In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-14-00476-CR

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BRANDON DINH TRAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 12-15180

MEMORANDUM OPINION

Brandon Dinh Tran was indicted by a Jefferson County grand jury for commission of a capital murder. Tran entered a plea of not guilty, and trial was to a jury. The jury found Tran guilty of the lesser-included offense of felony murder. The jury assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for life and a fine of $10,000. Tran filed a timely notice of appeal. We affirm.

Tran presents six issues for review. In his first, second, and fourth issues, Tran argues that the trial court abused its discretion by denying his requests for instructions as to the lesser-included offense of aggravated robbery, accomplice-witness testimony, and the voluntariness of his statement. In his third issue, Tran contends the trial court abused its discretion in admitting his written statement (confession) into evidence over his objection. In his fifth and sixth issues, Tran claims the trial court erred in admitting hearsay evidence in the absence of authentication. We affirm.

I. Background

Loan Tran, the widow of Hieu Huynh, testified that she was with her husband, the owner of Nikki's Lounge, when he died on September 1, 2012. She recalled that at approximately 2:00 a.m., she and Huynh were closing up Nikki's Lounge when they were stopped by an individual outside the building who demanded money from them. Loan testified she was unable to see the man's face, as it was covered, but she observed him to have a gun under his jacket. After the man demanded money from Huynh, Huynh began to run away. The man chased Huynh around the building, and then Loan heard two gunshots. Loan told police that she saw another individual that evening hiding behind the dumpsters nearby but that he ran away after the gunshots were fired. Loan ran to the front of the

building and found her husband lying face down on the ground. She turned him over and observed him to be very bloody, but she was unsure where he was wounded. Huynh was transported to the hospital by ambulance, but shortly thereafter, he died from his injuries. The medical examiner testified that Huynh was shot once in the back and once in the back of the head.

Loan provided the police with the surveillance video taken that night by security cameras at Nikki's Lounge. The video was entered into evidence and played for the jury. The video shows there were two assailants that night, the shooter and another person shown running away. The shooter stole Huynh's wallet and a gold chain that he wore around his neck.

Eddie Keller lived just behind Nikki's Lounge. Early in the morning on September 1, 2012, he was at home watching television when he heard two gunshots. When he went outside to investigate, he observed a man staggering from behind the lounge, followed by another man who then shot the first individual, who was identified as Huynh. Keller testified that he saw the shooter take jewelry and another item that appeared to be strapped to Huynh. Keller then called 911. The shooter ran off when Keller shouted to him, and Keller followed him in his truck. Keller followed the shooter to a nearby apartment complex but eventually went back to check on Huynh. He found Huynh and observed that he was bleeding and

barely breathing. Keller gave a statement to the police but was unable to identify the alleged shooter.

After viewing surveillance video from the lounge and a nearby business, a detective with the Port Arthur Police Department, identified one of the subjects shown on the lounge's video as Darren Oliver. The detective eventually obtained a statement from Oliver wherein Oliver admitted to being the lookout for the murder and identified Tran as being involved as well. Oliver informed the detective that he, along with Tran, had planned to rob Nikki's Lounge. Oliver told the detective that Tran asked Oliver to be the lookout person while Tran robbed the owners of the lounge. When the owners exited the building, Tran ran from behind the dumpster and pointed the gun at Huynh. Huynh ran away from Tran, but Tran pursued Huynh and fired several shots at him. Oliver claimed that he ran to a nearby apartment complex where his car was parked, and he hid underneath the car to wait for Tran's return. When Tran returned, he told Oliver that he had taken the store owner's wallet. According to the detective, Oliver told him that Tran instructed Oliver to put the gun in the backseat of Oliver's car, which he did. Oliver then called his girlfriend, Brittany Broussard, to pick him up. Oliver told Brittany that he and Tran had robbed Nikki's Lounge and that Tran had shot a man, and the gun used in the shooting was in the backseat of his car. Brittany

convinced a friend to dispose of the gun in a dumpster at the rear of the apartment complex. The police were able to retrieve the gun from the dumpster located at the apartment complex near the lounge. The detective testified that Oliver identified the pistol as being the one used in the robbery and murder. The detective also testified that Oliver denied shooting Huynh but identified Tran as the shooter.

