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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

ANTONIO LOPEZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS OF TEXAS
CAUSE NUMBER 08-17-00039-CR

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would be helpful to the Court's resolution of this cause. Important legal issues are involved, and they deserve full adversarial testing.

STATEMENT OF THE CASE [1]

This is a petition for discretionary review from the judgment of the Eighth Court of Appeals, affirming Appellant's conviction for murder in the 171st District Court. Appellant was indicted for capital murder on September 19, 2012 (1 CR 17-18). The indictment was amended on November 9, 2015 (1 CR 565). After one mistrial, Appellant was convicted of murder on February 8, 2017 in a second trial by jury (2 CR 1017), and assessed punishment on February 8, 2017 by the trial court at confinement in the Texas Department of Criminal Justice for thirty-five (35) years. (2 CR 1033-34)

STATEMENT OF PROCEDURAL HISTORY

Appellant's conviction and sentence were affirmed by the Court of Appeals in

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[1] "CR" refers to the clerk's record, "SCR" to the supplemental clerk's record. "RR" refers to the reporter's record, "SRR" to the supplemental reporter's record. All volumes are numbered consecutively, beginning with "1". "MS" refers to an exhibit introduced by the State at the hearing of Appellant's pretrial motion to suppress. "SX" refers to an exhibit introduced by the State at trial. "DX" refers to an exhibit introduced at trial by the defense.

an unpublished opinion. *Lopez v. State*, 2019 WL 3812377 (Tex. App. – El Paso, No. 08-17-00039-CR, Aug. 14, 2019).

QUESTIONS PRESENTED FOR REVIEW

1. Whether statements made by police detectives during their interrogation of the Appellant constituted a threat to arrest and charge his wife with capital murder if, and only if, he did not confess to it himself.

2. Whether police detectives had probable cause to arrest Appellant's wife for capital murder.

3. Whether the existence of probable cause to arrest Appellant's wife for capital murder, if it existed, was sufficient to excuse threats to arrest and charge her with capital murder if Appellant did not confess to it himself.

3. Whether truthful statements made to Appellant by police detectives during their interrogation of him were sufficient to excuse threats to arrest and charge his wife with capital murder if he did not confess to it himself.

4. Whether Appellant's involuntary confession to police detectives was harmless beyond a reasonable doubt.

ARGUMENT [2]

THE FACTS

Antonio Lopez was convicted of murdering an infant child entrusted to his care and to the care of his wife. They were first-time foster parents. (2 SRR 39-44; 7 RR 36) The child had been with them only a couple of months and, at the time of her death, she was scheduled to be placed permanently with adoptive parents in a few days.

On the day she died, the child was supervised by Lopez in the master bedroom of the Lopez residence where her crib was located. Lopez spent part of the day watching television in the bedroom, but the rest of it in a walk-in closet that had been converted to an office where he prepared lesson plans on his computer for Bible Study classes at his church. (2 SRR 58-59, 65, 85, 102-107; 7 RR 59-61) His wife spent the day in the kitchen and dining room of the house decorating a cake and preparing for a quinceañera at their church that evening. (2 SRR 58; 7 RR 62-63)

Three other children were residents of the Lopez household: Lopez's two young daughters and a young teenaged girl in foster care who had been placed with Lopez and his wife temporarily for about a week. (2 SRR 40-41, 75-76, 97; 7 RR 20) During

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[2] Questions presented are grouped for argument have a common or similar basis in law or fact which makes it more comprehensible to present them together and avoids undesirable duplication of material in the brief.

the day, six other people came and went from the house, all without Lopez's knowledge. Five were foster children between the ages of nine and sixteen, all in the custody of Lopez's mother-in-law, who had come to help her daughter prepare for the quinceañera. (2 SRR 83, 152; 7 RR 65-69, 140-42, 147-48; 8 RR 20-23, 40, 120; 10 RR 49-51, 87-90) One was twelve-year-old girl who had committed physical attacks, some life-threatening, on other foster children, both before and after the lethal assault on the deceased child in this case. (10 RR 57-58, 100-114, 159-67)

Around three in the afternoon, Lopez discovered that the infant child was in distress. (2 SRR 66-68, 107-108; 3 RR 59-60, 106-107; 4 RR 21) He called for his wife to help, and then telephoned 911. (2 SRR 69-70; 7 RR 71-73, 75-76, 140) Within minutes, emergency medical technicians arrived and attempted to resuscitate the child, but she was unresponsive. (2 SRR 71; 3 RR 38, 46, 71; 7 RR 77) They transported her to the hospital where she was pronounced dead. (2 SRR 72-73; 3 RR 47, 81-82, 89; 5 RR 175, 185; 7 RR 78-79)

Lopez and his wife were both questioned by detectives at police headquarters the same day, and both denied knowing how the child came to be ill or injured. (MS-1; 2 SRR 17, 133; 3 SRR 12, 15, 133, 158-59; 3 RR 143, 145-47, 149, 211; 5 RR 123-28; 7 RR 89-91; SX-22) A few days later, the medical examiner discovered during an autopsy that the child's death was caused by blunt force trauma to her

abdomen from which she bled to death internally. (2 SRR 112-13; 5 RR 210-14; 6 RR 131-36; SX-47) As a result, the detectives asked Lopez and his wife to return for further interviews. Lopez in particular was interrogated aggressively for hours, during which he continued to deny any knowledge of how the child was injured. (2 SRR 22, 28; MS-2; 3 RR 215, 218-19; 5 RR 135; 7 RR 102; SX-23)

Eventually, Lopez and his wife were released to return home. (3 SRR 64-65, 165; 4 RR 108; 5 RR 137; 7 RR 119-20) On the way, his wife told him that one of the detectives thought Lopez had murdered the baby and that she would also be arrested if he did not confess. (3 SRR 41-42, 163, 165; 5 RR 47-50; 6 RR 22; 7 RR 103, 116-18, 167) This was consistent with what the detectives had also told him repeatedly during their interrogation. (2 SRR 116, 117, 120, 125, 128, 129, 130, 137, 146, 151, 155, 160, 168-69, 172; 3 SRR 35; 4 RR 183-87; 6 RR 20-21; 7 RR 127) He decided at that moment to return to police headquarters and admit culpability. (3 SRR 169; 7 RR 127-29, 164, 167) In a brief final interview with one of the detectives, Lopez confessed to putting the infant child on the floor and stomping her abdomen with his foot. (3 SRR 64, 67, 84-90, 99-102, 105-106, 113-16; MS-4; 4 RR 109; SX-33; 5 RR 103-104, 139-41, 150-51, 157; 6 RR 46-47) He was then arrested and charged with capital murder. (3 SRR 127-28; 4 RR 109; 5 RR 165)

THREATS TO ARREST LOPEZ'S WIFE

There is no dispute regarding the historical facts. Lopez was threatened no fewer than fifteen times with the arrest of his wife if he did not confess and assured that she would not be arrested if he did. (2 SRR 120, 130, 137, 140, 146, 151, 160, 168, 172; 4 RR 33, 43, 50, 53, 60, 65, 74, 81, 86) These statements were obviously and deliberately intended to make Lopez believe, and he did believe, that his wife would be charged with capital murder unless he confessed to it himself. It is impossible to understand them any other way.

