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MEMORANDUM OPINION

Do Not Publish-TEX. R. APP. P. 47.2(b).

Court of Appeals of Texas,

Houston (14th Dist.).

Rafael BAEZ, Appellant

v.

The STATE of Texas, Appellee.

No. 14-07-00426-CR.

Nov. 18, 2008.

On Appeal from the 209th District Court, Harris County, Texas, Trial Court, Cause No. 1114314.

Kurt B. Wentz, for Rafael Baez.

William J. Delmore, III, for The State of Texas.

Panel consists of Justices FROST, SEYMORE, and GUZMAN.

MEMORANDUM OPINION

KEM THOMPSON FROST, Justice.

*1 Appellant Rafael Baez challenges his conviction for capital murder, claiming the trial court abused its discretion in admitting appellant's videotaped confession because the recording device, the operator, and the actual video did not meet the requirements of article 38.22, section 3(a)(3) of the Texas Code of Criminal Procedure. Appellant also claims the trial court erred in admitting the videotape because in it, the interrogating officer continued to question appellant after he allegedly invoked his Fifth Amendment right to remain silent, signaling his intention to terminate the interview. Because there is no merit in these points, we affirm.

I. Factual and Procedural Background

Appellant was charged with capital murder. At a pre-trial hearing on appellant's motions to suppress, appellant sought to suppress his videotaped confession to police, claiming that the recording device was not capable of making an accurate recording, the video, itself, was not accurate, and the operator of the recording device was not competent. Appellant also challenged the admissibility of the video

because he claims that his words, “do I have to say” indicated his desire to invoke his Fifth Amendment right to remain silent and signaled his intention to terminate the interview. The trial court denied appellant's motions. In the trial that followed, the trial court admitted the video into evidence, over appellant's renewed objection, and allowed the jury to view the video in the guilt-innocence phase. In the video, appellant confessed to shooting the complainant.

The jury found appellant guilty as charged, and the trial court sentenced him to confinement for life.

II. Issues and Analysis

A. Did the trial court abuse its discretion in admitting the videotape of appellant's confession under article 38.22 of the Texas Code of Criminal Procedure?

In two issues, appellant complains that the trial court erred in admitting appellant's videotaped confession under article 38.22, section 3(a)(3). In his first issue, appellant claims that the recording device was incapable of an accurate recording and the operator of the device was not competent.^{FN1} In his second issue, appellant claims the recording, itself, was inaccurate. Appellant filed several pre-trial motions, claiming under article 38.22, section 3(a)(3) that the recording device was not capable of making an accurate recording and the recording, itself, was not accurate.

^{FN1}. None of appellant's motions to suppress raise the issue at the trial-court level that the operator was not competent in making an accurate recording. Appellant's motions and arguments at the pre-trial hearing involved a claim, among others, that the recording device and the recording, itself, did not comply with the requirements of article 38.22, section 3(a)(3). Only on appeal does appellant raise the issue of the competency of the operator of the recording device. To preserve a complaint for appellate review, a party must make a timely request, objection, or motion with sufficient specificity to apprise the trial court of the complaint. *Tex.R.App. P. 33.1(a)*; *Saldano v. State*, 70 S.W.3d 873, 886-87 (Tex.Crim.App.2002). Appellant has not cited and we have not found any place in the appellate record showing that appellant raised this issue in the trial court. Because he did not raise this objection with the trial court, appellant's complaint as to the operator's competency in recording the video is waived. See *Tex.R.App. P. 33.1*; *Reed v. State*, 227 S.W.3d 111, 117 (Tex.App.-Houston [1st Dist.] 2006, pet. ref'd).

We review a trial court's ruling on the admissibility of evidence under an abuse-of-discretion standard. See *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). Specifically, whether the predicate for admission of a videotaped confession has been satisfied is a matter within the trial court's discretion. *McEntyre v. State*, 717 S.W.2d 140, 146 (Tex.App.-Houston [1st Dist.] 1986, pet. ref'd). Section 3(a)(3) of article 38.22 provides that a defendant's oral statement is not admissible against the defendant in a criminal proceeding unless "the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered." Tex.Code Crim. Proc. Ann. art. 38.22 (Vernon 2005 & Supp.2008).

*2 The trial court is within its discretion to infer that the requirements of section 3(a)(3) have been met if the tape is an accurate portrayal of the interview. See *Maldonado v. State*, 998 S.W.2d 239, 246 n. 9 (Tex.Crim.App.1999); *Falcetta v. State*, 991 S.W.2d 295, 298 (Tex.App.-Texarkana 1999, pet. ref'd). A person with knowledge of the interview need only testify that the video is an accurate portrayal of the interview and has not been altered in order to meet the requirements of article 38.22, section 3(a)(3). See *Minger v. State*, No. 11-01-00107-CR, 2003 WL 190729, at *4 (Tex.App.-Eastland 2003, no pet.) (not designated for publication) (concluding that testimony of witness with personal knowledge that the video accurately portrays the interview permits inference of compliance with article 38.22, section 3(a)(3)); see also Tex.R. Evid. 901(b)(1); *Angleton v. State*, 971 S.W.2d 65, 67 (Tex.Crim.App.1998).