The co-defendant, Darren Oliver, Jr., testified that he participated in the robbery and homicide of Huynh. Oliver testified that he received a phone call from Tran on September 1, 2012. Tran wanted Oliver to serve as a lookout for Tran while Tran robbed the owners of Nikki's Lounge. According to Oliver, he and his girlfriend Brittany picked up Tran and traveled to the parking lot of the Beverly Apartments, where Brittany remained while Oliver and Tran walked across the street to Nikki's Lounge. Oliver and Tran both hid behind a trash dumpster at Nikki's Lounge. Oliver testified that while they were waiting behind the dumpsters, Tran handed him the firearm so he could unjam it for Tran. Oliver then returned the weapon to Tran. When Oliver saw the owners leaving the lounge, Tran ran to them and demanded money. Oliver recalled that Huynh attempted to run away, but Tran chased Huynh. Oliver testified that he saw Tran shoot Huynh once. Oliver testified that as he ran from the scene, he heard four or five more gunshots. Oliver ran in the direction of the apartment complex, but turned around

and saw Tran searching through Huynh's clothing, while Huynh was lying on the ground.

Oliver testified that he had only intended to rob the owners of the lounge and had not intended to participate in a shooting. Although Oliver testified that he did not inform Brittany of what happened, he admitted he said in his earlier statement to police that he called Brittany and told her that he and Tran had "jacked a man[.]" Oliver testified that Tran told him that he had taken Huynh's wallet but did not mention anything about taking a necklace or a chain. Tran allegedly gave Oliver three cards from Huynh's wallet, which the police located in Oliver's home the next day. The cards, however, were in Tran's name, not Huynh's name. Oliver further testified that Tran threatened Oliver after the crime to keep him from implicating Tran in the crime.

Brittany testified that she was with Oliver on September 1, 2012, when Oliver received a phone call from someone allegedly claiming to be "Lil' B[.]"She overheard a portion of the call when Oliver and the other person were discussing jewelry and money that they could get from someone else. Later, they drove to the other side of town and picked up Tran. After smoking a cigar filled with marijuana, they drove to the apartment complex where Oliver and Tran exited the vehicle, leaving Brittany behind. A short time later, Brittany heard several gunshots and not

long after hearing the gunshots, Oliver returned to the vehicle and asked if Brittany had seen Tran as he did not know where he was. According to Brittany, Tran eventually returned and appeared to be hyperventilating and panting. Oliver then drove them to the far backside of the apartment complex. Oliver and Tran left, and Brittany began walking to the apartment rented by Oliver's mother, when she encountered law enforcement officers who instructed her to "get off the streets[.]" Brittany then walked to the apartment rented by a friend of Oliver, and the two of them walked to Oliver's car where her friend then took the gun back to her apartment. Brittany and her friend then drove to a nearby location and picked up Oliver. Once Oliver was in the vehicle, he told Brittany and her friend that Tran had killed a man.

Amanda Alsharief testified that Tran asked her to drive him to Houston to sell a gold chain. She testified that she drove Tran to Houston and after he was unable to sell the chain, she took it and sold it to a shop owner, who gave her $1,900 for the chain. The shop owner testified that an Asian man was with a woman from whom she purchased the gold chain, which was later identified as belonging to Huynh.

Hoang Peter Tran, a long-time acquaintance of Tran's, testified that Tran called him and wanted to talk. Tran told Hoang that Tran had "messed up[.]"Tran

told Hoang that a "black dude" had shot someone, but Tran admitted to Hoang that Tran had taken the victim's gold necklace. The State also called a former classmate of Tran's, Kevin Miranda, who testified that Tran told him that Tran shot someone at Nikki's Lounge. According to Miranda, Tran told him that he tried to rob the man but, when the man refused, Tran "shot him once and then he stood over him and shot him in the head." Miranda further testified that Tran threatened to kill anyone who "snitched" on him.