Perhaps for this reason, the Court of Appeals ultimately conceded that "at least" two of the statements made by the detectives "can be considered 'threats' to arrest Appellant's wife[.]" *Lopez*, 2019 WL 3812377, at *7. Nevertheless, the Court concluded that such threats did not render his subsequent confession inadmissible because they included "truthful" statements of fact and were "supported by probable cause." Citing its own recent, unpublished opinion in *Luna v. State*, 2019 WL 1925004 at *10 (Tex. App. – El Paso, April 30, 2019, no pet.) (not designated for publication), and relying on *dicta* in *Contreras v. State*, 312 S.W.3d 566 (Tex. Crim. App. 2010), for the proposition that "an officer's threat to arrest a family member during an interrogation does not render a confession involuntary when the officer had probable cause to make such an arrest," the Court concluded that "when an officers

[sic] makes a statement that constitutes an ‘accurate representation' of a defendant's situation, any such statement cannot be considered coercive and does not render a confession involuntary." *Luna*, 2019 WL 1925004, at **9-10. For this proposition, the Court relied mainly on cases from various United States Courts of Appeals.

FEDERAL PRECEDENT: TRUTHFUL INTERROGATION

In *United States v. Braxton*, the Fourth Circuit reversed an order of the United States District Court suppressing Braxton's confession to "making false statements in connection with the purchase of firearms" because, among other things, such confession was induced by statements of ATF agents that he could face "five years jail time" for not "coming clean" with them. 112 F.3d 777, 780 (4th Cir. 1997). But, because the statements themselves were clearly intended only to impress upon Braxton that false answers given to the agents during their investigation carried the possibility of a criminal penalty, such statements did not constitute a threat to arrest Braxton if he did not cooperate, or a promise not to arrest him if he did. *Id.* at 783.

United States v. Nash involved a prosecution for conspiring and attempting to import cocaine into the United States. 910 F.2d 749 (11th Cir. 1990). Nash confessed to that offense during an interview with a Customs Service agent who stated that he could not guarantee an outcome for Nash but that cooperating defendants normally

received more lenient treatment, and that he would make the United States Attorney aware of Nash's cooperation. *Id.* at 751. Nash later claimed that these statements amounted to "illegal inducements," rendering his confession involuntary. Of course, the Circuit Court disagreed, noting only that "noncoercive" advice concerning "realistically expected penalties," coupled with encouragement to tell the truth, is not coercive, citing *U.S. v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978), which is to much the same effect. *Id.* at 753.

Likewise, in *United States v. Gallardo-Marquez*, the defendant asserted that, when arrested at home early in the morning for multiple felony offenses, the police "told him that he was going to jail for life, and that he should cooperate with the government to reduce his jail time." 253 F.3d 1121, 1123 (8th Cir. 2001). He claimed later that these statements, among other things, rendered his confession involuntary. Again, however, the Circuit Court properly regarded the statements as "accurate representations of Gallardo-Marquez's predicament" and were not "the sort of coercion necessary to impair his capacity for self-determination." *Id*.

Finally, in *United States v. Phillips*, wherein the defendant was charged and ultimately convicted of various child pornography and sexual-exploitation-of-a-minor offenses, the Circuit Court refused to find that statements made by FBI agents during their interrogation of Phillips, although "unnecessary and inappropriate," rendered his

confession involuntary. 230 Fed. Appx. 520, 524 (6th Cir. 2007). Evidently, one of the agents referred to Phillips as a "monster" and wondered whether he should be sentenced to life in prison or treated more leniently. *Id*. But Phillips did not explain how these statements affected the voluntariness of his confession and, unlike the instant case, the statements themselves did not "imply that, if Phillips would confess, the agents would think him less of a monster, [or] would be lenient in their investigation of him[.]" *Id.*

None of these federal cases holds that a threat which actually overcomes or impairs a defendant's will can be excused under the Due Process Clause of the Fourteenth Amendment because it includes accurate statements of fact about what legal consequences may follow from the commission of a crime.

FEDERAL PRECEDENT: PROBABLE CAUSE TO ARREST

Some cases from the United States Courts of Appeals do hold, however, that a threat to arrest one's relatives is permissible under the Due Process Clause when there is probable cause or other legal authority to carry out the threat. The most categorical expression of this view can be found in *Allen v. McCotter*, 804 F.2d 1362 (5th Cir. 1987). There, Allen was arrested for aggravated robbery. During police interrogation the next day, he was told that "because his wife was directly involved

in the robbery, charges could be filed against her . . . [but] that if he confessed, the police would not [do so]." *Id*. at 1363. He later claimed that his ensuing confession was involuntary because of the threat, but the Circuit Court held, citing two earlier circuit court opinions, that his confession was not rendered involuntary "by reason of his desire to extricate his wife from a possible good faith arrest." *Id.* at 1364. See also *States v. Hall*, 711 Fed.Appx. 198 (5th Cir. 2017).

The two precedents upon which the Court relied in *McCotter* are *U.S. v. Diaz*, 733 F.2d 371 (5th Cir. 1984), and *U.S. v. Mullens*, 536 F.2d 997 (2nd Cir. 1976). But *Mullens* does not remotely support the holding that probable cause to arrest vitiates the coercive nature of a threat. Indeed, in *Mullens*, there was not even the suggestion of a threat. The defendant merely claimed that, following the arrest of his parents, his "filial affection left him no choice" but to confess. And *Diaz*, while it is analogous to *McCotter*, involved a claim that the defendant's guilty plea, not his confession, was involuntary because induced by threats to prosecute members of his family. The Court rejected this claim because no such threats were actually made, and then observed in *dicta* that "threatening prosecution of a third party family member [during plea negotiations] is not itself legally wrong[,]" citing *U.S. v. Nuckols*, 606 F.2d 566 (5th Cir. 1979). 733 F.2d at 375.

Nevertheless, a few opinions of the United States Courts of Appeals since

McCotter have reached the same or a similar result. Thus, in *United States v. Johnson*, as here, the police effectively promised not to prosecute the defendant's wife if he confessed, and they kept that promise when he did. 351 F.3d 254 (6th Cir. 2003). The Circuit Court conceded that Johnson had been threatened and that "the threat was a crucial motivating factor in [his] decision to confess." *Id*. at 262. But the Court nevertheless held that the threat was not "objectively coercive" because "the threat could have been lawfully executed." *Id*. at 263.

