**Affirmed and Opinion filed January 31, 2002.**

**In The**

# Fourteenth Court of Appeals

---

**NO. 14-01-00242-CR**

---

**CAROLYN MANLEY BAILEY, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

---

**On Appeal from the 262nd District Court**
**Harris County, Texas**
**Trial Court Cause No. 846,907**

---

## O P I N I O N

The jury found appellant, Carolyn Manley Bailey, guilty of murder. *See* TEX. PEN. CODE ANN. § 19.02(b)(1), (2) (Vernon 1994). The jury found against appellant on the special issue of sudden passion and assessed punishment at 50 years confinement and a $10,000 fine. On appeal, appellant raises a single issue challenging admission of her written statements. We affirm.

## I.

## FACTUAL AND PROCEDURAL BACKGROUND

The State charged appellant with the murder of Curtis Maserang, who died from complications due to blunt force injuries to the head and face. During the investigation, appellant gave two written statements to the police. In the first, she stated she "cracked [Maserang] in the head with a rake or a piece of brick." In the second, she admitted, she picked up a concrete trailer pad and "popped [Maserang] on the right side of the head with the concrete pad."

Appellant filed a motion to suppress the statements, alleging in part the statements were "involuntary . . . coerced and enticed." Pursuant to article 38.22, section 6 of the Code of Criminal Procedure, the court held a hearing on the voluntariness of appellant's statements. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 6 (Vernon 1979); *see also Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964). At the hearing, three officers testified for the State, and appellant and a friend testified for the defense.

### A. *Jackson v. Denno* Hearing

Deputy Sheriff Raymond Hernandez, a homicide investigator with the Harris County Sheriff's Office, testified he arrived at the scene at about 2:00 a.m., and found it to be the address of a trailer home. He saw witnesses occupying several patrol cars. Hernandez learned from the reporting deputy, Deputy Miller, that Maserang had suffered extensive head injuries and a Life Flight helicopter had taken him to Hermann Hospital. Witnesses had told Miller Maserang was possibly suffering from a gunshot wound. One of the witnesses, Michael Manley, Jr., told Hernandez Maserang had fallen and hit his head on one of the concrete pads.

Hernandez saw appellant seated in one of the patrol cars. He observed appellant appeared to be slightly intoxicated and upset. As far as Hernandez could recall, appellant was not handcuffed.

According to Hernandez, Detective Valerio told Hernandez appellant had been very abrasive when Valerio tried to interview her, and Valerio asked Hernandez to talk with appellant. Hernandez decided to take appellant to the Lockwood station to interview her. Hernandez testified that, at the time, he did not know exactly what had happened to Maserang or know the nature of appellant's involvement.

Hernandez introduced himself to appellant and asked her to step out of the patrol car. Appellant asked whether she was under arrest, and Hernandez told her she was not, but he needed a statement from her about what had occurred. After Hernandez told appellant she was not under arrest and was needed only as a witness, appellant agreed to go to Lockwood. Appellant, however, did not want to get back in the patrol car because she felt she was being detained. Hernandez explained it was a matter of department procedure to separate witnesses to avoid their "try[ing] to get their stories straight or confuse each other with what may have occurred." Hernandez also explained the patrol car was simply going to transport appellant to Lockwood and she was not going to be handcuffed. Appellant then went to Lockwood.

Detective Robert Tonry, a homicide detective with the Harris County Sheriff's Office, took appellant's first statement at Lockwood. Before Tonry met with appellant, Tonry went to Hermann Hospital to determine Maserang's status. The Life Flight crew at the hospital advised Tonry that Maserang was dead from a gunshot wound. Tonry then went to Lockwood, where Hernandez told Tonry "the girlfriend of the deceased had advised [Hernandez] . . . she struck [Maserang] with a brick."

Tonry met with appellant at about 5:45 a.m. He described appellant as friendly and cooperative. Although appellant appeared to be somewhat upset, she was coherent in her conversation and did not complain of any prior mistreatment. She never asked to leave.

