PD-0956-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 5/1/2020 9:56 AM
Accepted 5/1/2020 10:16 AM
DEANA WILLIAMSON
CLERK

NO. PD-0956-19

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/1/2020
DEANA WILLIAMSON, CLERK

ANTONIO LOPEZ **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S BRIEF

ON DISCRETIONARY REVIEW FROM
THE 8TH COURT OF APPEALS
CAUSE NUMBER 08-17-00039-CR

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

JOHN L. DAVIS
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 256-2393
FAX (915) 533-5520
E-MAIL: jdavis@epcounty.com
SBN 05515700

ATTORNEYS FOR THE STATE

TABLE OF CONTENTS

INDEX OF AUTHORITIES. . . . . iii-v

STATEMENT OF THE CASE. vi

STATEMENT OF FACTS. 1-8

SUMMARY OF THE STATE'S ARGUMENT. 9-10

STATE'S REPLY TO APPELLANT'S QUESTIONS PRESENTED. . . . 11-33

WHERE DETECTIVES REPEATEDLY TOLD LOPEZ THAT HIS WIFE COULD BE ARRESTED FOR THE OFFENSE, BUT SUCH STATEMENTS WERE BACKED BY PROBABLE CAUSE FOR HER ARREST, SUCH STATEMENTS DID NOT COERCE LOPEZ' CONFESSION. NEVERTHELESS, THAT ISSUE SHOULD NOT BE REACHED BECAUSE, AS A PRELIMINARY MATTER, THERE WAS NO CAUSAL CONNECTION DEMONSTRATED BETWEEN THE COMPLAINED-OF STATEMENTS MADE BY DETECTIVES DURING LOPEZ' SECOND INTERVIEW AND HIS LATER THIRD INTERVIEW RESULTING IN HIS CONFESSION TO DETECTIVES WHERE NO SUCH STATEMENTS WERE MADE. ANY ERROR IN THE ADMISSION OF THE INCULPATORY CONFESSION TO DETECTIVES, A CONFESSION IN A 911 CALL, AND A CONFESSION TO A PATROL OFFICER RESPONDING TO THE 911 CALL WAS EITHER NOT PRESERVED OR RENDERED HARMLESS WHEN LOPEZ FAILED TO OBJECT TO A FINAL CONFESSION HE MADE TO A TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES INVESTIGATOR.

PRAYER. 34

SIGNATURES.. 34

CERTIFICATE OF COMPLIANCE.. 35

CERTIFICATE OF SERVICE. 35

INDEX OF AUTHORITIES

CASES

Allen v. McCotter, 804 F.2d 1362 (5th Cir. 1986). 18-19, 21, 24

Amador v. State, 221 S.W.3d 666 (Tex.Crim.App. 2007). 15

Armstead v. State, 978 So.2d 642 (Miss. 2008). 22, 24

Colorado v. Connelly, 479 U.S. 157 (1986). 25

Commonwealth v. Raymond, 676 N.E.2d 824 (Mass. 1997). 18-19, 21, 24

Contreras v. State, 312 S.W.3d 566 (Tex.Crim.App. 2010).. . . . . 16, 19

Davidson v. State, 386 S.W.2d 144 (Tex.Crim.App. 1965). 31-32

Davis v. State, 313 S.W.3d 317 (Tex.Crim.App. 2010). 25-26

Diaz v. State, 2017 WL 4987665
(Tex.App. – Corpus Christi November 2, 2017, pet. ref'd).. 16

Estrada v. State, 154 S.W.3d 604 (Tex.Crim.App. 2005). 15

Gibbs v. State, 555 S.W.3d 718 (Tex.App. – Houston [1st Dist.] 2018, no pet.). . 28

Hunt v. State, 237 S.W.3d 434 (Tex. App. – Waco 2007, pet. ref'd). 17

Ifechukwu v. State, 2011 WL 3449495
(Tex.App. – Houston [14th Dist.] January 11, 2012, pet. ref'd).. 28-29

Johnson v. State, 68 S.W.3d 644 (Tex.Crim.App. 2002). 15

Lane v. State, 151 S.W.3d 188 (Tex.Crim.App. 2004). 33

Leday v. State, 983 S.W.2d 713 (Tex.Crim.App. 1998). 31-32

Lopez v. State, 2019 WL 3812377
(Tex.App. – El Paso August 14, 2019, pet. granted). . . iv, 17, 19, 21-22, 24, 30-31

Marx v. State, 953 S.W.2d 321 (Tex.App. – Austin 1997).. 15-16

McGruder v. State, 483 S.W.3d 880 (Tex.Crim.App. 2016). 31-32

Miranda v. Arizona, 384 U.S. 436 (1966). 2

Oursbourn v. State, 259 S.W.3d 159 (Tex.Crim.App. 2008). 25-26

Pham v. State, 175 S.W.3d 767 (Tex.Crim.App. 2005). 25

Penaflor v. State, 2006 WL 3360550
(Tex.App. – Houston [14th Dist.] November 21, 2006, pet. ref'd). 30

Redd v. State, 2009 WL 4810190
(Tex.App. – Houston [14th Dist.] December 15, 2009, pet. ref'd). 29-30

Roberts v. State, 545 S.W.2d 157 (Tex.Crim.App. 1977). 19-21, 24

Schmitt v. State, 2003 WL 22411210
(Tex.App. – Tyler October 22, 2003, no pet.). 16

State v. Perez, 920 N.E.2d 122, 131-32 (Ohio 2009). 21-22, 24

Thompson v. Haley, 255 F.3d 1292 (11th Cir. 2001).. . . . . 21, 24

United States v. Hufstetler, 782 F.3d 19 (1st Cir.).. 22-24

United States v. Johnson, 351 F.3d 254 (6th Cir. 2003). 21, 24

Villarreal v. State, 2010 WL 2333525
(Tex.App. – Corpus Christi June 10, 2010, pet. ref'd). 29