Vicky Cunningham Crisanty testified that she and her daughters had been with Tran the day before he was arrested. She had taken Tran to church, where she overheard Tran tell a pastor that he had done something bad. When she saw a news report on television about the crime, she asked Tran if he was involved and he "shook his head . . . up and down." Tran told Crisanty that he was going to turn himself in. When Tran was arrested, he told one of the detectives that he could not do life, that he wanted the needle. Two jail cellmates of Tran also testified at the trial that while in jail, Tran told them details of the murder and robbery and that he threatened anyone who might testify against him. Finally, upon his arrest, Tran gave a written statement to the police, which was read to and published to the jury.

II. Jury Charge

In his first, second, and fourth issues, Tran argues that the trial court erred by denying his request for the inclusion of a jury-charge instruction pertaining to (1) the lesser-included offense of aggravated robbery, (2) accomplice-witness testimony, and (3) the voluntariness of his statement. Our review of jury charge issue involves a two-step analysis. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). First, we must decide whether error exists, and then, if it does, we analyze the error for harm. *Id*. at 743.

A. Lesser-Included Offense Instruction

Tran contends that the trial court erred in refusing to submit an instruction on the lesser-included offense of aggravated robbery. The trial court submitted instructions to the jury on the offense of capital murder, as well as the lesser-included offense of felony murder. Tran requested that the trial court submit an instruction on the lesser-included offense of aggravated robbery to the jury. The trial court denied his request. On appeal, Tran contends that because the trial court charged the jury as to the lesser-included offense of felony murder, "the trial court obviously found that a jury could have found [Tran] not guilty of the indicted offense of capital murder, and guilty of a [lesser-included] offense."

Section 19.03(a)(2) provides that a person is guilty of capital murder if he intentionally commits murder in the course of committing or attempting to commit "kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation[.]" Tex. Penal Code Ann. § 19.03(a)(2) (West Supp. 2016). Section 19.02(b)(3) provides that a person commits the offense of felony murder when the person

> commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Tex. Penal Code Ann. § 19.02(b)(3) (West 2011). Felony murder is a lesser-included offense of capital murder. *Fuentes v. State*, 991 S.W.2d 267, 272 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1026 (1999).

A defendant is entitled to the submission of a lesser-included offense if a two-pronged test is met: (1) "the [lesser-included] offense must be included within the proof necessary to establish the offense charged," and (2) "some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense." *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993) (citation and emphasis omitted); *see also Solomon v. State*, 49 S.W.3d 356, 368–69 (Tex. Crim. App. 2001).

Here, the State does not dispute that aggravated robbery is a lesser-included offense of capital murder in this case. Therefore, the first prong is satisfied.

Turning to the second prong of the test, we analyze the record for some evidence that would permit a rational jury to find that if Tran is guilty, he is guilty only of aggravated robbery. *See Rousseau*, 855 S.W.2d at 673. A person commits robbery if, in the course of committing theft and with the intent to obtain or maintain control of the property, he "intentionally, knowingly, or recklessly causes bodily injury to another" or "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Tex. Penal Code Ann. § 29.02(a) (West 2011). A person commits aggravated robbery if he commits robbery and "(1) causes serious bodily injury to another; (2) uses or exhibits a deadly weapon; or (3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is . . . 65 years of age or older; or . . . a disabled person." *Id.* § 29.03(a). The offense of aggravated robbery is a first degree felony. *Id.* § 29.03(b). A deadly weapon includes "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury[,]" or "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code Ann. § 1.07(17) (West Supp. 2016).

