

Affirmed and Memorandum Opinion filed December 16, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00835-CR

NO. 14-08-00848-CR

JOSEPH LEE FLORES, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Cause Nos. 44,556, 44,557**

MEMORANDUM OPINION

Appellant, Joseph Lee Flores, appeals from his convictions for aggravated robbery and attempted capital murder of a peace officer. In three issues, appellant contends that the trial court erred in overruling his motion to suppress a videotaped statement he made subsequent to his arrest because (1) he did not intelligently and voluntarily waive his *Miranda* rights prior to making the statement; (2) the State illegally induced his statement by making improper promises; and (3) the statement included evidence of appellant's post-arrest silence. We affirm.

BACKGROUND

According to numerous witnesses, on June 2, 2006, appellant engaged in a prolonged high speed chase with police officers. During the chase, appellant shot an officer and stole a pickup truck at gunpoint after the first vehicle he was in broke down. After his arrest, appellant was taken to the Sugar Land, Texas police station for questioning. The questioning was videotaped, and the videotape was played for the jury at trial over appellant's objection.

Before trial, the trial court considered appellant's motion to suppress the videotape and heard testimony thereon. However, other than ruling that certain portions of the recording regarding appellant's criminal history should be redacted, the court carried the motion with the trial. At the pre-trial hearing, Detective Bart Grider, who conducted the interview of appellant, testified that appellant had given his statement freely and voluntarily. Grider stated that appellant appeared lucid in his responses and that nothing about appellant's behavior lead Grider to believe that appellant was overly tired, distracted, or suffering withdrawal. According to the detective, although appellant did not state that he wanted to talk to Grider, appellant's body language indicated that he was willing to talk to the detective. Grider further admitted that he did not ask appellant if he wanted to talk with him. Grider also explained that he did not raise his voice to appellant, threaten him, or offer him a lesser charge if he cooperated.

Prior to the admission of the redacted video, Grider restated stated that he had not coerced, threatened, or offered any promises regarding lesser charges in exchange for appellant's cooperation. The trial court then admitted the video over appellant's objections and granted him a running objection to the admission of the video.

In the videotape, after Detective Grider had informed appellant of his Miranda rights, Grider asked appellant if he understood his rights. After appellant clearly nodded his head up and down in response, Grider began questioning him. During the course of the approximately fifty-minute interview, appellant appeared calm and, for the most part,

intelligible and responsive. On a number of occasions, appellant paused before answering a question or failed to answer a question before Grider began talking again. The vast majority of these lapses in the conversation were less than ten seconds in duration.

At the beginning of the interview, Grider provided appellant with water and briefly removed his handcuffs so that appellant could move his hands from behind him to in front of him to drink the water. Appellant requested a cigarette several times during the interview. Grider replied that they would take a cigarette break after appellant answered some questions. Grider and appellant twice left the room for cigarette breaks during the course of the interview and did not return to the interview room after the second one. At one point, appellant informed Grider that he had not slept in four days; however, except for a few yawns, which increased in frequency and duration toward the end of the interview, appellant did not appear impaired in his capacity to converse with Grider.

During the interview, appellant neither confessed to shooting the officer nor confessed to using a firearm in stealing the second vehicle. He did, however, acknowledge fleeing from police and taking the vehicle, and he acknowledged that handguns were present in the vehicles. Whenever directly asked if he was responsible for any of the shooting, appellant declined to answer, at one point responding only: "What's the next question?"

At the conclusion of his trial, a jury convicted appellant of both offenses and assessed punishment at sixty years' confinement and a \$10,000 fine for the aggravated robbery and life in prison and a \$10,000 fine for the attempted capital murder. Appellant timely filed notices of appeal in both cases. On the State's motions, we abated these appeals for the trial court to enter findings of fact and conclusions of law concerning the voluntariness of appellant's statement pursuant to article 38.22. Tex. Code Crim. Proc. art. 38.22, § 6.