Zamorano v. State, 84 S.W.3d 643 (Tex.Crim.App. 2002). 17

STATUTES AND RULES

TEX. CODE CRIM. PROC. art. 38.22(2)(a-b), (3).. 2

TEX.R.APP.P. 9.10(a)(3), (b), (d).. 1

TEX.R.APP.P. 33.1(a)(1)(A).. 32

TEX.R.EVID. 103(a)(1)(A-B). 32

TEX.R.EVID. 103(b). 32

STATEMENT OF THE CASE

Appellant, Antonio Lopez (hereinafter Lopez), was convicted by a jury on February 7, 2017, of the offense of murder. (CR2: 1017, 1032; RR12: 1, 112).[1] On February 8, 2017, after an agreement on punishment was reached, the trial court assessed punishment in accordance with the agreement at 35 years' confinement in the Texas Department of Criminal Justice – Institutional Division. (CR2: 1032, 84-85; RR13: 1, 8-10). Notice of appeal was timely filed on February 20, 2017. (CR2: 1035). The trial court certified the right to appeal. (SuppCR2: 10).

On August 14, 2019, the 8th Court of Appeals affirmed Lopez' conviction and sentence in an unpublished opinion. *See Lopez v. State*, No. 08-17-00039-CR, 2019 WL 3812377 (Tex.App. – El Paso August 14, 2019, pet. granted)(not designated for publication). This Court granted Lopez' petition for discretionary review on January 29, 2020.

---

[1] Throughout this brief, references to the record will be made as follows: clerk's record, "CR" and volume and page number; supplemental clerk's record, "SuppCR" and volume and page number; reporter's record, "RR" and volume and page number; supplemental reporter's record, "SuppRR" and volume and page number; exhibits, "RR" and volume number followed by "SX" or "DX" and exhibit number. For further clarification, "SuppCR1" refers to the supplemental clerk's record filed on April 19, 2017. "SuppCR2" refers to the supplemental clerk's record filed on April 26, 2017. "SuppCR3" refers to the supplemental clerk's record filed on January 30, 2018.

STATEMENT OF FACTS

On July 28, 2012, at 4:02 PM, 11-month-old, Jxxxx Bxxxxxx (hereinafter JB or Jxxxx),[2] the foster child of Lopez and his wife, Perla,[3] was pronounced dead. (SuppRR2: 41, 44; RR3: 36-39, 71, 97, 132; RR5: 176). From the autopsy performed three days later on July 31, 2012, it was determined that JB's cause of death was a homicide due to blunt-force injuries to the chest and abdomen. (RR6: 130; RR14: SX47). There was also a fracture of the left occipital bone and tears to her liver, with the injuries to her liver sufficient to cause her death. (RR6: 130; RR14: SX47). There were multiple blunt-force injuries to the head, chest, and abdomen. (RR6: 130). The medical examiner concluded that JB's injuries had been intentionally inflicted, using a significant amount of force. (RR6: 133-34). The injuries were consistent with someone striking JB with a foot, stomping on her two or three times, up to as many as six or seven times, using significant force. (RR6: 134, 136, 150). Other medical testimony at trial cast doubt on a two-year-old or even a twelve-year-old causing JB's injuries, but that a man of Lopez' size

---

[2] In order to comply with rule of appellate procedure 9.10, the sensitive data concerning the child has been redacted in a manner indicating that the data has been redacted. *See* TEX.R.APP.P. 9.10(a)(3), (b), (d).

[3] Lopez' wife's full name was Alice Pearl Lopez, but she frequently went by Perla. *See* (SuppRR3: 145, court reporter showing her as "Alice Perla Lopez,"; RR7: 25, where Perla stated she went by either Pearl or Perla).

could have caused JB's injuries. (RR11: 101-04). Important to the issues here, based on information from the medical examiner, the injuries inflicted on JB would have had to occur from one to two hours before the 911 call made by Lopez at about 3:10 PM, less than an hour before JB's death. (RR3: 36-39, 58-60, 71; RR5: 13-14; RR6: 8-9). Lopez told EMS and detectives that he had been the only one who had cared for JB on the day of her death, and he had been around JB since at least about 12:30 PM that day. (RR3: 60-61, 132-33, 141-42; RR4: 20-23, 27; SuppRR2: 62, 107-08).

On the date of JB's death, July 28, 2012, at about 8 PM, Detective Arturo Ruiz of the El Paso Police Department asked Lopez and Perla to come to police headquarters to give a statement about what happened. (SuppRR12-13; SuppRR3: 158-59, 162). As Perla put it, it was an informational interview without any threats. (SuppRR3: 162). Still, even though Lopez was not in custody, he was given a full set of warnings compliant with article 38.22[4] and *Miranda*,[5] and he knowingly, voluntarily, and intelligently waived those rights and agreed to make a recorded statement for Detective Ruiz. (SuppRR2: 13-16). Lopez was never restrained, such as with handcuffs, while giving his statement, and he was free to

---

[4] TEX. CODE CRIM. PROC. art. 38.22(2)(a-b), (3).

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

leave. (SuppRR2: 17). After he gave his statement, Lopez was released; he was not under arrest. (SuppRR2: 16). Detective Ruiz took Lopez and his wife to their vehicle at the hospital and dropped them off. (RR3: 212). Lopez' first statement was introduced at the suppression hearing as MS-1 and at trial as SX22. (SuppRR2: 18; RR3: 153).

On July 31st, armed with the results of the autopsy and having talked to the medical examiner, (SuppRR2: 19; RR3: 213; RR5: 13-14; RR6: 8-9), Detective Ruiz and Detective Jerome Hinojos re-interviewed both Lopez and Perla, who drove their own vehicle to police headquarters for the second interview. (SuppRR2: 20-21). Again, Lopez and Perla voluntarily came to police headquarters and were not threatened or coerced to do so. (SuppRR2: 22). Lopez was interviewed first by himself, with neither he nor his wife under arrest, in handcuffs, or in custody, nor were they ever told that they could not leave. (SuppRR2: 22, 25). Once again, Lopez was given his full warnings under article 38.22 and *Miranda*, and he voluntarily, knowingly, and intelligently waived those rights. (SuppRR2: 22-24).