The State presented Oliver's testimony that Tran chased Huynh and fired multiple shots that killed Huynh. Oliver testified he saw Tran shoot Huynh in the back. The medical examiner testified that Huynh was shot once in the back and once in the back of the head, which caused his death. The jury heard evidence that Tran told Kevin Miranda that he tried to rob a man but, when the man refused, Tran "shot him once and then he stood over him and shot him in the head." This is evidence of an intentional killing. The evidence in this case did not establish aggravated robbery as a valid rational alternative to the charged offense, nor did it permit the jury to find that Tran had committed only aggravated robbery. *See Jackson v. State*, 992 S.W.2d 469, 475 (Tex. Crim. App. 1999) (holding "[a] murder defendant is not entitled to an instruction on the [lesser-included] offense of aggravated assault when the evidence showed him, at the least, to be guilty of a homicide"); *Solomon*, 49 S.W.3d at 369 (explaining that a person charged with capital murder was not entitled to lesser-included instruction on aggravated robbery unless there was evidence showing that if he was guilty, he was guilty only of aggravated robbery and further, that there was evidence that there was no murder.) Because evidence did not exist that would permit a jury to rationally find that the defendant, if guilty, was guilty of only aggravated robbery, the trial court

did not err in denying Tran's requested charge on the lesser-included offense of aggravated robbery. We therefore overrule Tran's first issue.

B. Accomplice Witness Instruction

In his second issue, Tran contends "[t]he trial court abused its discretion by denying [Tran's] request for a jury instruction regarding accomplice testimony as a matter of law as to witness Brittany Brittany." The trial court included a jury instruction for an accomplice witness as a matter of law for Oliver. However, the trial court included a jury instruction for an accomplice witness as a matter of fact for Brittany.

"A proper accomplice-witness instruction informs the jury either that a witness is an accomplice as a matter of law or that he is an accomplice as a matter of fact." *Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013) (citation omitted). The determination of which type of instruction is appropriate is based on the evidence presented in the case. *Id.* A trial judge has no duty to instruct the jury that a witness is an accomplice witness as a matter of law unless there exists no doubt that the witness is an accomplice. *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007); *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004). "An accomplice as a matter of law is one who is susceptible to prosecution for the offense with which the accused is charged or a lesser included offense."

Paredes, 129 S.W.3d at 536. Tran cites no evidence nor do we find any evidence that Brittany was charged with any offense connected with the robbery and murder, nor does Tran point us to any evidence clearly showing Brittany could have been charged.

"If the evidence presented by the parties is conflicting and it remains unclear whether the witness is an accomplice, the trial judge should allow the jury to decide whether the inculpatory witness is an accomplice witness as a matter of fact under instructions defining the term "'accomplice.'" *Druery*, 225 S.W.3d at 498–99. However, as with an accomplice as a matter of law, there must be some evidence of an affirmative act on the part of the witness to assist in the commission of the charged offense before such an instruction is required. *Id*. at 499; *Kunkle v. State*, 771 S.W.2d 435, 440 (Tex. Crim. App. 1986). An accomplice is someone who participates with the defendant before, during, or after the commission of a crime and acts with the required culpable mental state. *Paredes*, 129 S.W.3d at 536. To be considered an accomplice witness, the witness's participation with the defendant must have involved some affirmative act that promotes the commission of the offense with which the defendant is charged. *Id*. A witness is not an accomplice witness merely because he or she was present during the commission of the crime. *Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999).

Furthermore, that a person knew of the offense, failed to disclose the offense, and concealed the offense are insufficient to make someone an accomplice. *Id.* at 641; *Kunkle*, 771 S.W.2d at 439. Tran has failed to show any abuse of discretion by the trial court in instructing the jury on an accomplice as a matter of fact for witness Brittany. We overrule Tran's second issue.