Similarly, in *Thompson v. Haley*, a detective interrogating Thompson promised to release from custody a woman, already under arrest, who had assisted Thompson in the commission of murder. 255 F.3d 1292 (11th Cir. 2001). In fact, her culpability for the murder was already clear from her own statement to the detective. The Circuit Court, conceding that the Supreme Court had not yet spoken to the issue, analogized to one of its own cases on the voluntariness of a guilty plea, and held without further explanation that "whether a threat to prosecute a third party [is] coercive depends upon whether the state had probable cause to believe that the third party had committed a crime at the time that the threat was made." *Id*. at 1297.

Other cases relied on for the same proposition are not so clear. For example, in *Newland v. Hall*, Newland confessed after being told that his girlfriend, Margaret Beggs, who was being held in custody for aggravated assault, was about to be

charged with murder because the victim had died in the hospital. Newland had earlier been told by the officer interrogating him that, if the victim died, he would be charged with murder and Beggs would be charged as an accessory. 527 F.3d 1162, 1185 (11th Cir. 2008). Noting the opinions in *McCotter* and *Johnson*, the Court suggested that federal case law might not support a claim that Newland's confession was involuntary. *Id.* at 1189. In the end, however, the Court rejected Newland's claim because, while his confession might have been motivated by his desire to shield Beggs from prosecution, the police did not threaten him with Begg's arrest or promise not to charge her if he did confess. *Id.* at 1190.

Finally, a more thoughtful and nuanced approach can be found in *U.S. v. Hufstetler*. Hufstetler was an active participant in negotiations with FBI agents interrogating him about a bank robbery. The agents believed they had enough evidence to prosecute him but were concerned to know what role his girlfriend, Sheena Craig, had played in the robbery. 782 F.3d 19, 20 (1st Cir. 2015). Although the agents exploited Hufstetler's concern for her culpability and suggested that different consequences might follow for her, depending on his explanation, they insisted that they could not "make any guarantee or promise in exchange for his cooperation." *Id.* at 21. For his part, Hufstetler eagerly joined in what he evidently considered to be a negotiation for his confession, and seemed willing to confess his

crime, but not without some concessions to his girlfriend. *Id.*

Sensitive to the coercive nature of any interrogation in which potential consequences for a relative of the defendant are discussed, the Circuit Court engaged in a comprehensive review of precedent, ultimately concluding that the agents did not make any improper threat or promise. *Id*. at 23-24. They "never lied, exaggerated the situation, or conditioned either individual's release on Hufstetler's willingness to speak . . . [but noted only] that Craig was a suspect and unless new information came to light to discount her culpability she would continue to be criminally liable." *Id.* at 25.

Hufstetler, although its calculus included the existence of probable cause to arrest Hufstetler's wife, was undoubtedly analyzed and decided correctly under applicable Supreme Court precedent. It focused on whether Hufstetler's confession was an intelligent exercise of his free will, not on whether coercing his confession was excused because of probable cause to arrest his wife. When the same analysis is applied to the facts of *Lopez*, however, it yields an entirely different conclusion. Unlike Hufstetler, Lopez was persistently threatened and browbeaten. He did not negotiate with the detectives. Rather, he was the object of unilateral threats to prosecute his wife for capital murder if he did not confess. In contrast to Hufstetler, he was obviously frightened and shocked by the aggressive manner of the detectives

and by the allegations they were making against him and his wife. Unquestionably, his ultimate decision to confess was, unlike Hufstetler's, not "the product of a rational intellect and a free will," as required by the United States Constitution. *Lynum v. Illinois*, 372 U.S. 528, 534 (1963).

Nevertheless, in light of *McCotter* and *Johnson*, an aberrant, minority view is percolating in the United States Courts of Appeals that threats to prosecute, and promises not to prosecute, are not "objectively coercive," or that the coecion is excused, if the officers making the threats or promises have probable cause, or some other legal authority, to carry out the threats or to fulfill the promises. On its face, this view is either a legal fiction or contrary to settled precedent. The voluntariness of a confession has nothing do with probable cause to arrest a codefendant. It has to do with coercion, including threats, promises, or other improper influences by law enforcement that overcomes or critically impairs a defendant's will to resist. *Miller v. Fenton*, 474 U.S. 104, 110 (1985); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Bram v. U.S.*, 168 U.S. 532 (1897); TEX. CODE CRIM. PROC. art. 38.21; Dix & Schmolesky, 41 TEX. PRAC., *Criminal Practice & Procedure* § 16:6 (3d ed.).

PROBABLE CAUSE TO ARREST LOPEZ'S WIFE

Even if it were true that the police can threaten a suspect with consequences,

or promise the absence of consequences, so long as they have a legal right to bring those consequences about, it would not justify the conduct of the detectives in this case because probable cause did not in fact exist to arrest Lopez's wife. Lopez himself was not under arrest, and was told so by the detectives at each of his recorded interviews with them, including the one conducted after the detectives had been made aware of the autopsy results. *Lopez*, 2019 WL 3812377, at *2. The fact is that, until Lopez admitted to having assaulted the deceased child, the detectives lacked probable cause to arrest him or anyone else for her murder.

Nevetheless, the Court of Appeals seemed to think, as did the detectives, that Lopez's wife could be charged with capital murder for being in the same house, together with eleven other people, where a child for whom she was legally responsible was murdered, even absent evidence that she was ever in physical proximity to the child at or near the time of the murder, and in spite of evidence that many, if not most, of the others in the house, including a homicidal twelve-year-old girl, had equal access to the child and the means to inflict the fatal injuries. Such a collection of facts, none of which actually connects Lopez's wife to the fatal assault, could not remotely have supported her lawful arrest for capital murder. *Contreras v. State*, 312 S.W.3d at 577.

TEXAS PRECEDENT

Precedent of this Court holds that "[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." *Roberts v. State*, 545 S.W.2d 157, 161 (Tex. Crim. App. 1977) (citations omitted). See also *Contreras*, 312 S.W.3d at 576. Of course, it is not enough that the prisoner merely believes "his cooperation will benefit a relative" if there was no express of implied promise of such a benefit from the police. Nor may a prisoner who has "created conditions which place an innocent relative under suspicion" later exclude from evidence at trial a confession then made "to extricate the relative[.] " *Roberts*, 545 S.W.2d at 161. But, when a police officer obtains a confession by expressly or impliedly threatening to arrest, jail, or prosecute a relative of the accused unless he confesses, or promises not to do so if he does, the confession is not admissible over objection. It is irrelevant, under both state law and the United States Constitution, whether the confession was true in fact. *Rogers v. Richmond*, 365 U.S. 534 (1961); *Martinez v. State*, 127 S.W.3d 792, 794-95 (Tex. Crim. App. 2004). All that matters is whether the threat or promise was of a kind that would likely induce a false confession. *Coleman v. State*, 440 S.W.3d 218, 223 (Tex. Crim. App. 2013).