By the time of the second interview, the detectives had determined that, under the time frame of the offense (one or two hours before Lopez' 911 call) and

from the medical examiner, an adult, not any foster child,[6] had committed the offense, and Lopez and his wife were the suspects, as they were the two adults at home with JB at the time of the offense. (SuppRR2: 82; SuppR3: 140-42, 149; RR4: 154-55, 181-82; RR5: 13-14). Because that was the situation, the detectives told Lopez, no fewer than 17 times, that if he was denying committing the offense, then it must have been his wife who committed the crime. (SuppRR3: 35, 38-41). At least as frequently, the detectives told Lopez during his second interview that the crime was either committed by Lopez, his wife, or both of them. (SuppRR2: 116-17, 120, 125, 128-30, 137, 139-40, 146, 151, 155, 160, 168, 172). Nevertheless, Lopez did not make any inculpatory admissions during his second interview, and, at the end, he and his wife again left, not under arrest. (SuppRR2: 25-26; RR4: 107-08). Lopez' second interview started at about 7:30-8:00 PM on July 31st, and ended at 10:08 PM on July 31st. (SuppRR2: 25-26; SuppRR3: 49, 187). Lopez' second interview was introduced as MS-2 at the suppression hearing and SX23 at trial. (SuppRR2: 28-29; RR3: 220-21).[7]

On their drive home after leaving the second interview, Lopez and Perla

---

[6] JB was never left alone with the Lopezes' female teenage foster child. (SuppRR2: 82).

[7] Lopez' second interview was played verbatim and taken down in the record by the court reporter at the suppression hearing and at trial. (SuppRR2: 93-188; RR4: 6-101).

stopped at a hotel parking lot, and she told Lopez that the detectives had accused her of the crime and that they would put her in jail unless she told what she knew. (RR7: 167). And she stated that the detectives told her that either she, or Lopez, or both committed the crime. (SuppRR:3: 145-46, 163-64). Unless she confessed that Lopez committed the crime, both would go to jail. (SuppRR3: 165). Perla also recounted a threat made to take her children away. (RR7: 116-19, 127). According to Perla, after she told Lopez what the detectives had told her, Lopez right then decided to turn himself in. (RR7: 119-21, 164, 167).

After going home, about three hours later, at 1:31 AM on August 1st, Lopez called 911 and confessed the crime to the 911 operator:

SECOND 911 CALL BY ANTONIO LOPEZ

> MR. LOPEZ: [M]y name is Antonio Lopez and I'm at 1701 V*** S**** C*****. There was a homicide here on Saturday, the 28th of (inaudible) ....
>
> * * *
>
> MR. LOPEZ: And I'm just calling because I want a police officer to [come] by and pick me up, please, and I'm confessing that it was me.

(SuppRR3: 51; R5: 92; RR14: SX24).

In response to this 911 call, an El Paso patrol officer contacted Lopez at his home at 1:49 AM on August 1st, and Lopez told the officer, without any prompting

or questioning, that there was a homicide on July 28th, and then stated: "I called because it was me." (SuppRR3: 58-60, 62-64). Another patrol officer transported Lopez to police headquarters, not under arrest and not handcuffed, and Lopez was turned over to Detective Hinojos. (SuppRR3: 63, 66-67, 73-74, 80, 85, 90, 93).

Shortly after 2 AM on August 1st, Detective Hinojos made contact with Lopez, and Lopez was not handcuffed or under arrest. (SuppRR3: 100). Lopez consented to another recorded statement, was not threatened in any way, was not promised anything, was not deprived of food, drink, or use of a restroom, and was again read his rights, and he voluntarily, knowingly, and intelligently waived his rights and made his third recorded statement. (SuppRR3: 103-04, 108-10). Lopez never invoked his right to counsel or his right to remain silent. (SuppRR3: 104-05).

At the commencement of the third statement, Detective Hinojos asked the following:

> Q. (by Detective Hinojos) [I] just want to make sur (sic) that right now you're here of your own free will.
>
> A. Yeah.
>
> Q. Nobody has forced you to come here?
>
> A. No.

* * *

> Q. Did anybody -- did anybody tell you to come here and what you're gonna tell me, did anybody tell you what to say?
>
> A. No.

(SuppRR3: 110-11). Lopez confessed to Detective Hinojos in his third statement that he put JB on the floor and "stomped on her like two times; two, three times...." (SuppRR3: 113). Lopez' third statement started at 3:17 AM on August 1st and ended at 3:43 AM. (RR5: 145-164). After his third statement was concluded, a warrant for capital murder was obtained, and Lopez was placed under arrest. (RR5: 165). The third statement was introduced at trial as SX33 and played verbatim into the record. (RR5: 143, 145-164).

Carlos Andrade, a special investigator for the Texas Department of Family and Protective Services, investigated criminal cases for the department. (RR6: 53). He investigated the child death involving JB. (RR6: 54-55). He had no arrest authority and was not a peace officer. (RR6: 61). Investigator Andrade got involved in this case because there were other children in the Lopez home. (RR6: 62).

Investigator Andrade spoke with Lopez after he received word about the autopsy results for JB, and after Lopez gave his third statement to detectives in

which he told the detectives that he had stomped on JB. (RR6: 63). When Investigator Andrade met with Lopez later on August 1, 2012, he asked him what had happened to JB. (RR6: 63-64). Without objection, Investigator Andrade testified that Lopez told him that he picked JB up out of her crib, laid her down, face up, and then stomped on her twice. (RR6: 64-65).

SUMMARY OF THE STATE'S ARGUMENT

Because a fair, close reading of the record reveals that detectives, during their second interview with Lopez, told him that either he, his wife, or both committed the offense, not that he had to confess to avoid his wife being arrested and charged, and there was probable cause to arrest Lopez' wife, his inculpatory statements made in a subsequent third interview with detectives was voluntarily made.

