NUMBER 13-18-00167-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

MIGUEL ANGEL HERNANDEZ, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 370th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Tijerina
Memorandum Opinion by Justice Tijerina

A jury convicted appellant Miguel Angel Hernandez of two counts of injury to a child, a state-jail felony and a second-degree felony. *See* TEX. PENAL CODE ANN. §§ 24.04(a)(1),(g), 22.04(a)(1),(e). A jury sentenced him to 500 days' imprisonment for count one and fourteen years' imprisonment for count two. By five issues, appellant argues the trial court erred by (1) denying his motion for appointment of an expert; (2)

denying his motion for a mistrial; (3) admitting his written statement; and (4–5) permitting the testimony of an employee with Texas Department of Family and Protective Services (CPS). We affirm.

I. BACKGROUND

Appellant was indicted with two counts of injury to a child: count one charged injury by the act of burning with hot water while count two charged injury by omission of not seeking immediate medical attention.

The evidence at trial established that appellant and his common law wife lived with their two biological children and their four-year-old niece A.G.[1] pursuant to a court order. A.G. was removed from her biological mother after she ingested acid and burned her esophagus, which required that a feeding tube be inserted into her abdomen, and special pureed meals were fed to her.

In the fall of 2016, A.G. missed several days of school. Upon her return on November 9, 2016, A.G.'s pre-k teacher Olga Gonzalez noticed A.G. was "waddling from side to side" "like a penguin," and she was wearing black snow boots. Gonzalez testified that she thought A.G.'s boots were too heavy for her, so Gonzalez started to take them off. When Gonzalez tried to put her boots back on, A.G. started screaming and crying. Gonzalez carried her to the school nurse.

Principal Sylvia Hernandez noticed bloody boils on A.G.'s feet when she arrived at the nurse's office. She described her interaction with appellant upon his arrival on campus. According to Hernandez, appellant appeared nervous when she asked him what happened to A.G: "And this is why you kept her home? That's why you were not bringing

[1] To protect the identity of children, we refer to them by aliases. *See* TEX. R. APP. P. 9.8(b).

her? Did you tell the doctor about this? Does the doctor know?" When appellant responded no, she immediately contacted law enforcement and summoned for an ambulance. She recollected that appellant told her A.G. had turned on the water, "and that she had put [it] really hot, and that, you know, she had put her feet in the—in the water."

Jessica Ramos, the school nurse, testified that she attempted to take off A.G.'s boots, and A.G. was screaming, crying, and yelling in pain. Nurse Ramos noticed an infectious odor, so she attempted to take off her socks, but the socks stuck to A.G.'s skin. After Nurse Ramos used shears to cut off the sock, she noticed slough, blisters, skin discoloration, dead tissue, and burns. She suspected physical abuse. Her notes indicated that A.G. was withdrawn; had bruises; her feeding tube was draining; serosanguineous and sanguineous bleeding were present; her toes were stuck together by yellow drainage; she had burn-like blisters; hair was stuck to her wounds; she was missing several toenails; and she was limping.

Alamo Police Officer John Anzaldua arrived on campus and noticed A.G.'s feet were "severely burnt" and swollen. He stated A.G. had lots of tears in her eyes and did not want to look at him or at anybody.

Nurse Ramos accompanied A.G. in the ambulance to the hospital. At the hospital, Nurse Ramos testified that A.G. kept repeating appellant's name. When Nurse Ramos asked A.G. if appellant did that to her, A.G. responded yes. Appellant objected to the testimony and asked for a mistrial. The trial court sustained the objection but denied the request for a mistrial.

Hidalgo County Sheriff's Office Major Crimes Investigator Francisco Tomas Medrano responded to the local hospital. When he arrived, A.G. was asleep, and he noticed "that her feet were badly damaged. They appeared to be burnt . . . throughout her little toes, on the left foot, on the right foot, in between the toes, on top, on the bottom, and on the soles. It was the entire left and right foot." He took photographs of A.G.'s body including the bruising on her arm and her back.