A handful of reported Texas cases have specifically addressed the voluntariness

of confessions obtained under such circumstances, mostly in unpublished opinions of the intermediate appellate courts. In three of these, the appellate court found that the conduct of the officer did not amount to a threat or promise at all. *Chavez v. State*, 2012 WL 1949006, at *3 (Tex. App. – Dallas, May 31, 2012, pet. ref'd) (not designated for publication); *Rodriguez v. State*, 2005 WL 2736557, at *3 (Tex. App. – Amarillo, Oct. 24, 2005, no pet.) (not designated for publication); *Hunter v. State*, 148 S.W.3d 526, 532 (Tex. App. – Houston [14th Dist.] 2004, pet. ref'd).

A Houston Court of Appeals has also refused to find any implied police threat to prosecute the wife of the accused simply because she was briefly detained at the same time as the accused for possession of cocaine. Since the accused was arrested while hiding in the back of her car, the court reasoned that he was the one who had "placed her under suspicion of wrongdoing" in the first place. *Alvarez v. State*, 2004 WL 2438972, at *2 (Tex. App. – Houston [14th Dist.], Nov. 2, 2004, pet. ref'd) (not designated for publication)

But, when the threats or promises are apparent from the record, and there is no dispute that they were made in fact, it is clear that any ensuing statement of the accused must be suppressed. *Roberts*, 545 S.W.2d at 161. Accordingly, in *Tovar v. State*, the Thirteenth Court of Appeals did not hesitate to hold a confession involuntary where, on cross examination, the "police officer testified that he told

appellant that if he took the wrap [sic], his wife would not be charged." 709 S.W.2d 25, 29 (Tex. App. – Corpus Christi–Edinburg 1986, no pet.)

Threatening to throw a man's wife in jail if he does not confess to a crime is *ipso facto* just the kind of thing that is likely to overbear his will. It is why the police do it, and it is exactly what formed the basis of the holdings in *Roberts* and *Tovar*, which required no further explanation from the reviewing court than simply to state the fact. A straightforward application of the principles and precedents that govern this case thus makes it clear that Lopez's confession was obtained by Detectives Ruiz and Hinojos through coercive interrogation practices in violation both of due process, under settled decisional law of the United States Supreme Court, and of Texas statutory law, as authoritatively construed by this Court.

HARMLESS ERROR

Finally, the Court of Appeals held that the error in admitting Lopez's confession was harmless because, within a few hours of having confessed to the detectives, Lopez repeated his confession in jail to an investigator for Child Protective Services (CPS). The Court of Appeals did not identify the harmless error rule being applied, but it is reasonably clear from the authorities cited by the Court that it purported, or at least intended, to apply the rule articulated by the United States

Supreme Court in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Lopez*, 2019 WL 3812377, at *9, citing *Arizona v. Fulminante*, 499 U.S. 279 (1991) and *Zuliani v. State*, 903 S.W.2d 812 (Tex. App. – Austin 1995, pet. ref'd). If so, that would at least have been the right rule.

Well-established constitutional law provides that any error under the Due Process Clause in the admission of an involuntary confession to which objection was interposed at trial and complaint made on direct appeal is reversible unless the appellate court is satisfied beyond a reasonable doubt that the error made no contribution to the verdict. *Fulminante*, 499 U.S. at 310. It is unclear how, or even whether, the Court of Appeals actually reached such a conclusion, but it is certain that any such conclusion would be manifestly irrational on the facts of this case.

Lopez was tried once before for the capital murder of the same deceased child. In that trial, a jury heard substantially the same evidence, including Lopez's three interviews with the detectives in their entirety and a testimonial description of his subsequent confession to the CPS investigator, and was charged in substantially the same way by the trial court, including specific instructions regarding the admissibility of involuntary statements to law enforcement officers. After some two and a half days of deliberation, a mistrial was declared after the jury was irreconcilably deadlocked nine to three in favor of an acquittal. (2 CR 830) Clearly, uncertainty about the

voluntariness, and therefore reliablity, of Lopez's confession to the detectives (and, for the same reason, also to the CPS investigator) actually had a profound effect on the jurors in that trial. One would have to be irrational or ignorant to aver a belief, certainly a belief beyond reasonable doubt, that his admissions did not also similarly affect the verdict in the trial that is the subject of this petition.

PRAYER FOR RELIEF

For the foregoing reasons, Appellant requests that his petition for discretionary review be granted, that the judgment of the Eighth Court of Appeals be reversed, and that the cause be remanded for a new trial.

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CERTIFICATE OF COMPLIANCE

I hereby certify in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing petition for discretionary review contains 4,405 words, exclusive of the caption, identity of parties and counsel, statement regarding oral argument,

table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

/s/ Robin Norris
ROBIN NORRIS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served electronically through the electronic filing manager to the following parties or their attorneys whose email addresses are on file with the electronic filing manager.

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APPENDIX

(Opinion of the Court of Appeals)

2019 WL 3812377
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

(Do Not Publish)
Court of Appeals of Texas, El Paso.

Antonio LOPEZ, Appellant,
v.
The STATE of Texas, Appellee.

No. 08-17-00039-CR
|
August 14, 2019

Appeal from 171st District Court of El Paso County, Texas, (TC # 20120D04452)

Attorneys and Law Firms

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Robin Norris, for Appellant.

Before McClure, C.J., Rodriguez, and Palafox, JJ.

OPINION

ANN CRAWFORD McCLURE, Chief Justice

***1** A jury found Appellant Antonio Lopez guilty of the murder of 11-month-old J.B., who died as the result of blunt force trauma to her body. Upon agreement of the parties, the trial court sentenced Appellant to 35 years' confinement.

On appeal, Appellant contends that the trial court erroneously denied his motion to suppress evidence of several recorded statements he made shortly after J.B.'s death to law enforcement officers and to a 911 operator, arguing that his statements were coerced and the result of police overreaching, and were therefore not freely and voluntarily given. Appellant contends that the trial court's alleged error in allowing these statements into evidence violated his rights under the Fourteenth Amendment of the U.S. Constitution and Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure. Finding no error, we affirm the trial court's judgment.

FACTUAL BACKGROUND

On June 28, 2012, the day that J.B. died, Appellant and his wife, Pearl Lopez were living in their home with their two daughters, ages four and two years old. J.B. had been placed in the Lopez's home by the El Paso Center for Children on June 21, 2012, as their first foster child. On that same day, Appellant and Pearl were also providing temporary respite care for another foster child, R.R., who was 13-years old at the time. At some point that morning, Pearl's mother, Alicia, arrived at the home with three of her own foster children, a 16-year-old intellectually disabled boy, and two girls, ages 11 and 9. Alicia later left the home for approximately 15 minutes to pick up two more foster children, V.F. and J.H., whom she had agreed to watch while their foster parent went to Mexico for two days. Alicia left at an undetermined time before J.B.'s injuries were discovered, taking with her all of the foster children in her care except the 11-year-old girl.