C. Voluntariness of Statement Instruction

In issue four, Tran contends the trial court abused its discretion by denying his request for a jury instruction regarding the voluntariness of his statement pursuant to Article 38.22 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 38.22 (West Supp. 2016). At trial, Tran's counsel asked for a 38.22 instruction because he argued there was evidence adduced that would at least raise the issue of whether Tran's custodial statement was made freely and voluntarily based upon "the intoxication that he may have shown at the time that he gave his statement[.]"The trial court overruled his objection and denied his request.

Article 38.22, Section 6 states,

> Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof.

Id. The trial court held a hearing outside of the presence of the jury to determine the issue of voluntariness of Tran's custodial statement to the police. At the conclusion of such hearing, the trial court found as a matter of law and fact that the statement was voluntarily given. However, the trial court indicated that the issue could be litigated further in the presence of the jury when the State offered such statement in evidence. Tran questioned the detective that took Tran's statement as to whether a videotape of Tran on the evening of his arrest immediately after Tran had provided his custodial statement to the police showed that Tran was intoxicated. Tran did not testify and did not offer any other evidence before the jury suggesting his custodial statement was not voluntary.

Article 38.22, Section 6, "is a very detailed section that is essentially independent of the other sections contained within Article 38.22." *Oursbourn v. State*, 259 S.W.3d 159, 174 (Tex. Crim. App. 2008). With respect to Article 38.22, the Court of Criminal Appeals has explained:

> This is the sequence of events that seems to be contemplated by Section 6: (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. at 175 (internal citations omitted). To be entitled to the Section 6 instruction, an appellant first must "actually litigate" the issue of voluntariness before the trial court—the first three steps identified in *Oursbourn*—and then must introduce some evidence before the jury that would enable it to "find that the facts, disputed or undisputed, rendered him unable to make a voluntary statement[.]" *Id*. at 175–76; *see Morales v. State*, 371 S.W.3d 576, 583–84 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). Finding no abuse of discretion on the record before us, we overrule Tran's fourth issue.

III. Admission of Tran's Written Statement

In his third issue, Tran argues that "[t]he trial court abused its discretion in admitting [his] written statement into evidence over his objection. Essentially, Tran contends that the trial court should have suppressed his statement as involuntary because he was intoxicated at the time of his interrogation and law enforcement used coercive tactics to obtain his statement.

A trial court's ruling on a motion to suppress is reviewed for an abuse of discretion. *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014). In reviewing the trial court's ruling, we do not engage in our own factual review. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). When the trial court does not make explicit fact findings, we must imply the necessary fact

findings that would support the trial court's ruling if the evidence, when viewed in the light most favorable to the trial court's ruling, supports those implied findings. *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006). When ruling on a motion to suppress, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony. *St. George*, 237 S.W.3d at 725. We give almost total deference to (1) the trial court's determination of historical facts that are supported by the record, and (2) the trial court's rulings on mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Gonzales v. State*, 369 S.W.3d 851, 854 (Tex. Crim. App. 2012); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). For rulings on mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor, we apply a *de novo* standard of review. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010); *Guzman*, 955 S.W.2d at 89.

As a general rule, appellate courts limit their review of a trial court's suppression ruling to an examination of the evidence produced at the suppression hearing because the ruling was based on it rather than evidence introduced later. *Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996). However, because the record establishes that the trial court conducted the hearing on Tran's motion to suppress during the evidentiary portion of the trial, we will consider all of the

evidence that was before the trial court at the time of its ruling. *See id.*; *see also Statin v. State*, No. 01-11-00651-CR, 01-11-00652-CR, 2013 WL 2456716, at *4 (Tex. App.—Houston [1st Dist.] June 6, 2013, pet. ref'd) (mem. op. on reh'g, not designated for publication) (reviewing all evidence before the trial court at the time of its ruling, including evidence introduced at trial, where suppression hearing was conducted following the State's case-in-chief at trial); *Matus v. State*, No. 10-08-00149-CR, 2011 WL 1166383, at *9 (Tex. App.—Waco Mar. 30, 2011, pet. ref'd) (mem. op., not designated for publication) (reviewing all evidence before the trial court at the time of its ruling, including evidence introduced at trial, where suppression hearing was held at the end of the first day of trial after two witnesses had already testified).