Lora Spiller, M.D., specializing in child maltreatment, testified that A.G.'s injuries were consistent with a child being held in hot liquid.[2] Because the injuries lacked splash marks, it was her opinion that A.G. was held in hot water, unable to move around while she suffered excruciating pain. For a burn of that degree to occur, the water needed to be at least 130 degrees' Fahrenheit while the child was held down for several minutes. Dr. Spiller had to shave skin from A.G.'s thigh and place it on her burned feet so that her feet would have some skin. Dr. Spiller believed that A.G.'s burns worsened because of the lack of treatment. According to Dr. Spiller, A.G. must now regularly see a plastic surgeon to reduce the size of keloids that have formed as a result of the skin grafting. A.G. also requires the use of compression garments, which were made specifically for her, and she receives steroid injections to decrease the scars on her feet and thigh.

Hidalgo County Sheriff's Office Investigator Odilon Palomo testified that on November 6, he made contact with appellant and his wife outside the school. Appellant agreed to go to the sheriff's office substation to provide a statement. Investigator Anna

[2] Her main concerns regarding A.G. were the burns to her feet, malnutrition, lice, and her short height. A.G. had a protuberant abdomen, full of air, and severe diarrhea. Although she was almost five years old, she weighed only twenty-five pounds, which is the average weight of a twenty-one-month-old toddler. Upon her hospitalization, A.G. immediately began to gain weight, increase in height, and her speech improved dramatically.

Delia Mendez took appellant's statement. Appellant stated he was frustrated with A.G. and placed her in the hot water while she yelled. He admitted he let his anger get the best of him.

CPS Special Investigator Sam Herrera testified that he interviewed appellant on November 21, 2016. During the interview, appellant shared that he was frustrated with A.G. because she had soiled her underwear and her feeding tube was leaking. He then placed her in the tub and placed her feet in hot water while she was crying. The next day appellant discovered the severity of her injuries. Appellant and his wife decided they would not allow her to go to school, and they did not seek medical care because he did not want to get in trouble or get arrested.

A jury convicted appellant of two counts of injury to a child. This appeal followed.

II. EXPERT ASSISTANCE

By his first issue, appellant argues the trial court erred by denying his motion to appoint an expert. He asserts an expert was necessary to assist in his defense.

A. Standard of Review

We review a trial court's denial of a motion for expert assistance for an abuse of discretion. *See Griffith v. State*, 983 S.W.2d 282, 287 (Tex. Crim. App. 1998) (en banc); *Perales v. State*, 226 S.W.3d 531, 536 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). An abuse of discretion occurs only when the trial judge's decision was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003).

An indigent defendant is entitled to expert assistance if "the expert can provide assistance which is likely to be a significant factor at trial." *Ex parte Jimenez*, 364 S.W.3d

866, 876 (Tex. Crim. App. 2012) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985)). On the other hand, "an indigent defendant is not entitled to the appointment of an expert when he offers 'little more than undeveloped assertions that the requested assistance would be beneficial.' He must provide concrete reasons for requiring the appointment of any particular expert." *Id*. at 877–78 (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)). A defendant must identify the expert and explain what the expert will do and why it will be important in representing the defendant. *See id*. at 878. For these reasons, the court of criminal appeals "reiterated the importance of presenting affidavits or other information to the trial judge in making the required threshold showing." *Id*. at 881–82.

B. Discussion

Appellant filed an "Ex Parte Motion for Appointment of an Expert" less than one week before trial. In his motion for expert assistance, appellant claimed Kris Sperry, M.D. "a medical doctor with expertise in forensics and child abuse cases" was "necessary to effectively prepare for trial and defend against the charges and to mitigate the imposition of punishment, if any." Appellant asserted that Dr. Sperry would need time to review the voluminous medical records in this case and would be unable to testify for at least another month. At a pretrial hearing, appellant argued that an expert was necessary to assist "in whether the injuries are consistent with intentional or accidental scalding." The trial court asserted that it was too late for any potential expert to be permitted to testify because trial was to commence that week:

> Your motion was filed late. You requested an expert, and all the deadlines had already passed . . . You've had this case—[appellant] has been in jail for over a year. I'm not gonna be delaying this trial any further. If, in over a year, you didn't file a motion for an expert, I'm not gonna to be entertaining it at this time.

Moreover, the trial court stated that an expert would not be able to opine on whether the injuries were intentional or whether appellant intentionally did not seek medical advice because those provinces were for the fact finder. The trial court denied appellant's motion.