Nevertheless, the issue should not be reached, as Lopez failed to demonstrate a causal connection between the statements made to him by detectives in his second interview and the inculpatory statement he made to detectives during his subsequent third interview. The record shows that Lopez was not under arrest after his second interview, went home, and three hours later called 911 and confessed to a 911 operator and to a patrol officer responding to Lopez' 911 call. This was followed by the detective conducting the third interview, making sure that Lopez was agreeing to a third interview of his own free will. No coercive statements by the detectives were made during Lopez' third interview, unlike the statements complained of as such made by detectives during the second interview. Absent any causal connection between the alleged threats in Lopez' second interview and his inculpatory statement to detectives in his third interview, Lopez'

issues (questions) here should not be reached and the court of appeals affirmed.

Finally, because after Lopez confessed in his third interview with detectives, Lopez again confessed the offense to an investigator from the Texas Department of Family and Protective Services, who was not a peace officer and who had no arrest authority, and that investigator's testimony was not attacked or brought up in Lopez' hearing on his motion to suppress and was not objected to in any manner outside the jury or in their presence, any error in admission of Lopez' confession in his second 911 call, his confession to the responding patrol officer, or this third statement to detectives, was not preserved or was harmless.

STATE'S REPLY TO APPELLANT'S ISSUES (QUESTIONS) PRESENTED

WHERE DETECTIVES REPEATEDLY TOLD LOPEZ THAT HIS WIFE COULD BE ARRESTED FOR THE OFFENSE, BUT SUCH STATEMENTS WERE BACKED BY PROBABLE CAUSE FOR HER ARREST, SUCH STATEMENTS DID NOT COERCE LOPEZ' CONFESSION. NEVERTHELESS, THAT ISSUE SHOULD NOT BE REACHED BECAUSE, AS A PRELIMINARY MATTER, THERE WAS NO CAUSAL CONNECTION DEMONSTRATED BETWEEN THE COMPLAINED-OF STATEMENTS MADE BY DETECTIVES DURING LOPEZ' SECOND INTERVIEW AND HIS LATER THIRD INTERVIEW RESULTING IN HIS CONFESSION TO DETECTIVES WHERE NO SUCH STATEMENTS WERE MADE. ANY ERROR IN THE ADMISSION OF THE INCULPATORY CONFESSION TO DETECTIVES, A CONFESSION IN A 911 CALL, AND A CONFESSION TO A PATROL OFFICER RESPONDING TO THE 911 CALL WAS EITHER NOT PRESERVED OR RENDERED HARMLESS WHEN LOPEZ FAILED TO OBJECT TO A FINAL CONFESSION HE MADE TO A TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES INVESTIGATOR.

ARGUMENT AND AUTHORITIES

Outside of the question of harmless error, Lopez' issues (presented by him as questions) can be summarized as a contention that unfounded threats by detectives (Ruiz and Hinojos) to arrest and prosecute his wife unless he confessed to the crime had such an overbearing effect on his will that his confession (third statement) was involuntary, and the trial court erred by not suppressing it and admitting it into evidence. *See* (appellant's PDR at 14-15, 18; appellant's brief at 4, 10-11). This contention is factually and legally incorrect.

There are two factual contentions made by Lopez that are incorrect. First,

Lopez is adamant that the threat made by the detectives was that, unless he confessed, his wife would be arrested and prosecuted for the murder of JB. *See* (appellant's brief at 4, 10, 11; appellant's PDR at 5-6). A close reading of the record, however, shows that the complained-of statements made by the detectives to Lopez during his second interview were that the crime was committed by either Lopez, his wife, or both of them, not that his wife would be arrested and charged unless he confessed. (SuppRR2: 116-17, 120, 125, 128-30, 137, 139-40, 146, 151, 155, 160, 168, 172). The closest the record comes to what Lopez claims occurred is as follows, starting with the cross-examination of Detective Ruiz at the hearing on the motion to suppress:

> Q. (By defense counsel) [N]o fewer than 17 times telling him, when he denied doing this, that it must be, therefore the case, that his wife did it?
>
> A. That is correct.
>
> Q. Okay. What did you mean to have him think by that?
>
> A. I just wanted him to rethink what he was telling us.
>
> Q. All right. Did you mean to have them think that if he did not confess and tell you what you knew to be the truth, that his wife would also be held response (sic) for this?
>
> A. I believe he was told that at one point.
>
> Q. He was told that his wife would be held responsible for it if he

didn't confess?

A. **I don't believe we told him if he didn't confess**.

(SuppRR3: 35-36)(emphasis added). Then, during trial, Detective Hinojos testified as follows:

> Q. (by defense counsel) And every time he denied doing it, or nearly every time he denied doing it, somebody, either you or Detective Ruiz would responded (sic) by saying that it must have been your wife; is that correct?
>
> A. Yes.
>
> Q. And at some point, you even suggested, or Detective Ruiz suggested, that if he continued to persist in denying he was guilty and not confessed to what he had done, that they both go to jail, their kids would be taken away from them, and maybe their kids would wind up on a slab, just the way [JB] did, correct?
>
> A. Correct.
>
> Q. Did you mean him to understand, that if he persisted in denying his culpability, that his wife would be arrested, and charged with this, and maybe him too?
>
> A. I meant that in the process of the investigation, that is a possibility.
>
> * * *
>
> Q. And during those intervals, did you make it clear to [Perla] the same thing you made clear to [Lopez]?
>
> A. Which is?
>
> Q. Which is that if somebody didn't confess to this that they – either

one, or both of them, would have to go to jail?