The officer who took Tran's statement testified that Tran was arrested and taken into custody on Monday, around 4:50 p.m. According to the officer, immediately after Tran was handcuffed and was being placed into a patrol car for transport, Tran made spontaneous statements to him. The officer immediately stopped and read Tran the Miranda warnings. Upon arrival at the police station, the officer placed Tran in an office. Tran requested and received cigarettes and a soda. For the next thirty to forty-five minutes, the officer questioned Tran and obtained a written statement. Tran's written statement contains the Miranda warnings at the

top of the first page. The officer testified that he read the Miranda warnings on the statement together with Tran. Tran's initials appear in the margin next to each warning. The officer testified that he ". . . purposely made mistakes in the statement so that when Mr. Tran would read through it and initial the mistakes[,] it would show that he read every part and every page of his statement." After the statement was completed, the officer reviewed the written statement with Tran and Tran corrected the typographical mistakes and initialed each correction. The officer had Tran initial the top of each page and sign the bottom of each page to protect against any claim that anything was added to Tran's statement after Tran's signature. Finally, Tran's signature on the last page is notarized. The officer testified that he made no promises to Tran at the time of the statement and that Tran's statement was purely voluntary.

Tran testified at the hearing on his motion to suppress that he consumed cocaine and beer all day on the Sunday before his arrest on Monday—that he "partied" for a twelve hour period with Crisanty. He testified he was intoxicated at the time he gave the statement and thus, did not voluntarily provide the statement. Crisanty testified during the trial that after Tran showed up at her home on Saturday evening, she was with Tran all day on Sunday and into Monday morning. While she admitted they consumed cocaine and drank beer, she also testified that

they slept Sunday evening and Tran went with her to eat breakfast at a fast food restaurant on Monday morning, before they took him to the hotel where he was arrested later that afternoon. Before Crisanty left the hotel, Tran was coherent enough to have the forethought to give her money to place in his commissary account at the jail once he was arrested.

Intoxication, while relevant, does not render a statement involuntary *per se*. *Jones v. State*, 944 S.W.2d 642, 651 (Tex. Crim. App. 1996); *Nichols v. State*, 754 S.W.2d 185, 190 (Tex. Crim. App. 1988), *overruled on other grounds by Green v. State*, 764 S.W.2d 242, 247 n.2 (Tex. Crim. App. 1989). The central question is the extent to which the declarant was deprived of his faculties due to the intoxication. *Nichols*, 754 S.W.2d at 190. The question becomes whether the declarant's intoxication rendered him incapable of making an independent, informed decision to waive his rights. *Paolilla v. State*, 342 S.W.3d 783, 792 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). We evaluate whether the statement was voluntary by examining the totality of the circumstances. *Wyatt v. State*, 23 S.W.3d 18, 23 (Tex. Crim. App. 2000) (quoting *Penry v. State*, 903 S.W.2d 715, 744 (Tex. Crim. App. 1995). Tran emphasized the time period over which he had consumed intoxicants, but his testimony was inconsistent and uncertain. He testified, "[M]y mental was impaired. It take 24 hours to detox on anybody's person." He further stated, "I

didn't read or understand anything that was going on at the time." However, Tran testified that he had not consumed any intoxicants from around 11:00 a.m. to the time of his arrest at 4:50 p.m.

The officer that took Tran's statement testified that he had many years of experience as a trained officer, has dealt with hundreds of intoxicated individuals and, based on his experience, he saw no signs that Tran was intoxicated or under the influence of any drugs at the time of his confession. The officer stated that based on Tran's presentation and the statement he made to him, he believed that "[Tran] was 100 percent not impaired." The trial court found, "In accordance with the Article [38.22], Section 6, in the absence of the jury I find that statement No. 90 to have been voluntarily made and admissible as a matter of law and fact." From this finding, we may reasonably infer that the trial court found Tran was not under the influence of alcohol or drugs to such an extent so as to render his confession involuntary but expressly found the statement was voluntary.