Appellant's *Ake* motion did not specify to the trial court what, if anything, Dr. Sperry would potentially glean by reviewing case files. Although an indigent defendant has a right to have an expert available to "consult with counsel, to interpret records, to prepare counsel to cross-examine State's witnesses, and generally to help present appellant's defense in the best light," the defendant, however, must nevertheless make "a sufficient threshold showing of the need for expert assistance on a particular issue." *Id.* at 877 (quoting *DeFreece v. State*, 848 S.W.2d 150, 161 n. 7 (Tex. Crim. App. 1993) (en banc)). Here, appellant's mere affirmation to the trial court that he needed an expert "to prepare for trial and defend against the charges" was not sufficiently concrete to warrant appointing an expert. *See id*. at 878. Moreover, appellant did not clarify how or why the expert was necessary, and he did not attach any affidavits evidencing a need for expert assistance.

> In cases holding that a sufficient showing was not made under *Ake*, the defendant typically has failed to support his motion with affidavits or other evidence in support of his defensive theory, an explanation as to what his defensive theory was and why expert assistance would be helpful in establishing that theory, or a showing that there was reason to question the State's expert and proof.

Id. at 881-82. We hold appellant failed to provide concrete reasons warranting for the appointment of an expert and offered "little more than undeveloped assertions that the requested assistance would be beneficial." *Id*. at 878. Accordingly, the trial court's denial of the motion for expert assistance was not so clearly wrong as to lie outside the zone of

reasonable disagreement. *See Zuliani*, 97 S.W.3d at 595. The trial court did not abuse its discretion in denying appellant's motion for expert assistance. We overrule his first issue.

III. MISTRIAL

By his second issue, appellant argues the trial court erred in denying his motion for a mistrial based on inadmissible hearsay testimony of Nurse Ramos. Specifically, he claims her testimony violated his Sixth Amendment right to confrontation and cross-examination. *See* U.S. CONST. amend. VI.

A. Standard of Review

We review a trial court's denial of a motion for mistrial for abuse of discretion. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). To constitute an abuse of discretion, the trial court's decision must fall outside the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). We will not substitute our judgment for that of the trial court, but rather we decide whether the trial court's decision was arbitrary or unreasonable. *Webb*, 232 S.W.3d at 112. Only in extreme circumstances, when the error is incurable, will a mistrial be required. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). The asking of an improper question will seldom call for a mistrial because any harm can usually be cured by an instruction to disregard. *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). A mistrial is required only when the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of jurors. *Id*.

B. Hearsay

The relevant portion of Nurse Ramos's testimony reads as follows:

> [State]: Why did you stay with her at the hospital?
>
> [Nurse]: I didn't want to leave her.
>
> [State]: And defense counsel posed some questioning [sic] to you about how you came to realize who the defendant was.
>
> [Nurse]: Uh-huh.
>
> [State]: What questions did you ask A.G.?
>
> [Nurse]: As they were trying to remove the top layer, they—they do, like, a little—they soak—they were soaking her feet. So they were attempting to take it off. So I was hugging her, so she wouldn't cry. So I had her.
>
> And she kept saying the name "Miguel", Miguel." So I was like "Who's Miguel?" And she just kept saying "Miguel," and "No." "Miguel, no." "No, Miguel."
>
> So I asked, "Is Miguel the one who did it?" And she said, "Yes."

Outside the presence of the jury, appellant objected under non-responsiveness, hearsay, and a violation of the confrontation clause.[3] Appellant asked for a mistrial, which the trial

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[3] The trial court informed appellant:

> I mean, you can't just hide behind—say, "Well I don't want to object in front of the jury"—because you're saying, "I don't want to highlight it." But you're gonna have to highlight it, because she already said it . . .
>
> You know, you may, "Well, it's hearsay. Therefore, it shouldn't be allowed." Well, unobjected to hearsay has been found to be probative also.
>
> You have to, in fact, object. There's a—there were opportunities. And so the Court can only assume that it was your strategy to see what she was about to say . . .
>
> You could have objected, at any time, at that point. At—You could have already started objecting, at that point, because that's unresponsive. "And then she kept saying the name "Miguel," Miguel." You could have objected at that point . . .

court denied but offered a limiting instruction instead. When the jury returned, the trial court acceded to appellant's specific jury instruction:

> The Court has, in fact, sustained those objections to the answers that were given as being unresponsive . . . So, therefore, I am instructing you—I am instructing you to disregard the witness'[s] response to the last question asked by the State. And I want you to understand that when I tell you that, you are not to consider it for any purpose, nor discuss that answer in your deliberations.