A. Yes.

(RR6: 20-22). When viewed in its totality, what the two detectives repeatedly kept saying to both Lopez and his wife was that it had to be one or the other or both who committed the crime, not that someone had to confess for the other not to be charged. And the detectives based their statements on the fact that they had narrowed the time frame of the injuries inflicted on JB to a time when Lopez and Perla were the only adults in the home and that the medical examiner (and even Lopez himself) had discounted any foster child's commission of the offense. (SuppRR2: 82; SuppRR3: 140-42, 149, RR4: 154-55, 181-82; RR5: 13-14, 16; RR11: 101-04). The only other adult in the Lopez home on the day of the offense was Alice Holguin, Perla's mother, but she had left with most of the foster children by 1 PM, before the offense was committed, to include her leaving with a foster child of hers who had been accused of violent acts. (RR8: 23-24, 31-32, 35, 37, 40-42; RR7: 73, 142-43; SuppRR2: 83, 171; RR10: 57-58, 100-14, 159-67).

At the very least, the record supports the trial court's findings that the threat complained of by Lopez, that he had to confess for his wife not to be charged, was never made. *See* (trial court's findings at SuppCR3:12-17, specifically findings 22, 26, 27, 44, and 45). Detective Ruiz's testimony that the detectives did not tie

Lopez confessing to not charging his wife was sufficient alone to support the trial court's findings. (SuppRR3: 35-36). Almost total deference should be given to a trial court's rulings on questions of historical fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Amador v. State*, 221 S.W.3d 666, 673 (Tex.Crim.App. 2007); *Estrada v. State*, 154 S.W.3d 604, 607 (Tex.Crim.App. 2005); *Johnson v. State*, 68 S.W.3d 644, 652-53 (Tex.Crim.App. 2002). Thus, the trial court's findings here should be given deference, as they turned expressly on evaluation of credibility and demeanor.

The second factual deficiency in Lopez' argument is his contention that there was no probable cause for the detectives to get a warrant to arrest Lopez' wife. As noted, the detectives had narrowed the time frame of the injuries inflicted on JB to a time when Lopez and Perla were the only adults in the home, and the medical examiner (and even Lopez himself) had discounted any foster child from having committed the offense. (SuppRR2: 82; SuppRR3: 140-42, 149, RR4: 154-55, 181-82; RR5: 13-14, 16; RR11: 101-04). For probable cause for a warrant, the detectives did not have to narrow the field of candidates down to one person; two was sufficient for arrest-warrant purposes, as it had to be one of the two, Lopez or his wife, who committed the offense. *See Marx v.* State, 953 S.W.2d 321, 335-36 (Tex.App. – Austin 1997), *aff'd on other grounds*, 987

S.W.2d 577 (Tex.Crim.App. 1999)(where defendant had access to the victim at the time of the offense, probable cause existed to issue an arrest warrant for the defendant); *Schmitt v. State*, No. 12-01-00306-CR, 2003 WL 22411210, at *2 (Tex.App. – Tyler October 22, 2003, no pet.)(not designated for publication)(where documentation demonstrated that defendant had access to child on the dates of the offenses alleged in the indictment, such provided the magistrate with enough information to determine that probable cause existed to arrest the defendant); *Diaz v. State*, No. 13-14-00675-CR, 2017 WL 4987665, at *5 (Tex.App. – Corpus Christi November 2, 2017, pet. ref'd)(not designated for publication) (holding that telling defendant of possible arrest of his parents, where officers did have sufficient probable cause to arrest the defendant's parents for their role in hindering the apprehension of the defendant, did not render the defendant's confession involuntary); *compare Contreras v. State*, 312 S.W.3d 566, 577 (Tex.Crim.App. 2010)(where defendant's wife was not present when child-victim's injuries were sustained, there was no probable cause to arrest defendant's wife). Here, because Perla was present in the home when JB's injuries were inflicted, and the injuries had to be caused by either Lopez or Perla, the two adults in the house when the injuries were caused, there was probable cause for a warrant for her arrest, such that Lopez' contention that there was no probable cause is

without merit.

Thus, the statement by the court of appeals was correct in this regard:

> 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.

Lopez, 2019 WL 3812377, at *8. The court of appeals did not conclude that the detectives threatened Lopez that unless he confessed, they would charge his wife, as that is not a fair reading of the record.

Additionally, the trial court here did not make any finding regarding the presence of Perla in the Lopez home the day of the offense. But, regarding questions of fact upon which the trial court did not make findings, the reviewing court should presume that trial court resolved any disputed fact issues against the losing party and the reviewing court should defer to any implied findings supported by the record. *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex.Crim.App. 2002); *Hunt v. State*, 237 S.W.3d 434, 437 (Tex. App. – Waco 2007, pet. ref'd). This Court should thus hold that, based on an implied finding by the trial court, Perla did have access to JB at the time of the offense, such that there was probable

cause for a warrant for her arrest.

Without waiving the foregoing, should this Court determine that the detectives did threaten to arrest Perla unless Lopez confessed, assuming there was probable cause for Perla's arrest, the issue then is whether such vitiated the voluntariness of Lopez' confession in his third statement. There are three lines of reasoning holding that a police threat to arrest a relative does not render a defendant's subsequent confession involuntary.

First, there is *Allen v. McCotter*, 804 F.2d 1362 (5th Cir. 1986). Where there was probable cause to arrest the defendant's wife, and a detective told the defendant during interrogation that if he confessed, charges would not be brought against his wife, the resulting confession of the defendant was not involuntary "by reason of his desire to extricate his wife from a possible good faith arrest." *Allen*, 804 F.2d at 1364; *see also Commonwealth v. Raymond*, 676 N.E.2d 824, 833-34 (Mass. 1997)(holding that defendant's confession made as a motive to protect his mother from being charged as an accessory after the fact to murder, presumably backed by probable cause, did not "[constitute] the sort of coercion that would override the will of the defendant and render his confession involuntary"). Thus, a desire or motive to save a relative who could be arrested does not constitute coercion that would overbear a defendant's will, such that the threat to arrest that

relative does not render a resulting confession by the defendant involuntary. *Allen*, 804 F.2d at 1364; *Raymond*, 676 N.E.2d at 833-34.