The trial court subsequently filed these findings and conclusions, which provide in pertinent part:

- The Court finds that while being video-recorded the Defendant was advised of his rights and given certain warnings that comported in all respects with the constitution and law of the United States of America and the State of Texas[.]
- The Court finds that after being so duly warned, the defendant freely and voluntarily waived his rights and gave a video-recorded statement which was inculpatory as to the said defendant.
- The Court further finds from viewing, in its totality, all the circumstances surrounding the making of this statement, that the defendant, at the time of giving his statement understood the rights of which he had been advised, and further that the defendant knowingly and intelligently waived these rights. The totality of the circumstances includes, but is not limited to: the defendant's apparent intelligence, his ability to articulate his thoughts, the knowledge on the part of the defendant as to his right to counsel as well as his right to continue or discontinue the interview as well as the method and tone used by Detective Grider during the interview.
- The Court finds no credible evidence that the defendant was coerced to give his statement. The Court finds that the defendant chose to answer questions on some topics and chose not to answer questions as to others.

...

- The defendant did not appear to be under the influence of any intoxicants or drugs, and appeared to have the normal use of his mental and physical faculties.
- There is no evidence that the defendant was mentally impaired by any medications, intoxicants or drugs that would have had an effect on the voluntariness of his statement.
- Providing or withholding of cigarettes did not rise to the level of any coercive conduct which would produce an involuntary and unreliable statement, nor does it support a finding of an involuntary confession.

- The Court finds there is no evidence that the defendant was suffering from sleep deprivation to the extent that he did not understand what he was doing or that had an impact on the voluntariness of his statement.
- The Court finds that the defendant never invoked any of his constitutional or statutory rights before, during or after giving his statement.

...

- The Court finds that the times where the defendant did not respond orally or where there was a lull in the conversation could be attributed to a number of factors including but not limited to a desire to think through what he wanted to say, rethinking his strategy, feeling guilty about the crime and what happened to the officer, or considering the magnitude of what had occurred and the degree to which he wanted to accept blame or place it on the co-defendant, but this was not an invocation of his right to remain silent that would require Detective Grider to cease any further questioning.

...

- The Court finds Detective Grider’s testimony to be credible.

With these findings and conclusions properly filed, we now address the merits of appellant’s issues regarding his motion to suppress.

ANALYSIS

A. Standard of Review and Applicable Law

The trial court is the “sole and exclusive trier of fact and judge of the credibility of witnesses” and evidence at a hearing on a motion to suppress based on the voluntariness of a confession. *Delao v. State*, 235 S.W.3d 235, 238 (Tex. Crim. App. 2007). We give great deference to the trial court’s decision to admit or exclude a confession and will reverse only when the trial court flagrantly abuses its discretion. *Id.*

Article 38.21 of the Texas Code of Criminal Procedure provides that the statements of a person accused of a crime “may be used in evidence against him if it

appears that the same was freely and voluntarily made without compulsion or persuasion. . . .” Tex. Code Crim. Proc. art. 38.21. To determine whether a confession was voluntarily made, we examine the totality of the circumstances. *See Delao*, 235 S.W.3d at 239.

B. Waiver of Rights

In his first issue, appellant contends that the trial court erred in overruling his motion to suppress because he did not intelligently and voluntarily waive his *Miranda* rights prior to making the videotaped statement. Specifically, appellant asserts that he made no affirmative waiver of his rights.

The law does not require that a recording reflect an express waiver of rights. *Rocha v. State*, 16 S.W.3d 1, 12 (Tex. Crim. App. 2000). The waiver of *Miranda* rights, explicit or implicit, must be proven by a preponderance of the evidence. *Joseph v. State*, 309 S.W.3d 20, 24–25 (Tex. Crim. App. 2010). In some cases, a waiver may be clearly inferred from the actions and words of the suspect interrogated. *Id.* at 25. The waiver requirements are met if, before making a statement, a defendant is advised of his rights and states that he understands them. *Villarreal v. State*, 61 S.W.3d 673, 678 (Tex. App.—Corpus Christi 2001, pet. ref’d) (citing *Etheridge v. State*, 903 S.W.2d 1, 17 (Tex. Crim. App. 1994), *superseded by statute on other grounds as stated in Diaz v. State*, 110 S.W.3d 181, 184 (Tex. App.—San Antonio 2003, pet. ref’d)).