Thus, the trial court instructed the jury not to consider Nurse Ramos's statement for any purpose. Prompt instruction to disregard will ordinarily cure error associated with an improper question and answer. *See Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). "We generally presume the jury follows the trial court's instructions in the manner presented." *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). Appellant does not explain how the jury disregarded this instruction, nor is there evidence to conclude that any of the complained-of testimony was so extreme under the circumstances as to render ineffective the trial court's instruction to disregard. *See Moore v. State*, 999 S.W.2d 385, 405–06 (Tex. Crim. App. 1999). Moreover, Nurse Ramos's testimony was not clearly calculated to inflame the juror's minds nor was it of such a character as to suggest the impossibility of withdrawing the impression left to the jury. Under these circumstances, we conclude that the trial court's prompt and unequivocal instructions to disregard Nurse Ramos's statements was sufficient to cure any harm resulting from the impression left on the jury, and we presume the jury followed the trial court's instruction. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009) (noting that a reviewing court

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> At no point did you object to any of that . . . even though there are many instances in there where you had an opportunity to—to object . . . .

generally considers instructions given to the jury sufficient to remedy most improprieties that occur during trial and presumes the jury will follow the trial court's instructions). Nonetheless, Herrera and Investigator Mendez testified that appellant confessed to injuring A.G. As a result, Nurse Ramos's testimony is harmless as other properly admitted evidence established the same information. *See Jabari v. State*, 273 S.W.3d 745, 754 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding that the erroneous admission of extraneous offenses was harmless because other properly admitted evidence established the same information). Accordingly, the trial court did not abuse its discretion by denying appellant's request for a mistrial on this basis. *See id*.

C. Confrontation Clause

The Sixth Amendment prohibits the introduction of testimonial statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 52 (2004). "[T]estimonial statements are those 'that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013) (quoting *Crawford*, 541 U.S. at 52)).

A.G.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. When Nurse Ramos noticed A.G.'s injuries, she rightly became worried that the four-year-old was the victim of serious violence. When A.G. kept repeating appellant's name, Nurse Ramos's question was primarily aimed at identifying the abuser in order to protect the victim. There is no indication that the primary purpose of the conversation was to gather evidence for appellant's prosecution. *See Ohio v. Clark*,

135 S.Ct. 2173, 2181 (2015) (holding that a three-year-old's statement to his teacher identifying defendant was not testimonial). At no point did Nurse Ramos inform A.G. that her statement would be used to arrest or punish her abuser, and A.G. never hinted that she intended her statement to be used by the police or prosecutor. *See id*. ("[I]t is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony."). Moreover, the conversation between Nurse Ramos and A.G. was informal and spontaneous in the hospital setting. *See id*. When Nurse Ramos asked if appellant was the one who did that to A.G., she "did so precisely as any concerned citizen would talk to a child who might be the victim of abuse." *Id*.

Considering all the relevant circumstances here, A.G.'s statement clearly was not made with the primary purpose of creating evidence for appellant's prosecution. *See id*. "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." *Id*. at 2182. Thus, its introduction at trial did not violate the Confrontation Clause. We overrule appellant's second issue.

IV. MOTION TO SUPPRESS

By his third issue, appellant argues the trial court erred when it denied his motion to suppress his written statement because he made that statement while he was in police custody without receiving his *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 463, 444 (1966).

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *State v. Martinez*, 570 S.W.3d 278, 281 (Tex. Crim. App. 2019); *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). First, we afford almost total deference

to the trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Abney v. State*, 394 S.W.3d 542, 547 (Tex. Crim. App. 2013). The trial judge is the sole judge of witness credibility and the weight to be given to witness testimony. *Ex parte Moore*, 395 S.W.3d 152, 158 (Tex. Crim. App. 2013). Second, we review de novo the trial court's application of the law to the facts. *See Valtierra* 310 S.W.3d at 447. "As a general rule, appellate courts view the evidence in the light most favorable to the trial judge's ruling, regardless of whether the judge granted or denied the suppression motion." *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011). "Thus, courts afford the prevailing party 'the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence.'" *Id*. (quoting *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008)).