This line of reasoning was followed here, in part, by the court of appeals. *See Lopez*, 2019 WL 38112377 at *8 ("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."). And, although this Court stated in *Contreras* that it has not adopted the rule 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)," *see Contreras*, 312 S.W.3d at 577, the Court appears to have already done so in *Roberts v. State*, 545 S.W.2d 157 (Tex.Crim.App. 1977).

In *Roberts*, the defendant was convicted of possession of heroin, and having prior experience with law enforcement, his sentence was enhanced with one prior felony conviction, and he was sentenced to life imprisonment. *Roberts*, 545 S.W.2d at 158. Both the defendant and his wife were arrested for possession of heroin when a car they were in, the defendant as the driver and his wife as the front-seat passenger, was found to contain three packets of heroin alongside the

console. *Id*. at 160. The defendant protested that his wife did not know anything about the heroin, and a police sergeant asked him, if that was the case, would he put that in writing, and the defendant did. *Id*. Afterwards, the wife's case was dismissed. *Id*.

This Court held: "When a 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, it may [be] deem[ed] voluntary and admissible in evidence." *Roberts*, 545 S.W.2d at 161. Due to the fact that the defendant had placed his innocent wife under suspicion, was a mature man who had prior felony convictions, and thus extensive experience with law enforcement, made his confession within an hour after being arrested, and first brought up the question of his wife's innocence and the issue of leniency for her, the voluntariness of the defendant's confession was upheld. *Roberts*, 545 S.W.2d at 161. This Court stated: "The trial court could well conclude that the statement was self-motivated and voluntarily made by the appellant because he wanted his innocent wife who was under suspicion freed and that the appellant's confession was not induced by promises direct or implied made by Creed. The trial court did not err in admitting the appellant's confession in evidence." *Roberts*, 545 S.W.2d at 161. Though this Court recounted some

unique facts in *Roberts*, the case can still stand for the proposition that a desire or motive to save a relative who could be arrested does not constitute coercion that would overbear a defendant's will, such that the threat to arrest that relative does not render a resulting confession by the defendant involuntary. *See Roberts*, 545 S.W.2d at 161; *Allen*, 804 F.2d at 1364; *Raymond*, 676 N.E.2d at 833-34; *see also Lopez*, 2019 WL 38112377 at *8 (citing *Roberts*).

In a second line of reasoning, many cases simply hold that such a threat, if validated by the existence of probable cause to arrest the relative, does not rise to a level of coercion that would render a confession involuntary. *See United States v. Johnson*, 351 F.3d 254, 257, 263 (6th Cir. 2003)(police threat, backed by probable cause, to arrest defendant's sister unless defendant turned himself in and took responsibility for the crime (which he did in response to the threat), was a threat that could have been lawfully executed, such that the threat did not constitute coercion); *Thompson v. Haley*, 255 F.3d 1292, 1296-97 (11th Cir. 2001)(holding that a confession is not the result of coercion where police threaten to prosecute a third party, providing there is probable cause to believe that the third party had committed a crime at the time that the threat was made); *State v. Perez*, 920 N.E.2d 122, 131-32 (Ohio 2009)(because police had probable cause to arrest defendant's wife for a related obstruction offense, threatening to do so was not a

coercive tactic, such that the defendant's resulting confession was not involuntary); *Armstead v. State*, 978 So.2d 642, 648 (Miss. 2008)(holding that threat to arrest defendant's wife for possession of drugs found in the kitchen, a common area of the defendant's home, was backed by probable cause, as the wife also lived in the home, such that the defendant's resulting confession was not involuntary). This line of reasoning was also followed here by the court of appeals. *See Lopez*, 2019 WL 38112377 at *6-*7 (holding that, "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...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").

A third line of reasoning (cited with approval in Lopez' PDR, *see* PDR at 12-14), is found in *United States v. Hufstetler*, 782 F.3d 19 (1st Cir.), *cert. denied*, 136 S.Ct. 191 (2015). The *Hufstetler* court adopted two lines of reasoning, starting first with the line that if there is probable cause to arrest the third party, then making such a threat to a defendant does not render a subsequent confession involuntary: "In such a circumstance where the referenced relative is both a family

member and a co-suspect, probable cause for holding that individual helps to place the officers' statements in context. Without more, an officer's truthful description of the family member's predicament is permissible since it merely constitutes an attempt to both accurately depict the situation to the suspect and to elicit more information about the family member's culpability." *Hufstetler*, 782 F.3d at 24. But the *Hufstetler* court equally noted that the record showed that the defendant acted with free will, with control over his own choices, such that his will had not been overtaken by any coercive techniques, and thus his confession was voluntary. *Hufstetler*, 782 F.3d at 25-26. Under this line of reasoning, if there is evidence of the defendant acting of his own free will, independent of any coercive police tactics, a confession should be held to be voluntarily made. *See Hufstetler*, 782 F.3d at 25-26.

While Lopez contends that his decision to finally admit guilt in his third statement was not an act of free will like the defendant in *Hufstetler*, *see* (appellant's PDR at 13-14), there is evidence in the record showing that his decision to confess was an act of his free will independent of any police tactics here.

That evidence is shown by Detective Hinojos stopping for a few minutes before the third statement was taken and engaging Lopez over whether his

decision to finally confess was an act of free will on his part:

> Q. (by Detective Hinojos) **[I] just want to make sur (sic) that right now you're here of your own free will.**
>
> **A. Yeah.**
>
> Q. Nobody has forced you to come here?
>
> A. No.
>
> * * *
>
> Q. Did anybody -- did anybody tell you to come here and what you're gonna tell me, did anybody tell you what to say?
>
> A. No.

(SuppRR3: 110-11)(emphasis added).