Uncertain as to whether appellant was in custody, but not believing she was, Tonry read appellant her *Miranda* rights so appellant would have no complaint if it were later

determined she was in custody.[1] Appellant told Tonry she would give a statement, and Tonry started taking appellant's statement at 6:00 a.m. Tonry typed appellant's responses as she gave them. Tonry testified appellant gave her responses freely and voluntarily. At no time was appellant threatened, coerced or promised anything in exchange for the statement. Tonry would not say appellant appeared to be intoxicated when she gave her statement, but he did say she had been drinking. Sergeant Prieto and Detective Beall witnessed appellant sign her statement, State's exhibit one, at 7:15 a.m.

Harris County Sheriff's Detective Allen Beall testified he was contacted to assist in taking statements. He arrived at the Lockwood station around 6:40 a.m., and when he first spoke with appellant and witnessed her statement, Beall observed appellant was calm, gave the statement freely and voluntarily, and did not appear intoxicated or under the influence of a controlled substance. He also testified appellant was not in custody, handcuffed or restrained, and, if she had wanted to leave the sheriff's department homicide division, he would have allowed it.

Beall read appellant's statement and those of several other witnesses, concluded the statements conflicted, and, shortly after 9:00 a.m., decided to interview appellant again. At the time, appellant was seated in a hallway in the waiting area of the homicide division. Beall advised appellant he had reviewed the other witnesses' statements, it appeared appellant had minimized her involvement and not been totally truthful, and appellant needed to try to clarify some of the points in a second statement and needed to tell the truth. Specifically Beall told appellant he knew Maserang had not been hit with just a rake handle and that he had been hit more than once and appellant needed to clarify exactly what her involvement was and how many times she hit Maserang.

---

[1] *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2 (Vernon 1979).

"[T]o be on the cautious side," Beall read appellant her *Miranda* rights again even though he believed she was not in custody. Beall allowed appellant to read the second statement after he typed it, required appellant to read the statement aloud to confirm her reading proficiency, and had appellant initial the beginning and end of each paragraph, waiver and rights. Beall believed appellant gave the statement freely and voluntarily. She was not promised anything before giving the statement other than the opportunity to give her version of what happened. The entire process of taking the statement lasted approximately an hour and ten minutes.

Ronnie Russell, who had been "going with" appellant for six years, testified for the defense. Russell first arrived at appellant's trailer home around 11:00 p.m. and saw flashing lights and a person lying on a stretcher. Russell left briefly, returned around midnight, and saw appellant in a patrol car. Russell testified he observed an Hispanic officer hit appellant in the stomach and "upside" the head and shove her into a police car.

Appellant testified she had picked Maserang up in Galveston and taken him to a barbecue at her home, where six or seven other people, including her family members, were present. During the late afternoon, evening, and before the incidents leading to Maserang's death, she and Maserang had been drinking beer and wine.[2] Appellant also was taking a ten

---

[2] Appellant testified as follows about the alcoholic beverages she had consumed:

> Q. Now, you stated you . . . started drinking around 4:00 o'clock in the afternoon?
>
> A. Yes, 4:00 or 5:00 – 3:00.
>
> Q. Could you estimate approximately how many beers or how many glasses of wine did you have between that time and midnight?
>
> A. I estimated – well, I had went through a 12-pack of Corona and about 6 bottles of wine.
>
> Q. And that's between you and two others?
>
> A. No, sir. I was drinking the Corona. He was drinking Bud Light and Terri was drinking Bud Light.

milligram dose of Valium prescribed for depression. Appellant stated she was "pretty much soaked, intoxicated" when a gun was fired in her mobile home. After the gunshot, fighting ensued outside, and appellant called 911. Appellant testified she had become "[v]ery intoxicated" by the time the first patrol car arrived around midnight.