B. Noncustodial Interrogation

1. Applicable Law

There are three types of interactions among police officers and citizens: (1) consensual encounters, (2) investigative detentions, and (3) arrests or their custodial equivalent. *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010); *State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002). "An encounter is a consensual interaction which the citizen is free to terminate at any time." *Crain*, 315 S.W.3d at 49. "On the other hand, an investigative detention occurs when a person yields to the police officer's show of authority under a reasonable belief that he is not free to leave." *Id*. "When the court is conducting its determination of whether the interaction constituted an encounter or a detention, the court focuses on whether the officer conveyed a message that compliance with the officer's request was required." *Id*. "The question is whether a reasonable person

in the citizen's position would have felt free to decline the officer's requests or otherwise terminate the encounter." *Id*.

Both a detention and an arrest involve a restraint on one's freedom of movement; the difference is in degree. *State v. Sheppard*, 271 S.W.3d 281, 290–91 (Tex. Crim. App. 2008); *State v. Whittington*, 401 S.W.3d 263, 272 (Tex. App.—San Antonio 2013, no pet.). An arrest is a comparatively greater degree of restraint on an individual's freedom of movement than is an investigative detention. *Sheppard*, 271 S.W.3d at 290. Whether a person has been arrested depends on whether the individual's liberty of movement was actually restricted or restrained. *See* TEX. CODE CRIM. PROC. ANN. art. 15.22; *Amores v. State*, 816 S.W.2d 407, 411–12 (Tex. Crim. App. 1991).

A defendant seeking the suppression of a statement on *Miranda* grounds has the threshold burden of clearly establishing that his statements were given during custodial interrogation. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). A person is "in custody" for *Miranda* purposes when there is either (1) a formal arrest or (2) a restraint on the person's freedom of movement to the degree an objectively reasonable person would otherwise associate with a formal arrest. *Nguyen v. State*, 292 S.W.3d 671, 677 (Tex. Crim. App. 2009); *see Miranda*, 384 U.S. at 444; *State v. Saenz*, 411 S.W.3d 488, 496 (Tex. Crim. App. 2013).

> Texas cases are generally categorized as an "arrest" or "detention" depending upon several factors, including the amount of force displayed, the duration of a detention, the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and any other relevant factors.

Sheppard, 271 S.W.3d at 291; *see Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996); *Ortiz v. State*, 421 S.W.3d 887, 891 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

There are at least four general situations which may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement do not tell the suspect that he is free to leave. *Dowthitt*, 931 S.W.2d at 255. We make the determination of when an investigatory detention escalates into full custody on an ad-hoc basis, considering the totality of the circumstances. *See Saenz*, 411 S.W.3d at 496–97.

2. Suppression Hearing

At the suppression hearing, Investigator Palomo testified that he asked appellant and his wife if they were willing to come into the sheriff's office substation to provide a statement, and both appellant and his wife agreed. Appellant traveled in his own vehicle while his wife traveled in Investigator Palomo's vehicle. According to Investigator Palomo, appellant voluntarily walked into the substation lobby. He was not under arrest, and he was not handcuffed. On cross-examination, Investigator Palomo testified that once appellant arrived at the substation, Investigator Palomo asked Investigator Mendez to take appellant's statement. Thus, Investigator Palomo stated he was "out of the picture" and had no other contact with appellant.

Investigator Mendez testified that she made contact with appellant in the front lobby and discussed whether he would agree to provide a statement. After she had that discussion with him, she took him to the interview room. Although he was not under arrest, she testified that she read him his *Miranda* warnings. Appellant waived his constitutional rights by initialing each *Miranda* warning before providing her with a statement.

Appellant testified that in his first statement to Investigator Mendez, he told her that A.G. turned on the faucet and poured hot water on herself. Shortly after that, appellant asserts that Investigator Palomo told him: "I'm already tired. I'm fed up. Tell me the truth. If you tell me the truth, I'll let your wife go at this point." After appellant was *Mirandized* again, he provided his statement as follows:

> I do not remember exactly what day but around October 25th, 2016, Maria went to the gym with the kids. [A.G.], as always, stayed with me. I had a very difficult day at work and I was a little stressed out. The tube that [A.G.] has in the stomach was leaking. On top of that, she had diarrhea and soiled herself. I got upset with her because she was dirty. I picked [A.G.] up to take her to the bathroom. I put her in the tub with her clothes on but without socks or shoes. I opened the hot water knob completely. I got the shower head and I put in on [A.G.] getting her feet wet. [A.G.] then screamed and she was crying. I held [A.G.] in the water, that's why she couldn't get out. I held [A.G.] for more than several minutes in the hot water but I don't know exactly why I let my anger carry me away. Then, I reacted and I took her out of the shower. I gave [A.G.] clean clothes and I told her to change.
>
> . . .
>
> Around November 2nd, 2016, I took [A.G.] to Dr. Reynoso, her specialist for the feeding tube. Her appointment was to adjust the feeding tube and to let him know it was leaking. I didn't tell the doctor anything about her feet because I knew I was wrong and it was going to affect me negatively.