Under this record, the evidence meets the requirements of any and all of the three tests or lines of reasoning outlined above: (1) the desire-to-protect-an-innocent-relative line, *see Roberts*, 545 S.W.2d at 161; *Allen*, 804 F.2d at 1364; *Raymond*, 676 N.E.2d at 833-34; *see also Lopez*, 2019 WL 38112377 at *8; (2) the threats-backed-by-probable-cause-are-not-coercive line, *see Johnson*, 351 F.3d at 257, 263; *Haley*, 255 F.3d at1296-97; *Perez*, 920 N.E.2d at131-32; *Armstead*, 978 So.2d at 648; *Lopez*, 2019 WL 38112377 at *6-*7; and (3) the free-will-regardless-of-police-coercive-tactics line, *see Hufstetler*, 782 F.3d at 25-26. For all of these reasons, Lopez failed to show that his confession was coerced or

involuntary, and the 8th Court's decision should be upheld.

None of these tests/lines need be resorted to by this Court, however, as Lopez, in his PDR and his brief on the merits, assumes in making all of his arguments that there was a causal connection between the complained-of statements by the detectives and his only inculpatory statement to them, being his third statement. But the burden is on the moving party, Lopez here, by way of his motion to suppress, to produce evidence demonstrating a causal connection between the complained-of statements, made by the detectives as alleged by him during his second interview, and the making of his third, and only, inculpatory statement to the detectives during a third interview, where no such complained-of statements were made. *See Pham v. State*, 175 S.W.3d 767, 774 (Tex.Crim.App. 2005). Stated another way, this Court still need not decide whether to adopt the rule that law-enforcement officials can threaten to arrest a family member, without vitiating the voluntariness of a confession.

Absent coercive police conduct causally related to the confession, there is simply no basis for concluding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 164, 167 (1986); *Davis v. State*, 313 S.W.3d 317, 337 (Tex.Crim.App. 2010); *Oursbourn v. State*, 259 S.W.3d 159, 170 (Tex.Crim.App.

2008). Coercive government misconduct renders a confession involuntary if the defendant's "will has been overborne and his capacity for self-determination critically impaired." *Davis*, 313 S.W.3d at 337. Whether this has occurred is determined by assessing the "totality of all the surrounding circumstances," including "the characteristics of the accused and the details of the interrogation." *Id.*

Here, there are three significant events in the record that demonstrate that there was no causal connection between the detectives' complained-of statements to Lopez and his wife in their second interviews, and Lopez' confession in his third interview. First, after going home, not under arrest, after the alleged threats by detectives made during the second interview, and after three hours at home, Lopez himself decided to call 911, and he immediately confessed to the 911 operator: "There was a homicide here on Saturday...[a]nd I'm just calling because I want a police officer to [come] by and pick me up, please, and I'm confessing that it was me." (SuppRR2: 25-26; SuppRR3: 49, 51, 187; R5: 92; RR14: SX24).

The second significant event was that a few minutes later, in response to Lopez' 911 call, an El Paso patrol officer came to Lopez' home, not knowing what the situation was, and Lopez immediately told the officer without any prompting or questioning that there was a homicide on July 28th, and then stated: "I called

because it was me." (SuppRR3: 58-60, 62-64). Lopez was then transported to police headquarters, still not under arrest and not handcuffed, and turned over to Detective Hinojos. (SuppRR3: 63, 66-67, 73-74, 80, 85, 90, 93).

The third significant event occurred shortly after 2 AM on August 1st, four hours after the second interview had ended, when Detective Hinojos made contact with Lopez. (SuppRR3: 100). Lopez, who was still not handcuffed or under arrest, consented to another recorded statement, was not threatened in any way, was not promised anything, was not deprived of food, drink, or use of a restroom, and was again read his rights, and he voluntarily, knowingly, and intelligently waived his rights and made his third recorded statement. (SuppRR3: 100, 103-04, 108-10). Significantly, at the commencement of the third statement, Detective Hinojos asked the following:

> Q. (by Detective Hinojos) [I] just want to make sur (sic) that right now you're here of your own free will.
>
> A. Yeah.
>
> Q. Nobody has forced you to come here?
>
> A. No.
>
> * * *
>
> Q. Did anybody -- did anybody tell you to come here and what you're gonna tell me, did anybody tell you what to say?

A. No.

(SuppRR3: 110-11). Lopez finally confessed to Detective Hinojos in his third statement that he put JB on the floor and "stomped on her like two times; two, three times...." (SuppRR3: 113). Lopez' third statement started at 3:17 AM on August 1st, five hours after the second interview had ended, and that statement concluded at 3:43 AM. (RR5: 145-164). It was only after his third inculpatory statement was concluded that a warrant for capital murder was obtained, and Lopez was placed under arrest. (RR5: 165).

These events, occurring after Lopez went home after his second interview, and initiated by him, demonstrate that there was no causal connection between the detectives' complained-of statements to Lopez and his wife in their second interviews, and Lopez' inculpatory confession during his third interview when no alleged threats were made. *See Gibbs v. State*, 555 S.W.3d 718, 735-37 (Tex.App. – Houston [1st Dist.] 2018, no pet.)(holding that there was no coercion after threats made by police in first interview, where defendant, 24 hours later, contacted police and confessed in two subsequent statements); *Ifechukwu v. State*, No. 14-10-00405-CR, 2011 WL 3449495, at *2-*4 (Tex.App. – Houston [14th Dist.] January 11, 2012, pet. ref'd)(not designated for publication)(holding a lack of a causal connection between threats made to defendant by first officer and confession to

second officer three hours later after receiving his rights and affirmatively waiving them, and again 12 hours later after he received his rights again and confessed again to a third officer: "[E]ven if [the first officer] did make the alleged threat, Ifechukwu voluntarily gave statements to [the second officer] and [the third officer]. The record supports this conclusion because, as the trial court noted, there was a lack of causality between the alleged threat and the subsequent confessions."); *Villarreal v. State*, No. 13-09-00023-CR, 2010 WL 2333525, at *6 (Tex.App. – Corpus Christi June 10, 2010, pet. ref'd)(not designated for publication)(holding that where during an interview, police threatened to arrest the defendant's family members, but the next day, the defendant confessed in a second interview in which no threats occurred, the second inculpatory statement was voluntary, as there was no causal link between the threats in the first interview and the second interview where no such threats occurred and the defendant confessed); *Redd v. State*, No. 14-08-01089-CR, 2009 WL 4810190, at *5-*7 (Tex.App. – Houston [14th Dist.] December 15, 2009, pet. ref'd)(not designated for publication)(where defendant claimed that two detectives made improper promises during his first interview that caused his will to be overborne, appellate court nevertheless held that the inculpatory statements made during the second interview were voluntarily made: "None of the 'promises or threats' appellant

