of his statement. An abatement for such findings would be futile

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<sup>22</sup> See TEX. R. APP. P. 47.1.

<sup>23</sup> See, e.g., *Murphy v. State*, 112 S.W.3d 592, 601 (Tex. Crim. App. 2003); *Lee v. State*, 964 S.W.2d 3, 11–12 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd).



because they are irrelevant to the issue raised on appeal. The trial court can't be required to make findings about mental incapacity when that issue was not raised in the trial court, but instead has been raised for the first time on appeal.

### **Conclusion**

We affirm the judgment of the trial court.

Michael Massengale  
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

Justice Jennings, dissenting.

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