Appellant stated he would not have changed his statement if Investigator Palomo had not promised to let his wife go. Although appellant initialed each *Miranda* warning, he stated he did not understand what he was initialing, he did not have time to read it, he had

problems with his eyesight, and he signed the waiver because Investigator Palomo promised him he would let his wife go if appellant told the truth.

On cross-examination, appellant agreed that there was nothing stopping him from driving in a different direction on his route to the sheriff's office. He stated he walked into the front door of the sheriff's office alone, and he never informed anyone that he wanted to leave the premises. Moreover, appellant acknowledged over one month later, after he and his wife were arrested, he spoke to CPS and provided them with the same statement.

3. Analysis

Following the denial of appellant's motion to suppress, the trial court issued findings of fact and conclusions of law. In sum, the trial court found that appellant was not under arrest on November 9, 2017 when he was asked to meet investigators at the sheriff's office substation. Prior to making any written statement, the trial court determined that appellant was given warnings that complied with *Miranda* and article 38.22 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22; *Miranda*, 384 U.S. at 444. Subsequently, the trial court found that appellant voluntarily waived his right to remain silent and his right to speak to an attorney and fully understood his constitutional and statutory rights prior to making the statements. The trial court also found that no force, threats, coercion or promises were made in order to persuade appellant to sign the statements. These findings by the trial court are supported by the record, and we defer to them. *See Valtierra*, 310 S.W.3d at 447.

The evidence establishes that appellant voluntarily drove his personal vehicle to the sheriff's office, parked in the general parking area, and voluntarily walked in through the lobby. Thus, appellant was not in custody. *See State v. Vasquez*, 305 S.W.3d 289,

294 (Tex. App.—Corpus Christi–Edinburg 2009, pet. ref'd) ("When a person voluntarily accompanies officers to an interview, and he knows or should know that the police suspect he may be implicated in the crime under investigation, he is not 'restrained of his freedom of movement' and is not in custody."). Appellant was not handcuffed or restrained in any manner. *See Balentine v. State*, 71 S.W.3d 763, 771 (Tex. Crim. App. 2002) (providing that the placing of handcuffs on a defendant does not, in and of itself, automatically mean he is in custody). Appellant reiterates that "although not explicitly told he was not free to leave," he believed he was not free to leave, and he was under the impression that he had no choice but to cooperate with the investigation. This was apparently his own subjective view; it matters not whether appellant felt he was not free to leave but whether a reasonable person in appellant's position would have felt free to terminate the encounter. *See Crain*, 315 S.W.3d at 49.

We also note that appellant's car keys were in his possession the whole time, and at no point during their interaction did investigators tell appellant he was not free to leave or that he was under arrest. *See Campbell v. State*, 325 S.W.3d 223, 235 (Tex. App.—Fort Worth 2010, no pet.) (concluding that defendant was not in custody when an officer found him passed out inside his car and the officer took defendant's car keys and asked him questions as part of a continuing investigation); *Horton v. State*, 16 S.W.3d 848, 852 (Tex. App.—Austin 2000, no pet.) (concluding that defendant was detained when officers took his keys, ordered him out of his car, and prevented him from reentering the car). Under the reasonable person test, appellant was not in custody nor was he subjected to custodial interrogation at the time the statement was given. *See Crain*, 315 S.W.3d at 49. *Miranda* and article 38.22 did not come into play, and thus article 38.23 was inapplicable.

See TEX. CODE CRIM. PROC. ANN. art. 38.22; *Miranda*, 384 U.S. at 444; *Ortiz*, 382 S.W.3d at 372; *Dowthitt*, 931 S.W.2d at 255.