Tran also added that the police used coercive tactics to obtain his statement. He contends that he was having an anxiety attack and requested medical assistance, but the officer demanded that he sign his statement before he was provided medical attention. However, Tran never mentioned receiving any medical attention even after he signed his statement but, rather, he was transported to the jail. Finally,

when the State was pressing Tran on the many changes initialed by him in the statement, he added the claim that he did not have his reading glasses and was unable to read what he was signing.

At a hearing to suppress evidence, the trial court is the sole judge of the weight and credibility of the witnesses and the trial court's finding may not be disturbed on appeal absent a clear abuse of discretion. *Alvarado v. State*, 853 S.W.2d 17, 23 (Tex. Crim. App. 1993). The trial court could reasonably have found Tran's claims of involuntariness not to be credible. Accordingly, the trial court did not abuse its discretion in allowing Tran's written and sworn statement into evidence before the jury. We overrule issue three.

IV. Admissibility of Evidence

In issues five and six, Tran complains that the trial court erred by admitting certain writings in evidence without the proper predicate to ensure their authenticity or reliability. Lajohn Wilson, an inmate convicted of aggravated robbery and serving a fifty-year sentence, testified to have spoken with Tran while incarcerated. After he had provided a written statement concerning what Tran told him about the robbery and murder, Wilson indicated that he received a letter or note from Tran threatening him if he testified against Tran in court. The writing

referenced Wilson's statement. When the state offered the letter into evidence, Tran objected to the letter as hearsay. The objection was overruled.

Oliver, an accomplice of Tran, testified that he had spoken with Tran since the date of the incident for which they were criminally charged and Tran had threatened Oliver not to testify against him. During his testimony at trial, Oliver was asked to identify the contents of a plastic baggy and he identified them as being letters and communications from Tran he received while he was in jail. Tran's counsel objected,

> First of all, we object to relevance. We also have an objection as to 402 and 403 for the Court, Rule 402 and Rule 403, and we also object that there hasn't been enough certainty established from testimony that it can be shown that these are actually from our client.

That objection was overruled and the documents were admitted. While the writings referenced Oliver's written statement, which weighs in favor of their reliability and authenticity, for the most part, the writings were incoherent.

"Because trial courts are in the best position to decide questions of admissibility, we review a trial court's decision regarding the admissibility of evidence under an abuse of discretion standard." *Rodriguez v. State*, 203 S.W.3d 837, 841 (Tex. Crim. App. 2006); *see also Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (trial court "has the best vantage from which to decide" admissibility questions). This standard requires an appellate court to

uphold a trial court's admissibility decision when that decision is "within the zone of reasonable disagreement." *Montgomery*, 810 S.W.2d at 391. "An appellate court would misapply the appellate abuse of discretion standard of review to reverse a trial court's admissibility decision solely because the appellate court disagreed with it." *Rodriguez*, 203 S.W.3d at 841, *see also Robbins v. State*, 88 S.W.3d 256, 259–60 (Tex. Crim. App. 2002).

However, the erroneous admission of evidence that is otherwise cumulative of other properly admitted evidence pertaining to the same facts is harmless. *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999); *Eggert v. State*, 395 S.W.3d 240, 244 (Tex. App.—San Antonio 2012, no pet.). Both witnesses testified before the jury that they received oral and written threats from Tran during the pendency of the case, which testimony was admitted without objection. Other witnesses testified to similar threats from Tran, without objection. Therefore, even assuming error but without finding same, after examining the entire record, we have fair assurance that admitting the notes or letters did not influence the jury or had but a slight effect, and therefore, any error would be harmless. *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). We overrule issues five and six.

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

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on August 17, 2015
Opinion Delivered February 15, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Johnson, JJ.