Appellant admittedly spent most of the day alone with J.B. in the couple's master bedroom, where J.B.'s crib was located, and where the couple had created an office space in their walk-in closet. The remaining family members and foster children spent most of the day in the kitchen with Appellant's wife, preparing breakfast, and later preparing for an upcoming quinceanera. Approximately two hours before J.B.'s injuries were discovered, Appellant brought his daughters into the bedroom to either nap or watch television. Appellant acknowledged that no one else entered the bedroom that day, although he did recall hearing someone open a file cabinet in the bedroom, and assumed it was one of his children or his wife. [1]

According to Appellant, when he approached J.B.'s crib to change her diaper, he observed J.B.'s eyes crossing and rolling backwards in her head, and upon lifting her, he noted that her body was limp. Appellant then called out to his wife for help, and called 911 at approximately 3:00 p.m., advising the 911 operator that J.B. was in distress. Appellant told both the 911 operator and the first responders at the scene that he had been alone all day with J.B. in the bedroom but denied knowing what had happened to her. J.B. was transported to the hospital by ambulance but died shortly after her arrival at approximately 4:00 p.m.

Appellant's First Recorded Statement

***2** After police arrived at his home the afternoon of J.B.'s death, Appellant spoke with Detective Arturo Ruiz and agreed to travel with him to police headquarters to provide a recorded statement, which began at approximately 8:00 p.m. At the start of the recorded statement, Detective Ruiz informed Appellant that he was not under arrest and that he was free to leave at any time, but nevertheless advised Appellant of his *Miranda* rights, which Appellant expressly waived. [2]

After Appellant stated that he wanted to cooperate with Detective Ruiz, Appellant provided a description of the day's events, acknowledging that he was alone with J.B. throughout the day in the master bedroom, except for a brief period of time when he brought his two children into the bedroom. Appellant further acknowledged that he, his wife, and his mother-in-law were the only adults in the house on that day. Appellant further explained that he and his wife typically shared the responsibility of caring for J.B., who not yet walking, was overcoming an aversion to men, and preferred to be with Appellant's wife; however, Appellant acknowledged that he was J.B.'s sole caretaker that day.

Appellant recalled that when he approached J.B.'s crib to change her diaper that afternoon, he observed J.B. "wincing" or "whimpering," observed her eyes roll back in her head. and noted that her lips were "whitish." He then called out to his wife for help and called 911 immediately thereafter. Appellant repeatedly asserted that he did not know what had caused J.B.'s distress, and that neither he, his wife, nor any of the children had hurt J.B. After providing his statement, Appellant was permitted to return home without being placed under arrest. [3]

The Autopsy Findings

An autopsy was performed on J.B.'s body on July 31, 2012 by Dr. Juan Contin, the Deputy Medical Examiner for El Paso County. Dr. Contin concluded that J.B. had died as the result of "blunt force injuries to the chest and abdomen." He further noted that J.B. had tears in her liver, which caused excessive internal bleeding, and that she also had "contusions to the head associated with a fracture of the left occipital bond." Dr. Contin concluded that J.B.'s injuries were consistent with someone striking her with a foot, stomping on her two or three times--or perhaps as many as six or seven times--using significant force. Given the nature of J.B.'s injuries, Dr. Contin concluded that they were intentionally inflicted by someone using a significant amount of force, and that the manner of death was homicide.

Appellant's Second Recorded Statement

After J.B.'s autopsy had been performed and the cause of her death identified, the police requested that Appellant and his wife provide additional statements to police, and Appellant and his wife thereafter voluntarily drove their own vehicle to police headquarters to provide their statements. [4] Appellant provided his second recorded statement to Detective Ruiz and Detective Jerome Hinojos at police headquarters on July 31, 2012 at approximately 7:30 p.m. Prior to giving his statement, Detective Hinojos informed Appellant that he was not under arrest, but once again read Appellant his *Miranda* rights, and once again Appellant acknowledged that he understood his rights was willing to waive them.

***3** Appellant initially provided the same factual scenario as he did during his first statement to police, again acknowledging that he was the only adult responsible for watching J.B. in the master bedroom throughout the day, but that he did not know what had caused J.B.'s death. The detectives then informed Appellant that J.B.'s autopsy, which they had personally observed, revealed that J.B. had died as the result of a significant blow to her stomach or abdomen, which occurred within two hours of when Appellant called 911 was made, while he and his wife had legal and physical possession of J.B. The detectives also stated that the medical examiner had concluded that J.B.'s injuries were intentional, and that given the amount of force necessary to have caused the injuries, they could only have been inflicted by an adult, and therefore, they did not suspect any of the children who were in the house on the day of J.B.'s death of causing her injuries. [5] The detectives repeatedly reminded Appellant that he had previously acknowledged that he was alone in the bedroom with J.B. throughout the day, and that he and his wife were the only two adults in the house responsible for J.B.'s care in the house that day, which Appellant freely acknowledged throughout the interview.

However, Appellant continually denied that he had any involvement in J.B.'s death and stated that he had no explanation for how J.B. was injured, other than to repeatedly say that "something went wrong that day." In response, the detectives repeatedly stated that absent any other "reasonable explanation" for how J.B. was injured, this meant that either Appellant or his wife, or perhaps both, inflicted the injuries

and were therefore responsible for J.B.'s death. Despite these statements, the detectives made it clear that their focus was on Appellant, in part because they did not believe that his wife was physically capable of inflicting the injuries on J.B., and in part because Appellant had repeatedly told them that he was the only adult taking care of J.B. on the day of her death. [6] After Appellant repeatedly claimed that he did not know what happened to J.B., the detectives then switched tactics and began asking Appellant about his religious faith and his active role in his church, which Appellant had mentioned earlier in the interview. Appellant expressed his belief that if a person who had committed a crime, such as a murder, he could only be "forgiven" and allowed to enter the "Kingdom of God," if he asked for God's forgiveness, as well as "forgiveness under man's law," meaning that the person would need to be honest about his actions.

Appellant was allowed to leave police headquarters, along with his wife, at approximately 10:08 p.m. that night without being placed under arrest. Appellant's wife testified at the suppression hearing that upon leaving police headquarters, she informed Appellant that the police had threatened to arrest her if she did not tell them what she knew about J.B.'s death, and that if she did not, one or both of them would be going to jail for murder, and that their children could be removed to foster care. [7] She recalled that Appellant responded by telling her that he intended to turn himself in, even though he denied being responsible for hurting J.B. [8] She testified that she then took Appellant to their home, and thereafter went to her parents' house for the night. Appellant's wife later called Detective Hinojosa and left a message saying that Appellant was going to turn himself in; however, she admittedly did not advise the detective that Appellant was doing so because of any threats made to her or Appellant.

The 911 Call and the Third Recorded Statement

***4** Early the next morning on August 1, 2011, at approximately 1:31 a.m., Appellant called 911, and after providing his name and address to the 911 operator, he stated that he was "confessing" to a homicide that had occurred at his house on July 28, and that he wanted a police officer to come pick him up. Although not certain if the call was a prank, a patrol officer arrived at Appellant's house in a marked patrol car, and Appellant stepped outside. Appellant informed the officer that he was responsible for the homicide of his 11-month-old foster child. Appellant was then transported to police headquarters, but was not handcuffed or placed under arrest at that time.