Even if it could be argued that appellant was in custody and his statement was obtained as a result of custodial interrogation, the trial court found that that appellant was given the warnings required by *Miranda* and article 38.22. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22; *Miranda*, 384 U.S. at 444. These findings are supported by the record, and we defer to them. *See Valtierra*, 310 S.W.3d at 447. Investigator Mendez testified that she read appellant his *Miranda* warnings, and appellant indicated he understood each warning with his initials. After appellant provided his statement, Investigator Mendez showed it to him, and at no point did appellant indicate he was unable to see his statement. Even if appellant was unable to see the document, Investigator Mendez read his statement to him verbatim. When she asked him whether he needed to make any changes, he indicated "no." Thus, the evidence establishes that appellant voluntarily waived his rights and provided a statement.

Appellant also argues he was coerced into a false confession because Investigator Palomo stated he would let appellant's wife go if appellant told the truth about what happened. However, Investigator Palomo reiterated that his contact with appellant was limited: he merely asked appellant if he was willing to go to the sheriff's office to provide a statement and then instructed appellant to proceed to the lobby when appellant arrived. According to Investigator Palomo, he did not advise appellant of any of his rights, he did not interrogate appellant, and he was not present during the interrogation. Once Investigator Palomo asked Investigator Mendez to take appellant's statement, Investigator Palomo was "out of the picture" and did not have further contact with

appellant. On cross-examination when asked whether appellant was given *Miranda* rights, Investigator Palomo stated: "I didn't speak to [appellant] directly. No, sir. Only when I told him that if he could follow me over to the substation . . . I had no contact after—after that." See Ex parte Moore, 395 S.W.3d 152 (holding that the trial court is the sole the sole judge of witness credibility and the weight to be given to witness testimony). Investigator Mendez testified that she did not directly or indirectly promise appellant anything in exchange for his confession, and she did not hear anyone else make such promises. *See id*. Therefore, the evidence does not support that appellant was coerced into a false confession, and the trial court did not abuse its discretion in denying the motion to suppress. We overrule appellant's third issue.

C. CPS

By his fourth and fifth issues, appellant similarly asserts the trial court erred by permitting Herrera's testimony over his Sixth Amendment objection and in violation of the statutory requirements of article 38.22 of the code of criminal procedure. *See* U.S. CONST. amend. VI; TEX. CODE CRIM. PROC. ANN. art. 38.22.

In *Wilkerson v. State*, the Texas Court of Criminal Appeals held that "only when a CPS investigator (or other non-law enforcement state agent) is acting in tandem with police to investigate and gather evidence for a criminal prosecution are [*Miranda*] warnings required" because only then has a custodial interrogation occurred. 173 S.W.3d 521, 523 (Tex. Crim. App. 2005). To determine if this type of tandem relationship exists, we consider: (1) information about the relationship between the police and the CPS worker; (2) the CPS worker's actions and perceptions; and (3) appellant's perceptions of the encounter. *Id*. at 530–31.

In this case, there is no evidence to support the existence of a tandem or consensual relationship. Herrera stated that he was not present when Investigators Palomo and Mendez interviewed appellant on November 9, and he was not told the substance of the interview. When he spoke with appellant on November 21, 2019 at the sheriff's office interview room, law enforcement was not present. Herrera contacted the sheriff's office only to confirm that appellant was still held at the facility. He testified that the purpose of his visit was to interview appellant regarding the allegations as far as how the injuries were caused to A.G.'s feet.[4] The trial court asked Herrera whether he had an agreement with law enforcement to interview appellant or get a statement from him to which Herrera responded, "Absolutely not." The record contains no evidence that a relationship had developed between the police and Herrera with regard to the allegations against appellant. *See id*. at 531. Herrera did not communicate with law enforcement prior to his interview with appellant; he did not attempt to contact law enforcement; law enforcement did not attempt to contact Herrera's office; and he did not review any reports prior to his conversation with appellant. The record also does not contain any evidence that Herrera considered himself to be acting in tandem with police or that appellant held such perception. *Id*. At the conclusion of his interview, Herrera did not share with law enforcement the information he obtained in the interview. Accordingly, the trial court did not abuse its discretion in admitting appellant's statement to Herrera. Appellant's fourth and fifth issues are overruled.

[4] Herrera asked appellant to describe how he held A.G. and whether that could have caused any rib fractures that she had.

V. CONCLUSION

We affirm the judgment of the trial court.

JAIME TIJERINA
Justice

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

Delivered and filed the
12th day of November, 2020.