Affirmed and Memorandum Opinion filed February 9, 2009.

In The

Fourteenth Court of Appeals

NO. 14-08-00660-CR

ERNEST OLIVOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 1123475

MEMEORANDUM OPINION

A jury found appellant, Ernest Olivos, guilty of aggravated robbery, and the trial court assessed punishment at forty-five years' confinement in the Texas Department of Criminal Justice, Institutional Division. *See* Tex. Penal Code Ann. § 29.03 (Vernon 2009). In two issues, appellant challenges the trial court's failure to include a general voluntariness instruction in the jury charge and the trial court's failure to file findings of fact. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The complainant, Jose Gaitan, testified that on June 16, 2007, he was driving home from a bar and stopped to give a woman, whom he did not know, a ride to the local convenience store. Once they reached the convenience store, the complainant parked his vehicle to let the woman out. Immediately, appellant approached the complainant's vehicle door, opened the door, and pulled the complainant out of the vehicle. Appellant then demanded the complainant's money. When the complainant refused, appellant stabbed him in his torso ten times. The complainant eventually got away and ran home. Appellant drove off in the complainant's vehicle.

Officer Jeffrey L. Michael of the Houston Police Department arrested appellant on a charge unrelated to the stabbing incident. After arresting appellant, Officer Michael took him to the police station and interviewed him. Before commencing the interview, Officer Reese of the Houston Police Department read appellant his Miranda rights, which appellant agreed to waive. During the videotaped interview, appellant gave a statement regarding the stabbing incident. Appellant told police that he was at a friend's home when a woman came inside and claimed a man was trying to rape her. Appellant told police that he ran outside to fight the alleged rapist. Appellant claimed he pushed the complainant (alleged rapist) to the ground and neighborhood kids began kicking the complainant. Appellant told his interviewers that he jumped in the complainant's truck, drove a few blocks away, and abandoned the truck. Appellant never mentioned stabbing the complainant.

The interviewing officers confronted appellant with evidence that the complainant had stab wounds. Appellant denied having stabbed the complainant. The officers also told appellant they had interviewed witnesses and watched a surveillance tape from the nearby convenience store and as a result they did not believe he was telling the whole truth. Despite the officers' questions, appellant did not change his original story, insisting he had not stabbed the complainant.

Appellant was charged with aggravated robbery and a jury found him guilty. The trial court assessed appellant's punishment at forty-five years' confinement. Appellant timely filed this appeal.

DISCUSSION

I. Did the Trial Court err by failing to include an instruction on the voluntariness of appellant's statement?

Appellant contends the trial court should have included an instruction in the jury charge asking the jurors to determine whether they believed his videotaped statement had been given voluntarily.

A. Applicable Law

When the evidence raises an issue of the voluntariness of a defendant's statement under article 38.22 of the Code of Criminal Procedure, the trial judge must give a general voluntariness instruction under sections 6 and 7 of that article because it is the "law applicable to the case." *Oursbourn v. State*, 259 S.W.3d 159, 165 (Tex. Crim. App. 2008). A question of voluntariness is raised when it is litigated in some manner at trial. *Id*. at 176. When the defendant does not request this statutorily mandated instruction, the trial court's failure to include it is reviewed only for egregious harm. *Id*. at 165.

Under article 38.21, "[a] statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion[.]" Code Crim. Proc. Ann. art. 38.21 (Vernon 2005). A defendant may claim that his statement was not freely and voluntarily made and thus may not be used as evidence against him, under several different theories: (1) article 38.22 section 6, general voluntariness; (2) *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), as expanded in article 38.22, sections 2 and 3 (the Texas Confession statute); or (3) the Due Process Clause. *Oursbourn*, 259 S.W.3d at 169. It may be involuntary under one, two, or all three theories. *Id*. The theory of involuntariness determines whether and what type of an instruction may be appropriate. *Id*.

B. Analysis

Appellant contends the general voluntariness instruction under article 38.22 section 6 is the only instruction applicable to this case. Thus, we must first determine whether the issue of voluntariness was raised under the general voluntariness standard of article 38.22 section 6. If voluntariness was raised, we must decide whether the failure to include the jury instruction amounted to egregious harm. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

1. Article 38.22 section 6—General Voluntariness—Instructions

Article 38.22 section 6 of the Code of Criminal Procedure governs the admissibility of an accused's custodial and non-custodial statements, and provides that only voluntary statements may be admitted in court. Code Crim. Proc. Ann. art. 38.22 § 6 (Vernon 2005); *see Oursbourn*, 259 S.W.3d at 171. A claim under section 6 that an accused's statement was made involuntarily may include situations involving police overreaching, youth, intoxication, illness or medication, mental incapacitation, or other disabilities. *See Oursbourn*, 259 S.W.3d at 172–73. Although alone these fact scenarios are not enough to render a statement inadmissible, they are factors a jury is entitled to consider when armed with a proper instruction. *Id*. at 173.

Article 38.22, section 6 becomes "law applicable to a case" once a question is raised and actually litigated as to the general voluntariness of an accused's statement; however, a factual dispute is not necessary. *Id*. at 175–76, 180. A question of voluntariness is raised when a party notifies the trial court or the trial court raises the issue on its own. *Id*. at 175. The Court of Criminal Appeals has stated that the sequence of events contemplated by section 6 is as follows:

> (1) a party notifies the trial judge that there is an issue about the voluntariness of the confession (or the trial judge raises the issue on his own);
> (2) the trial judge holds a hearing outside the presence of the jury;
> (3) the trial judge decides whether the confession was voluntary;
> (4) if the trial judge decides that the confession was voluntary, it will be admitted, *and a party may offer evidence before the jury suggesting that the confession was not in fact voluntary;*

(5) *if such evidence is offered before the jury, the trial judge shall give the jury a voluntariness instruction.*

Id. (emphasis added); *see* Code Crim. Proc. Ann. art. 38.22 § 6 (Vernon 2005).