The officer in the first car was a short white male, and he was the officer who put appellant in the backseat of his vehicle. According to appellant, the officer did so because appellant wanted to go in the ambulance with Masarang. Appellant was handcuffed, there were no handles on the back doors of the car, and a screen separated the backseat and the front seat. The officer left and then subsequently returned. When he came back, he asked appellant if she knew where the gun was. According to appellant, when appellant told the officer she did not know, the officer became violent, hit appellant in the stomach, and pushed her into the car. As a result of the officer's actions, appellant urinated in the car.[3]

Later the same officer returned with "a big, heavyset guy with light brown hair, glasses, a white male." One of them told appellant she had better tell him where the gun was or she would be there all night long.

Appellant testified she was transported to the Lockwood station in handcuffs. When she arrived at Lockwood, an officer removed the cuffs. Appellant testified she told the officers she wanted to leave, and the officers told her she had to sign the first statement or she was not going to be able to leave. She also testified the officers told her that if she did not sign the first statement, Child Protective Services (CPS) could take her 11-year-old

---

Appellant testified on direct examination she did not eat anything between 4:00 or 5:00 p.m. and midnight. In appellant's first statement, she indicated, after she hit Masarang with a rock or a piece of brick, she went back to the table and ate some ribs.

[3] Appellant did not know the name of the officer who hit her, but it was someone who did not testify at the hearing. It was not until two weeks after being jailed that appellant sought medical attention for stomach problems that "could have been" from the alleged punch. Until the hearing, the only person appellant told about the mistreatment was her attorney.

daughter. Appellant believed Beall was the officer who told her CPS could take her daughter.

After giving the first statement, appellant was taken into another part of the station, where the officers said she could sit. She sat a long while and then put two chairs together and lay down. According to appellant, she had not been lying down long when an officer, whom she believed was Beall, opened the door and knocked the chair out from under her. Appellant remembered signing the first, but not the second, statement. At the time she was "intoxicated and . . . scared to death." According to appellant, the officers at the station told appellant they knew what had happened and appellant was the person who was going to be charged.

In arguing in support of the motion to suppress, defense counsel observed the evidence of physical abuse at the scene had not been contradicted by the evidence from the officers.[4] After the court denied the motion, the prosecutor requested to go back on the record, and stated he could "proffer to this Court as an officer of the Court that officers at the crime scene as well as the other detectives will all testify at this trial that no force was in any way used." Defense counsel objected to the prosecutor's testifying about the contents of the officers' testimony. The trial court did not change its ruling on the motion to suppress, but stated, "[I]f during the trial the State is unable to rebut any assertions made by testimony at this hearing, the State will act at its own peril in any efforts to introduce statements."

### B. Trial

At trial, Harris County Sheriff's Deputy Curtis Miller testified that, on the night in question, he was dispatched to check with EMS about a fall victim. Miller was the first person from the Sheriff's Department to arrive. Four other deputies, including Deputy

[4] Whenever the testimony of the accused is undisputed as to alleged coercive acts, then, as a matter of law, the confession is inadmissible. *Sinegal v. State*, 582 S.W.2d 135, 137 (Tex. Crim. App. [Panel Op.] 1979).

Gordon Trott and Deputy Hernandez, eventually arrived to assist. Deputy Trott arrived about 12:40 or a little after midnight. After Miller twice spoke briefly with appellant, she was placed in Trott's patrol car—probably close to an hour after Miller arrived at the scene. Appellant did not want to be in the car, was being hostile, and was trying to get out of the car. At one point, Trott was trying to close the door, and there was a struggle. Miller was at the scene the entire time, and according to Miller, there was never any fight with appellant. When asked whether the defendant was ever physically struck or hit, Miller responded, "Not to my knowledge."