Here, the trial court found that appellant “freely and voluntarily waived his rights and gave a video-recorded statement” and that he “did not appear to be under the influence of any intoxicants or drugs[.]” These findings are supported by the record. As noted above, the videotape shows that Detective Grider informed appellant of his *Miranda* rights and asked him if he understood. Appellant clearly nodded his head up and down before Grider began questioning him, thus affirmatively indicating his understanding. Appellant then began to speak with Grider, choosing which questions to answer. Although appellant stated that he and his girlfriend had been smoking crack

cocaine before the police chase started, he did not indicate that he was still under the influence of this intoxicant at the time of his questioning. Indeed, his decision to answer some questions and deflect others supports the trial court's finding that his waiver was knowingly and intelligently made. Further, Detective Grider testified that he did not believe that appellant was under the influence of crack cocaine during questioning. As noted above, determining Detective Grider's credibility is solely the province of the trial court. *See Delao*, 235 S.W.3d at 238.

Under the totality of the circumstances presented here, a valid waiver may be clearly inferred from the actions and words of appellant. *Joseph*, 309 S.W.3d at 25. Accordingly, we conclude that the trial court did not abuse its discretion in determining that appellant freely and voluntarily waived his rights. We overrule his first issue.

C. Inducement

In his second issue, appellant contends that the trial court erred in overruling the motion to suppress because his statement was induced by promises made by Detective Grider, specifically the promise of a cigarette break after he answered certain questions. Such argument goes to the voluntariness of the statement. As mentioned above, the trial court specifically found that (a) appellant made his video-recorded statement freely and voluntarily and (b) providing or withholding cigarettes did not rise to the level of any coercive conduct that would produce an involuntary or unreliable statement. A promise made during a police interrogation may render a confession involuntary if it was positive, made or sanctioned by someone with apparent authority, was of some benefit to the defendant, and was of such a character as would likely cause a person to speak untruthfully. *E.g.*, *Garcia v. State*, 919 S.W.2d 370, 388 (Tex. Crim. App. 1994) (en banc) (op. on reh'g). To determine if the alleged promise were likely to influence appellant to speak untruthfully, we must consider whether the circumstances surrounding the promise made appellant inclined to confess to a crime he did not commit. *Id.*

Although appellant requested a cigarette several times during the videotaped interview, Grider's promise to let appellant have a cigarette break was not the kind of promise that would typically be considered as influencing a person to speak untruthfully. *See Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (en banc) (determining that promise to contact charitable agencies to assist the defendant's wife and mother was not the sort of promise that would likely cause someone to confess to aggravated rape and murder); *cf. Roberts v. State*, 545 S.W.2d 157, 161 (Tex. Crim. App. 1977) ("A threat made by police officers to arrest or punish a close relative or a promise to free a relative of a prisoner in exchange for a confession may render the prisoner's subsequently made confession inadmissible in evidence."). Here, appellant was charged with serious crimes; it is unlikely that he would confess to such crimes for the sake of a single cigarette. Certainly, the trial court had discretion to find otherwise. Further, although appellant never answered the exact question that Grider tied to the grant of a cigarette break—who was responsible for the shooting during the police chase—Grider nonetheless granted appellant two cigarette breaks during the course of an approximately fifty minute interview.

Grider's promise neither rose to the level of coercion nor rendered appellant's confession involuntary. We overrule appellant's second issue.

C. Post-Arrest Silence

In his third issue, appellant argues that the trial court erred in admitting his statement because the statement constituted evidence of his post-arrest silence. More specifically, appellant points to the various pauses occurring during the interview after he was asked questions, as well as his refusal to answer certain questions, particularly as to whether he did any of the shooting during the chase. He asserts that by remaining silent in the face of questioning, he implicitly invoked his right to silence.

However, the United States Supreme Court and the Court of Criminal Appeals have both determined that a defendant must unambiguously invoke his right to silence.

See Berghuis v. Thompkins, 130 S.Ct. 2250, 2260 (2010) (“Thomkins did not say that he wanted to remain silent or that he did not want to talk with the police. . . . Here he did neither, so he did not invoke his right to remain silent.” (citations omitted)); *Dowthitt v. State*, 931 S.W.2d 244, 257 (Tex. Crim. App. 1996) (explaining that an officer need not stop questioning a suspect unless the suspect’s invocation of rights is unambiguous). Because appellant did not clearly and unambiguously invoke his right to silence, the trial court did not abuse its discretion in denying his motion to suppress his statement. We overrule his third issue.

We affirm the trial court’s judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Yates, and Senior Justice Mirabal.*

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* Senior Justice Margaret Garner Mirabal sitting by assignment.