Appellant gave his third recorded statement at police headquarters that same morning, at approximately 4:00 am to Detective Hinojos. Before taking Appellant's statement, Detective Hinojos once again read Appellant's *Miranda* rights to him, and Appellant once again acknowledged that he understood his rights, and that he was knowingly, intelligently, and voluntarily waiving those rights.

Detective Hinojos began the interview by asking Appellant whether he had told the truth in earlier interviews regarding the cause of J.B.'s injuries, and in response, Appellant began a protracted and uninterrupted soliloquy in which he stated that approximately ten to fifteen minutes before he called 911, his daughters had left the bedroom to be with his wife, and he had picked J.B. up from her crib. Appellant recalled that when J.B. began crying, he became upset because he believed J.B. did not want to be with him, and he then put J.B. down on the floor, and "stomped on her like two times, three times." At the detective's request, Appellant demonstrated how he had stomped on J.B. Appellant recalled that he then picked up J.B., who was gasping for air, and saw her eyes cross and roll back in her head, and felt her body go limp. He further recalled that when he placed J.B. back in her crib, she could not sit up; after trying to assist her by blowing into her mouth two or three times, he called his wife for help.

Appellant explained that he was confessing in part because of his religious beliefs--as discussed during the earlier interview--but also because he did not want to die on death row, and that he hoped that he would be released from prison one day to be able to see his family again. Appellant was thereafter arrested and charged with capital murder.

The Motion to Suppress

Prior to his trial, Appellant moved to suppress he recorded statements he made to law enforcement officers on August 1, 2012, arguing that they were not freely and voluntarily made because the detectives had repeatedly threatened to arrest both him and his wife and have their children removed from them and placed in foster care if he did not confess. The trial court heard Appellant's motion to suppress over a two-day period, taking witness testimony and listening to the various recordings. The trial court denied Appellant's motion

and thereafter allowed the State to admit all of Appellant's recorded statements into evidence at his trial.

After Appellant appealed his conviction, at this Court's request, the trial court entered written findings of fact and conclusions of law with regard to its decision, expressly finding that Appellant voluntarily went to police headquarters to provide all three of his statements, and that he was properly read his *Miranda* rights on all three occasions, and that he freely and voluntarily waived those rights. The trial court further concluded that the detectives did not coerce and/or threaten Appellant into giving any of his statements. The trial court therefore concluded that Appellant's statements were freely and voluntarily made in compliance with Articles 38.21 and 38.22, as well with all constitutional requirements.

***5** At trial, the jury was instructed in general terms that a defendant's confession may only be considered if it was made freely and voluntarily without compulsion or persuasion; the trial court also specifically directed the jury to disregard Appellant's recorded statements if it had a reasonable doubt regarding whether they were made as the result of a "threat that his wife would be arrested and his children would be taken from their home." Following trial, the jury found Appellant guilty of J.B.'s murder, and Appellant was sentenced to 35-years' confinement in prison.

DISCUSSION

In two related issues, Appellant contends that the trial court erred when it denied his motion to suppress and that the trial court's error violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure. Because we agree with the trial court that Appellant's statements were not coerced and were instead given freely and voluntarily and without compulsion, we conclude that the trial court did not err in denying the motion to suppress.

Standard of Review

We review an appeal from a trial court's ruling on a motion to suppress for an abuse of discretion and apply a bifurcated standard of review. *State v. Luna*, 08-16-00273-CR, 2019 WL 1925004, at *4 (Tex.App.--El Paso Apr. 30, 2019, no pet.)(not designated for publication), *citing Weems v. State*, 493 S.W.3d 574, 577 (Tex.Crim.App. 2016). Under this bifurcated standard, we are required to afford almost total deference to the trial court's determination of historical facts, especially when those determinations are based on assessments of witness credibility and demeanor. *Id.*, *citing Furr v. State*, 499 S.W.3d 872, 877 (Tex.Crim.App. 2016)). When, as here, a trial court makes express findings of fact, we must first determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports those findings. *Id.*, *citing Valtierra v. State*, 310 S.W.3d 442, 447 (Tex.Crim.App. 2010). However, we conduct a *de novo* review with regard to pure questions of law, to mixed questions of law and fact that do not hinge on credibility or demeanor, and to the trial court's application of the law to the facts. *Id.*, *citing State v. Woodard*, 341 S.W.3d 404, 410 (Tex.Crim.App. 2011); *Brodnex v. State*, 485 S.W.3d 432, 436 (Tex.Crim.App. 2016).

The Police May Make Truthful Statements to an Accused

A confession may be rendered inadmissible under both the Due Process Clause and Article 38.22 of the Code of Criminal Procedure if it was not voluntarily made. *Luna 20*19 WL 1925004, at *8, *citing Oursbourn v. State*, 259 S.W.3d 159, 169-70 (Tex.Crim.App. 2008). Under the Due Process Clause, a statement may be rendered involuntary due to police overreaching or misconduct, but only if it rises to the level at which the defendant's will was "overborne and his capacity for self-determination critically impaired." *Id., citing* ; *see also Craeger v. State*, 952 S.W. 2d 852, 856 (Tex.Crim.App. 1997)(the ultimate test in determining the voluntariness of a confession is whether the defendant's will was overborne by police coercion). Statements that have been found to be involuntary under the Due Process Clause include factual scenarios in which a suspect was subjected to threats, physical abuse, or extended periods of interrogation without rest or nourishment. *Luna*, 2019 WL 1925004 at *8, *citing Oursbourn*, 259 S.W.3d at 170-71.

Texas law generally allows for a broader inquiry when considering involuntariness issues and allows a court to consider more subjective considerations that are not relevant to Due Process claims. *Luna*, 2019 WL 1925004 at *8, *citing Oursbourn*, 259 S.W.3d at 169-71. Under Article 38.21 of the Texas Code of Criminal Procedure, a statement may be used against a defendant only if it was "freely and voluntary made without compulsion or persuasion ...." TEX.CODE CRIM.PROC.ANN. § 38.21. In turn, section 6 of Article

38.22 provides that "where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions." TEX.CODE CRIM.PROC.ANN. § 38.22, § 6. If the trial court determines that a statement was made voluntarily, then the statement may be submitted to the jury, but the jury must be instructed that unless it believes beyond a reasonable doubt that the statement was "voluntarily made," it may not consider the statement for any purpose. TEX.CODE CRIM.PROC.ANN. § 38.22, § 6.

***6** In determining the voluntariness of a confession under the Code, Texas courts employ a totality of the circumstance test, and consider all of the circumstances surrounding its acquisition. *Luna*, 2019 WL 1925004, at *9, *citing Wyatt v. State*, 23 S.W.3d 18, 23 (Tex.Crim.App. 2000); *Delao v. State*, 235 S.W.3d 235, 239 (Tex.Crim.App. 2007). In general, the State has the burden of proving the voluntariness of a confession, and it must satisfactorily negate the accused's allegations of coercion in order to satisfy its burden of proof. *Vasquez v. State*, 411 S.W.3d 918, 920, n.11 (Tex.Crim.App. 2013); *Zuliani v. State*, 903 S.W.2d 812, 821 (Tex.Crim.App. 1995).