2. Did appellant raise the issue of voluntariness?

Appellant contends he raised the issue of voluntariness through his motion to suppress and during his cross-examination of Officer Michael.[1] Appellant contends because Officer Michael admitted to the jury that he and Officer Reese lied to appellant during the interview, the issue of voluntariness was raised. The testimony appellant contends raised the issue of voluntariness is as follows:

[After playing appellant's videotaped statement]

DEFENSE COUNSEL:	But when you interviewed Mr. Olivos, you told him that there were independent witnesses, which wasn't true, correct?
OFFICER MICHAEL:	That is correct.
DEFENSE COUNSEL:	And you told him there was a surveillance camera, a tape that actually saw what was going on, correct?
OFFICER MICHAEL:	Officer Reese told him that.
DEFENSE COUNSEL:	Right. That wasn't true, right?
OFFICER MICHAEL:	Correct
	. . .
DEFENSE COUNSEL:	So they teach police officers at various interrogations schools that it is okay to lie to suspects when they are trying to get a statement from them?
OFFICER MICHAEL:	They teach us in the schools, yes, they teach you that you can tell them that you have more evidence than you have to try to get the truth.
DEFENSE COUNSEL:	They teach you anything else to — along those lines?
OFFICER MICHAEL:	What do you mean?
DEFENSE COUNSEL:	Do they tell you — teach you how to do search warrants and things of that nature?

[1] Article 38.22 section 6 requires that the evidence raising an issue on voluntariness must be presented before the jury; the hearing on the motion to suppress was held outside the jury's presence. Code Crim. Proc. Ann. art. 38.22 § 6 (Vernon 2005). Therefore, the motion to suppress has no bearing on whether appellant raised the issue of voluntariness as required by the Code. *See Butler v. State*, 872 S.W.2d 227, 236 (Tex. Crim. App. 1994).

OFFICER MICHAEL:	That would be a separate school.
DEFENSE COUNSEL:	Do they teach you at that school what a false confession is?
OFFICER MICHAEL:	No, sir.
DEFENSE COUNSEL:	Have you ever heard of what a false confession is?
OFFICER MICHAEL:	No, sir.

Additionally, during the videotaped statement, the officers told appellant the complainant's vehicle had been fingerprinted and that the co-defendants' fingerprints were found on the truck. This was untrue. However, the videotape also shows that appellant did not change his story after the officers suggested the false evidence to him. Furthermore, during closing argument defense counsel emphasized the fact appellant did not change his story after he was given the false evidence.

Although an accused does not have to testify or call witnesses in order to raise the issue of voluntariness, there must be some evidence presented that raises the issue. *Muniz v. State*, 851 S.W.2d 238, 255 (Tex. Crim. App. 1993) (holding where the majority of appellant's "evidence" of involuntariness consisted of leading questions regarding coercion propounded to peace officers, the issue of voluntariness was not raised). It is undisputed that the police officers made misrepresentations during their interrogation of appellant; however, the evidence shows these misrepresentations did not affect appellant's statement. When Officer Michael admitted to lying to appellant about evidence, the voluntariness of appellant's statement was not called into question because appellant's statement remained unchanged, despite the misrepresentations. Furthermore, the purported involuntariness-evidence consisted of leading questions about general police interrogation tactics. The purported involuntariness-evidence did not call into question a specific aspect of appellant's statement.

In light of the above, we hold appellant did not raise the issue of voluntariness and, therefore, the trial court did not err in failing to include an instruction on voluntariness. *See Oursbourn*, 259 S.W.3d at 175. Accordingly, appellant's first issue is overruled.

II. Did the Trial Court err by failing to file findings of fact regarding the voluntariness of appellant's statement?

If the trial court finds a statement was voluntarily made, article 38.22 section 6 of the Code of Criminal Procedure requires the trial court to file specific findings of fact upon which the conclusion was based. Code Crim. Proc. Ann. art. 38.22 § 6 (Vernon 2005). Appellant contends the trial court erred by failing to file findings of fact regarding the voluntariness of appellant's confession. Appellant's contention is now moot because the trial court filed findings of fact and conclusions of law regarding the trial court's finding of voluntariness after this Court abated the appeal.

Appellant filed his brief on July 9, 2009. On July 16, 2009 this Court abated the appeal and issued an order directing the trial court to enter findings of fact and conclusions of law on the voluntariness of appellant's statement. On August 17, 2009 a supplemental clerk's record was filed containing the trial court's findings of fact and conclusions of law. The appeal was reinstated on August 18, 2009. Appellant did not file a supplemental brief.

Appellant's contention was rendered moot by the filing of the supplemental clerk's record containing the requested findings of fact and conclusions of law. *Allen v. State*, 795 S.W.2d 15, 16 (Tex. App.—Houston [14th Dist.] 1990, no writ). While the trial court should file its findings of fact and conclusions of law as soon as possible after the admission of the statement, the fact that it did not do so until after abatement of the appeal for that purpose does not constitute reversible error. *Id*. Accordingly, appellant's second issue is overruled.

CONCLUSION

Having overruled both of appellant's issues on appeal, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Seymore, and Boyce.

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