Trott testified he asked appellant to get in his patrol car because she was one of the witnesses that needed to be separated. In Trott's opinion, appellant was intoxicated. Trott asked appellant numerous times to go over to the car, but she kept refusing, so he put his hands on her shoulders and escorted her physically. Once appellant was at the car, Trott opened the door and told appellant numerous times to have a seat, but she kept refusing. Trott grabbed her wrists with his hands and forced her to sit down in the car. Appellant was not handcuffed at the time and was beating on the door and shouting obscenities. Valerio came over to talk with appellant, and when appellant was belligerent with the detectives, Valerio had Trott handcuff appellant. The handcuffs remained on for 15 or 20 minutes, and then Valerio asked Trott to take them off. Trott eventually transported appellant to Lockwood.

When asked whether, other than the handcuffing and being escorted to the patrol car, appellant was ever physically struck or punched, Trott responded, "No." Trott was never more than 50 feet from his car.

Hernandez arrived at the scene around 3:00 a.m. At that time appellant was sitting in the backseat of the patrol car and was not free to go, although she not a suspect at that time. She appeared to be intoxicated. Hernandez spoke with appellant two times although Valerio was the one who actually questioned her. The whole time Hernandez observed

appellant, she was never threatened, promised anything in exchange for giving a statement, nor physically struck or manhandled.

### C. Findings of Fact and Conclusions of Law

After trial, the court filed findings of facts and conclusions of law regarding the voluntariness of the statement. The trial court made the following findings of fact:

> 1. Harris County Sheriff's Department (hereafter HCSO) personnel and EMS personnel were dispatched to 19306 Miller-Wilson Road, Harris County, Texas in the early morning hours of June 8, 2000 in regard to what they believed to be a possible shooting victim. At that location the complainant, Curtis Lee Maserang, was located in grave condition with massive head wounds. He was provided medical treatment at the scene and arrangements were made to life-flight the complainant to Hermann Hospital. The complainant was unable to provide law enforcement personnel with any information in regard to how he suffered his injuries.
>
> 2. The first Harris County Sheriff's Deputy at the scene, C.A. Miller, began inquiries of the five persons present at that location to determine the origin of complainant's injuries. He was later joined at the scene by numerous other HCSO personnel. The defendant, Carolyn Manley Bailey, provided two different and inconsistent statements to Miller regarding where she was positioned at the time the complainant was injured as well as her possible involvement in those injures [sic]. A decision was made shortly thereafter to detain the defendant in that she was a witness and/or possible suspect in the complainant's injuries. A decision was made to place the defendant in a HCSO patrol vehicle to insure she would remain at the scene as well as to separate her from other witnesses. The defendant was questioned in the back seat of the patrol car by Detective Valerio and others. At one point while the defendant was in the back seat of the patrol car she became unruly and was handcuffed. No unnecessary force was used against the defendant. The defendant was never punched nor struck in the stomach. When the defendant calmed down the handcuffs were removed. The defendant was eventually transported to the HCSO Homicide Division to provide a statement regarding the injuries suffered by the complainant. The defendant was not in custody at this time. At the time when the defendant was transported to the Lockwood offices the

cause of the complainant's injuries as well as any persons possible [sic] involved in causing those injuries was still uncertain. The defendant was primarily a witness and not a suspect at that time.

3. At the Lockwood offices the defendant was read her §38.22 V.A.C.C.P. rights and waived said rights and agreed to speak to Detective Tonry regarding her knowledge of the events surrounding Maserang's injuries. Information had been gathered by HCSO investigators [by] the time of this interview to lead HCSO investigators to believe that the complainant had been the victim of a criminal offense and that the defendant was a suspect in that offense. However, the defendant was not in custody at this time as investigators believed it would not aide their investigation. The defendant dictated her first statement (SX-1) to Tonry regarding her involvement in, and knowledge of, the offense. The defendant was given a chance to read the statement and signed same freely and voluntarily. The defendant was told to return to a nearby waiting area at the conclusion of the statement. She was not placed in custody at this time.