alleges induced him into involuntarily confessing were made during the second interview. Appellant has failed to establish a causal relationship between the alleged promises and his confession."); *Penaflor v. State*, Nos. 14-05-00569-70-CR, 2006 WL 3360550, at *4-*5 (Tex.App. – Houston [14th Dist.] November 21, 2006, pet. ref'd)(not designated for publication)(statement held voluntary, as no causal connection shown between initial improper promises by police in first interview and inculpatory statement initiated at defendant's request some twelve hours later). To reiterate, this Court need not even reach the question here of whether alleged coercive statements made by police concerning the arrest of a third party, backed by probable cause to arrest, render a confession involuntary, because, as a preliminary matter, there is no causal connection here between the complained-of statements by detectives to Lopez and his wife during their second interview and Lopez' own decision to contact police again three hours later after going home and to confess to the 911 operator, a patrol officer, and then to Detective Hinojos, who insured that Lopez was acting of his own free will in the third interview. Consequently, for these additional reasons, Lopez' issues for review are without merit and should be overruled.[8]

---

[8] The State raised its causal-connection argument in the court of appeals, but that argument was expressly not addressed, as the court held Lopez' third inculpatory statement was voluntarily made, not as a result of police overreaching or misconduct. *See Lopez*, 2019 WL

Finally, any error in the admission of Lopez' third inculpatory statement was harmless or simply not preserved. Investigator Andrade, a special investigator for the Texas Department of Family and Protective Services, who had no arrest authority and was not a peace officer, (RR6: 53-55, 61), met with Lopez later on August 1, 2012, after this third inculpatory statement was made to Detective Hinojos, and he asked Lopez what had happened to JB. (RR6: 63-64). Without objection, Investigator Andrade testified that Lopez told him that he picked JB up out of her crib, laid her down face up, and then stomped on her twice. (RR6: 64-65).

Overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. *Leday v. State*, 983 S.W.2d 713, 718 (Tex.Crim.App. 1998). Stated another way, the admission of improper evidence does not constitute reversible error if the same facts were proved by evidence that was not objected to. *Davidson v. State*, 386 S.W.2d 144, 148 (Tex.Crim.App. 1965). This is the doctrine of curative admissibility, a doctrine classified interchangeably as one of harmless error and/or error preservation. *See McGruder v. State*, 483 S.W.3d 880, 882 n.1 (Tex.Crim.App. 2016).

3812377, at *8 n. 14.

Here, at the motion to suppress, Lopez challenged three of his four inculpatory admissions being his formal inculpatory statement to detectives in his third interview, as well as his confession to the 911 operator in his second 911call, and his confession to the responding parol officer. Lopez perfected his objections to their admission during the suppression hearing, such that he did not have to object again when the evidence of those three inculpatory statements was offered at trial. *See* TEX.R.EVID. 103(b)("When the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal."). But Investigator Andrade's testimony was not part of the hearing on the motion to suppress, was never brought up or challenged, and was not otherwise heard outside of the jury's presence, such that it was necessary to object at trial when it was offered. *See* TEX.R.APP.P. 33.1(a)(1)(A); TEX.R.EVID. 103(a)(1)(A-B). Because Lopez did not ever object to Andrade's testimony, either outside or in the jury's presence, if there was any error in the admission of Lopez' inculpatory formal third statement to detectives, his second 911 call, or the testimony of the responding officer to the second 911 call, such error was cured (or not preserved) when Investigator Andrade testified to the same evidence without objection. *See McGruder*, 483 S.W.3d at 882 n.1; *Leday*, 983 S.W.2d at 718; *Davidson*, 386 S.W.2d at 148; *see*

also 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."). Lopez' issues (questions) for review, for this additional reason are without merit and should be overruled.

PRAYER

WHEREFORE, the State prays that this Court affirm the judgment and opinion of the 8th Court of Appeals, and that appellant's conviction and sentence be affirmed.

Respectfully submitted,

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

/s/John L. Davis

JOHN L. DAVIS
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 256-2393
FAX (915) 533-5520
E-MAIL: jdavis@epcounty.com
SBN 05515700

ATTORNEYS FOR THE STATE

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 7,898 words (taking out the caption, statement regarding oral argument, table of contents, index of authorities, statement of the case, signature, proof of service, certification, and certificate of compliance per rule of appellate procedure 9.4(i)(1)).

/s/John L. Davis
JOHN L. DAVIS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has registered to e-file documents through an EFSP, and the undersigned has on this day, May 1, 2020, served a copy of the State's brief through the EFSP on the attorney for appellant: Robin Norris, 2408 Fir Street, El Paso, Texas 79925, email: robinnorris@outlook.com, and on Stacey M. Soule, State Prosecuting Attorney, PO Box 12405, Austin, Texas 78711, email: information@spa.texas.gov.

/s/John L. Davis
JOHN L. DAVIS

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

John Davis
Bar No. 05515700
jdavis@epcounty.com
Envelope ID: 42680242
Status as of 05/01/2020 10:16:38 AM -05:00

Associated Case Party: The State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Jaime Esparza (Appeal)		DAAppeals@epcounty.com	5/1/2020 9:56:33 AM	SENT
State Prosecuting Attorney		information@SPA.texas.gov	5/1/2020 9:56:33 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Robin Norris		robbinnorris@outlook.com	5/1/2020 9:56:33 AM	ERROR