In the present case, Appellant argues that his confession was coerced and was not freely and voluntarily given because the detectives conducting his second interview made threats to arrest his wife if he did not confess to J.B.'s murder, and further threatened that his children would be taken away from him; he characterizes these alleged threats as being "inherently coercive," claiming that they caused his will to be overborne. Appellant is correct that, in some instances, a threat to arrest an accused's family member--whether express or implied--may result in a confession being rendered involuntary. *Luna*, 2019 WL 1925004, at *9, *citing Roberts v. State*, 545 S.W.2d 157, 161 (Tex.Crim.App. 1977)(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); *see also Contreras*, 312 S.W.3d at 577 (threats to arrest and prosecute defendant's wife raised a fact issue regarding whether his confession involuntary).

However, a confession is not rendered inadmissible in every instance in which the police have made statements regarding the potential liability of an accused and his family members. To the contrary, as we recently recognized in *Luna*, the police are entitled to make truthful statements to an accused that accurately reflect the potential consequences that an accused and his family member are facing, such as the potential that they could be arrested and prosecuted for a crime, and the resulting prospect that they could lose custody of their children in the process. *Luna*, 2019 WL 1925004 at *10, *citing United States v. Phillips*, 230 Fed. Appx. 520, 524-25 (6th Cir. 2007)(focusing a suspect's attention on the potential legal consequences of his actions is not self-evidently coercive; indeed, it is more likely to focus the mind on the importance of answering questions accurately, voluntarily or not at all); *United States v. Gallardo-Marquez*, 253 F.3d 1121, 1123 (8th Cir. 2001)(defendant's confession was voluntary where officers' statements to the effect that he would be going to jail for life and that he should therefore cooperate with the government to reduce his jail time were "accurate representations" of the defendant's situation); *United States v. Braxton*, 112 F.3d 777, 782 (4th Cir. 1997)(recognizing that a law "enforcement officer may properly tell the truth to the accused," and that "[t]ruthful statements about [the defendant's] predicament are not the type of 'coercion' that threatens to render a statement involuntary."); *Hernandez v. State*, 421 S.W.3d 712, 720 (Tex.App.--Amarillo 2014, pet. ref'd)(where interrogator made a statement regarding the potential length of a prison sentence faced by defendant, this was nothing more than "an accurate representation of [the defendant's] predicament that did not render the confession involuntary).

***7** Thus, in *Luna*, we concluded that because the police had probable cause to arrest the appellant's wife and other family members, all of whom were involved in a brawl that led to the victim's death, they did not engage in improper overreaching when they advised the appellant that his wife could be arrested, and that if so, they could potentially lose custody of their children. *Luna*, 2019 WL 1925004, at *10, *citing Contreras*, 312 S.W.3d at 576. Instead, we concluded that the threats were instead simply truthful representations of the situation that the appellant was facing. *Id.*, *citing Hernandez v. State*, 421 S.W.3d 712, 721 (Tex.App.--Amarillo 2014, pet. ref'd)(officer's statements emphasizing to appellant that she faced separation from her children were not threats of governmental action to punish a failure to cooperate but were accurate representations of her predicament); *United States v. Santos-Garcia*, 313 F.3d 1073, 1079 (8th Cir. 2002)(confession was not involuntary where the interrogating officers told the suspect that his story did not make sense and that his children would be driving by the time he was released

from prison, finding that the statement was simply an accurate representation of the defendant's predicament).

The Nature of the Detectives' Statements

In the present case, Appellant chronicles 17 statements that he believes constituted threats to arrest his wife if he did not confess to J.B.'s murder. However, a closer review of the challenged statements reveals that the majority of the statements were nothing more than descriptive, factual statements regarding the situation that Appellant and his wife were facing, i.e., that they were the only two responsible adults in a house where an 11-month old infant died as the result of multiple brunt force trauma, and that absent any other "reasonable explanation" for how the trauma was inflicted, either Appellant or his wife--or perhaps both--were responsible for the infant's death. [9] We do recognize, however, that in at least two instances, the police went a step further, and stated that unless Appellant could give a "reasonable explanation" for J.B.'s death, then both he and his wife could be arrested and face time in jail and/or prosecution. First, the detectives stated that if they had to take "this to court," one or both of them could be "locked up" while the courts decided what to do with them, and while they did not believe that his wife committed the murder, "[i]f she has to answer for it, then she's gonna [sic] have to answer for it, too." Second, the detectives expressed their belief that Appellant's wife, while not necessarily a primary suspect in the murder, could be "covering" for Appellant; they then stated that both of them could go to jail and their "kids [could] go to foster care ... and then hopefully the[y] don't end up with a family like yours and end up on a slab where I have to go see them get cut open--- and then blood leak out of their stomachs." [10]

While these statements can be considered "threats" to arrest Appellant's wife, we conclude that the statements were supported by probable cause and that the police did not engage in any overreaching or misconduct in making the statements. [11] As explained above, Appellant admitted to the detectives that he and his wife were the only two responsible adults in the house at the time of J.B.'s death, and the detectives had ruled out the possibility that any of the children present in the house could have inflicted the fatal blows to J.B. Therefore, the only two suspects in the case were Appellant and his wife, and the detectives truthfully advised Appellant that they were both subject to arrest, either as primary suspects or as accomplices after the fact. *See, e.g., Diaz v. State*, No. 13-14-00675-CR, 2017 WL 4987665, at *5 (Tex.App.--Corpus Christi Nov. 2, 2017, pet. ref'd)(not designated for publication)(where police had probable cause to believe that defendant's parents were responsible for hindering the defendant's apprehension, defendant's confession was not rendered involuntary where the police advised the defendant of the possibility that his parents could be arrested).

***8** In reaching this conclusion, we find it helpful to contrast Appellant's situation with the situation faced by the defendant in *Contreras v. State.* In *Contreras*, the defendant had been home alone with his sister-in-law's child and when the other family members returned, they found that the child was lifeless, and was later pronounced dead. *Contreras*, 312 S.W.3d. at 570. During his interrogation, the police told the defendant that if he did not confess, they could arrest his wife, as she took care of the child during the week; they further stated that if she was arrested, Child Protective Services would take away their children. *Id.* at 570. In determining whether these threats rendered the defendant's confession involuntary, the Court noted that various federal and state courts have held that "law enforcement officials can threaten to arrest a family member, without vitiating the voluntariness of a confession, if they can lawfully effectuate such an arrest (i.e., if there is probable cause to arrest)." *Id.* at 577. Although the Court in *Contreras* declined to decide whether to adopt such a rule in Texas, the Court found it significant that the officers in that case did not have probable cause to arrest the defendant's wife, as she was not with the child at the time she died, thereby raising a question regarding the voluntariness of the confession on that basis. [12] *Id.* at 577; *see also Tovar v. State*, 709 S.W.2d 25, 28 (Tex.App--Corpus Christi 1986, no pet.)(finding confession was inadmissible where police threatened to arrest accused's wife for possession of marijuana where there was no evidence that the police suspected her of exercising any care, custody or control over the marijuana at the time it was discovered).