4. Detective Beall decided to conduct a subsequent interview [with] the defendant after noting discrepancies between her first written statement and statements provided by other witnesses to the offense. The defendant was not in custody at the time Beall attempted to obtain a statement from her. The defendant was read her §38.22 rights and agreed to waive these rights and speak with Beall. The defendant then dictated the contents of SX-2 to Beall. The defendant signed SX-2 freely and voluntarily. Beall did not use coercion nor make any threats or promises to the defendant in exchange for the defendant providing the statement. The court specifically finds that Beall made no threats to the defendant in regard to custody of her daughter.

The trial court concluded appellant was not in custody at the time she provided both statements, and that both statements were "freely and voluntarily made . . . and not the result of duress, threat, physical force or any other unlawful persuasion." The trial court also concluded, assuming arguendo appellant was in custody, the custody was the result of a lawful arrest.

## II.
## ISSUE AND LEGAL STANDARDS

Appellant presents the following single issue for review: "Did the trial court err in admitting into evidence, over [a]ppellant's timely objection, an extra-judicial statement when the involuntary character of the statement was established?"[5] In reviewing a trial court's ruling on a motion to suppress, we show almost total deference to the trial court's determination of the historical facts, especially when the trial court's fact findings rest on an evaluation of the credibility and demeanor of the witnesses. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We show the same amount of deference to the trial court's rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *See id.* We review de novo "mixed questions of law and fact" not falling within this category. *See id.* When a court is faced with a mixed question of law and fact, the critical question under *Guzman* is whether the ruling "turns" on an evaluation of credibility and demeanor. *See Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998).

The State has the burden under the Fifth and Fourteenth Amendments of proving by a preponderance of the evidence that a defendant's confession was voluntary. *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 626-27 (1972); *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). A statement is involuntary "only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker." *Alvarado,* 912 S.W.2d at 211. A court looks at the totality of the circumstances to determine whether a confession is involuntary or coerced. *See Arizona v. Fulminante*, 499 U.S. 279, 285-86,

[5] Although appellant argues she was in custody at the time of the statement, she does not contend the State failed to follow the mandates of *Miranda* or Texas Code of Criminal Procedure article 38.22, section 2, and the record affirmatively shows the officers followed the requisite procedures for a custodial interrogation. Appellant also does not contest the legality of her custody. Accordingly, we address only the voluntariness of her two statements.

111 S. Ct. 1246, 1252 (1991); *Green v. State*, 934 S.W.2d 92. 99 (Tex. Crim. App. 1996). "Relevant circumstances include the 'length of detention, incommunicado or prolonged detention, denying a family access to a defendant, refusing a defendant's request to telephone a lawyer or family member, and physical brutality.'" *Guardiola v. State*, 20 S.W.3d 216, 223-24 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (quoting *Armstrong v. State*, 718 S.W.2d 686, 693 (Tex. Crim. App.1985), *overruled on other grounds by Mosely v. State*, 983 S.W.2d 249, 264 n.18 (Tex. Crim. App. 1998)). A defendant's characteristics and status are also important. *Armstrong*, 718 S.W.2d at 693.

## III.

## Did the Trial Court Err in Determining Appellant's Statements Were Voluntary?

### A. Alleged Custodial Status

Appellant first contests the trial court's conclusion she was not in custody at the time she gave the statements. A person is "in custody" only if, under the circumstances, a reasonable person would believe that her freedom of movement was restrained to the degree associated with a formal arrest. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). The "reasonable person" standard presupposes an innocent person. *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 438, 111 S.Ct. 2382, 2388 (1991)). The fact a person is transported to a police station for questioning does not, by itself, create a custodial situation. *See Shiflet v. State*, 732 S.W.2d 622, 628 (Tex. Crim. App. 1985) (stating, if circumstances show transportee is acting only on invitation, request, or even urging of police, and there are no threats, express or implied, that he will be taken forcibly, accompaniment is voluntary, and such person is not then in custody).