Unlike the situation in *Contreras*, Appellant's wife was in the house with Appellant at the time J.B.'s injuries were inflicted, was legally responsible for J.B.'s care, and had access to J.B. throughout the day. As such, the detectives accurately and truthfully informed Appellant that they were both suspects in J.B.'s death, and that both could be arrested, and as a corollary to this, the detectives also accurately and truthfully informed Appellant that if both he and his wife were arrested, their children could be placed in foster care. [13] While Appellant may have been motivated to confess in part by the desire to extricate his innocent wife from the

prospect of being arrested for his crime, this does not in itself render his confession involuntary, and instead, at most created a jury question regarding whether his confession was voluntarily given. *See, e.g., Roberts*, 545 S.W.2d at 161 (a confession is not rendered involuntary by threats to arrest a prisoner's relative, where the "prisoner has created conditions which place an innocent relative under suspicion and the prisoner desires to extricate the relative from this position by making a confession and the confession is self-motivated."). We therefore conclude that the trial court did not abuse its discretion in finding that Appellant's confession was made voluntarily and in submitting the matter to the jury for resolution. As such, we hold that the trial court did not violate either Appellant's constitutional or statutory rights when it admitted the confession at Appellant's trial. [14]

Harmless Error Analysis

***9** And finally, we agree with the State that even if the trial court erred in admitting Appellant's recorded statements into evidence, the admission of the statements was not reversible error. *See, e.g., Zuliani v. State*, 903 S.W.2d 812, 823 (Tex.App.--Austin 1995, pet. ref'd), *citing Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)(recognizing that the admission of a coerced conviction is considered trial error and is subject to a harmless error analysis). As the State points out, at trial, the jury received evidence, without any objection from Appellant, of a separate confession that Appellant made on August 2, 2012--the day after his confession to Detective Hinojos---to an investigator from the Texas Department of Family and Protective Services, who had been assigned to conduct a non-criminal investigation into J.B.'s death. Specifically, the investigator testified at trial that Appellant confessed to him that he had picked J.B. out of her crib, laid her face up, and then stomped on her twice. As the jury received evidence of Appellant's August 2nd confession without objection from Appellant, we conclude that any error in admitting his August 1 st confession was thereby rendered harmless. *See generally Leday v. State*, 983 S.W.2d 713, 717-18 (Tex.Crim.App. 1998), *citing Crocker v. State*, 573 S.W.2d 190, 201 (Tex.Cr.App.1978)("It is well established that the improper admission of evidence does not constitute reversible error if the same facts are shown by other evidence which is not challenged."); *see generally Lane v. State*, 151 S.W.3d 188, 193 (Tex.Crim.App. 2004)("An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection.").

Appellant's issues one and two are overruled.

CONCLUSION

The trial court's judgment is affirmed.

All Citations

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Footnotes

1 According to Appellant, his wife later informed him that she had not opened the file cabinet.

2 Appellant does not raise any issues regarding whether he was properly advised of his *Miranda* rights and/or whether he voluntarily waived those rights prior to giving any of his recorded statements.

3 R.R. was also interviewed that day at the Advocacy Center for the Children of El Paso, and she was similarly unable to provide any explanation for J.B.'s death.

4 The couple also agreed to drop their two daughters off at the Child Advocacy Center on their way to police headquarters so that their daughters could be interviewed. It does not appear that the daughters were able to provide any additional information regarding the cause of J.B.'s injuries.

5 In addition, during his interviews with police, Appellant repeatedly stated that because of the nature of her respite stay status, R.R. was only permitted to engage with J.B. while supervised, and Appellant stated that he and his wife never left R.R. alone with J.B. The detectives therefore eliminated R.R. as a suspect on that basis as well.

6 In addition, the detectives advised Appellant that the older children who had been in the house that day of J.B.'s death had been interviewed, and that they all stated that Appellant's wife had been in a different part of the home that day.

7 At the hearing on Appellant's motion to suppress, Detective Hinojos denied threatening Appellant's wife with arrest.

8 Appellant's wife testified at trial that she believed Appellant was innocent and that he only confessed because he was afraid that she would be put in jail and their children would be taken away from them.

9 For example, during the second recorded interview, the detectives made the following statements: “[I]t's either you or your wife....” “And if you didn't do it, then I guess your wife made the mistake, okay?” “But the thing is that that child suffered injuries at your hand or the hands of your wife, or both ....” “But I can tell you right now, okay that that child suffered those injuries under your hand--or your wife's hand. Period. Period. Okay? It's not a mysterious injury, okay?”

10 Earlier in the interview, Detective Ruiz informed Appellant that he had observed J.B.'s autopsy and that it was “unbelievable” that he had to watch “an 11-month-old baby on [a] slab getting cut open.”

11 The test for determining whether probable cause exists is an objection one, and depends on whether the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense. *Luna*, 2019 WL 1925004, at *10, *citing Nelson v. State*, 848 S.W.2d 126, 133 (Tex.Crim.App. 1992); *Amador v. State*, 275 S.W.3d 872, 878 (Tex.Crim.App. 2009).

12 In *Contreras*, the appellant's only complaint on appeal was that the trial court failed to instruct the jury not to consider his confession if it found that it was involuntarily given in light of the threats that were made to arrest his wife. *Contreras*, 312 S.W.3d at 570. As set forth above, the jury herein was given such an instruction, but Appellant argues that his confession should have been suppressed altogether.

13 As well, given what occurred to J.B. in foster care, the detectives were not untruthful in raising the prospect that their own children could also be injured if placed in the wrong hands.

14 The State also argues that there was no causal connection between the alleged threats made by the detectives and the defendant's confession, given the lapse in time that occurred between the threats and Appellant's confession. The State is correct that in some instances, when a defendant when there is a significant break between the time the police threaten the defendant and the time the defendant confesses, this may break any causal connection between the threats and the confession, thereby rendering the confession admissible at trial, *See, e.g., Zuliani v. State*, 903 S.W.2d 812, 822 (Tex.App.--Austin 1995, pet. ref'd)(“An interruption in the stream of events between the initial coercion and the confession has been recognized as significant” in determining the voluntariness of a confession). Appellant counters that the causal connection was not broken, as the evidence demonstrated that he announced his decision to his wife that he intended to confess to police immediately after leaving police headquarters on their drive home. Given our conclusion that Appellant's confession was not the result of police overreaching or misconduct, and that it was instead freely and voluntarily made, we need to address the State's argument on this point.

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