Although appellant was handcuffed when she became abusive at the scene, Detective Valerio requested the handcuffs be removed after 15 or 20 minutes. Appellant was not handcuffed when she gave either statement. Detective Tonry, who took appellant's first statement, testified appellant was not in custody when she gave her statement or afterward.

According to Detective Beall, after appellant gave the first statement, she was directed to an adjacent waiting area, where she pulled two chairs together and went to sleep.[6] When Beall wanted to talk with appellant, Beall just walked over to her and asked her to take a seat at his desk and talk with him. Appellant arguably was not in custody when she gave her statements.

Nevertheless, as the trial court correctly concluded, even if appellant had been in custody, the officers complied with the requirements of Texas Code of Criminal Procedure Article 38.22. Appellant initialed the waiver of rights on both statements, and indicated she was making "the following voluntary statement."

**B. Alleged Coercion**

Appellant also contends the statements were coerced. In this context, she points first to her alleged intoxication. Detective Tonry, who took the first statement, testified appellant had been drinking, but he would not say she was intoxicated. Detective Beall, who witnessed appellant sign the first statement and took the second statement, testified appellant did not appear to be intoxicated or under the influence of drugs or a controlled substance.

Appellant next draws this court's attention to the amount of time that elapsed from when she was first placed in the patrol car until when she finished her second statement – a period of approximately ten hours from sometime after 12:40 a.m. until 10:30 a.m. Taking each statement required about one hour and fifteen minutes. This court has found eight hours of questioning over two days not to have been coercive. *See Cox v. State*, 644 S.W.2d 26, 28-29 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd).

Appellant states that, other than a drink of water when she was in the patrol car, she had nothing to eat or drink during this period of time, and she was exhausted and sleepy when she gave the statements. In support, she cites only her trial testimony. Appellant

[6] At trial, Detective Tonry described the waiting area as being where the vending machine is located.

cannot rely on this evidence to contest the trial court's decision to admit the statements. *See O'Hara v. State*, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000) (stating officer's testimony on which defendant/appellant relied was irrelevant because it occurred at trial, not at hearing on defendant's motion to suppress evidence, and on appellate review, court must examine record as it existed at the time of suppression hearing).[7]

Finally, appellant points to her testimony and that of Russell to the effect appellant had been subjected to physical abuse by the police while still at the crime scene. This testimony was uncontroverted at the suppression hearing. Uncontroverted testimony of an accused that a confession was procured through coercive acts renders such confession inadmissible as a matter of law. *See Barton v. State*, 605 S.W.2d 605, 607 (Tex. Crim. App. 1980); *Brownlee v. State*, 944 S.W.2d 463, 467 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). The State, however, introduced controverting evidence at trial; and, on appeal, we may consider that evidence in reviewing the trial court's ruling. *See Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996) (stating rule reviewing court will generally consider only evidence adduced at suppression hearing, but stating rule does not apply when State raises suppression issue at trial either without objection or with subsequent participation in inquiry by defense). The trial court found that no unnecessary force was used against appellant and that appellant was never punched nor struck in the stomach. We defer to that finding, which rests on the trial court's assessment of the credibility of the officers' testimony. *See Guzman*, 955 S.W.2d at 89.

---

[7] The *O'Hara* court relied in part on *Vargas v. State*, 838 S.W.2d 552, 556-57 (Tex. Crim. App. 1992). *See O'Hara v. State*, 27 S.W.3d 548, 551 n.22 (Tex. Crim. App. 2000). In *Vargas*, the court explained, "An appellate court may not reverse a trial court's finding based upon information that was not introduced into evidence or elicited before the trial judge during the voir dire." *Vargas*, 838 S.W.2d at 557.

The record supports the trial court's conclusion appellant gave her statements freely and voluntarily. We overrule appellant's sole issue.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed January 31, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).