Appellant complains that the audio quality and an "electronic hum," as heard for most of the video, contributes to the poor quality of the video and affects the accuracy of the recording. In this case, Officer Mosqueda had personal knowledge of the video because he conducted the interview with appellant. See Tex.R. Evid. 901(b)(1); *Minger*, 2003 WL 190729, at *4; see also *Falcetta*, 991 S.W.2d at 298. At times, it is difficult to hear appellant speak on the video, and the parties and the trial court acknowledged as much at the pre-trial hearing. Officer Mosqueda testified that he asked appellant to sit up and speak more clearly several times in the interview because appellant's words were difficult to hear, even for Officer Mosqueda. The video supports this testimony. Officer Mosqueda reviewed the video and testified that the video was an accurate recording of the interview and had not been altered. Though inadvertent as well as intentional anomalies in a recording may affect reliability and admissibility of a recording, Officer Mosqueda's testimony supports an inference that the video accurately reflects Officer Mosqueda's interview with appellant, that any anomalies in the video were unintentional, and that the video

had not been impermissibly altered in the sense contemplated by article 38.22, section 3(a)(3). See *Maldonado*, 998 S.W.2d at 245-46 (admitting a videotape with “skips” under article 38.22, section 3(a)(3)); see also *Quinones v. State*, 592 S.W.2d 933, 944 (Tex.Crim.App.1980) (“If the alteration is accidental and is sufficiently explained so that its presence does not affect the reliability and trustworthiness of the evidence, the recording can still be admitted.”); *McEntyre*, 717 S.W.2d at 145, 148-49 (admitting surveillance video with seven-minute “gap” and police radio interference when there was no evidence of specific alterations and only speculation of possible alterations).

Because Officer Mosqueda had personal knowledge of the interview, he need only to have testified that the tape was accurate and had not been altered to meet the requirements of article 38.22, section 3(a)(3). See *Minger*, 2003 WL 190729, at *4; see also *Falcetta*, 991 S.W.2d at 298-99. Officer Mosqueda testified that the recording device used to record appellant's statement was capable of making an accurate recording. Moreover, Officer Mosqueda testified that the video was a fair and accurate representation of the interview he conducted with appellant. He testified that the tape had not been altered in any way. From Officer Mosqueda's testimony, the trial court could infer that the recording device functioned properly. See *Sanchez v. State*, No. 03-03-00139-CR, 2005 WL 1536219, at *7 (Tex.App.-Austin June 30, 2005, no pet.) (mem. op., not designated for publication); *Minger*, 2003 WL 190729, at *4.

*3 Accordingly, the videotape met the requirements of article 38.22, section 3(a)(3). See *Minger*, 2003 WL 190729, at *4. Therefore, the trial court was within its discretion in admitting the videotape. See *Maldonado*, 998 S.W.2d at 246; *Minger*, 2003 WL 190729, at *4. We overrule appellant's first and second issues.

B. Did the trial court abuse its discretion in admitting appellant's videotaped confession based on appellant's claims that the video shows that appellant invoked his Fifth Amendment right to silence and indicated his intention to end the interview?

In his third issue, appellant asserts that in the video, in response to Officer Mosqueda's questions about the murder, when appellant asked the officer, “do I have to say,” appellant invoked his Fifth Amendment right to remain silent and indicated his intention to terminate the interview.

We review a trial court's ruling to admit or exclude evidence under an abuse-of-discretion standard. *Ramos v. State*, 245 S.W.3d 410, 417-18 (Tex.Crim.App.2008). The Fifth Amendment of the United States Constitution provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. Under the Fifth Amendment, law enforcement officials, before questioning a person in custody, must inform a defendant that he has the right to remain silent and that any statement he makes may be used against him in court. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966); *Ramos*, 245 S.W.3d at 418. If a suspect makes a statement governed by *Miranda* and invokes his right to remain silent, a law enforcement officer's failure to end the questioning after the suspect invokes that right violates the suspect's rights and renders any subsequently obtained statements inadmissible. See *Dowthitt v. State*, 931 S.W.2d 244, 257 (Tex.Crim.App.1996).

An officer need not stop the interview unless the suspect makes an unambiguous invocation of his rights. *Ramos*, 245 S.W.3d at 418; *Dowthitt*, 931 S.W.2d at 257. Though no particular phraseology is necessary to invoke a defendant's right to remain silent, any declaration in any manner of a desire to remain silent or to terminate the interview will suffice. *Ramos*, 245 S.W.3d at 418. A reviewing court looks to the totality of the circumstances to determine whether a defendant unambiguously has invoked his right to remain silent. See *Watson v. State*, 762 S.W.2d 591, 597 (Tex.Crim.App.1988). The totality of the circumstances must illustrate that the suspect actually invoked his right by expressing a definite desire. See *Mayes v. State*, 8 S.W.3d 354, 358-59 (Tex.App.-Amarillo 1999, no pet.); see also *Dinkins v. State*, 894 S.W.2d 330, 350-51 (Tex.Crim.App.1995) (invoking right to counsel). Ambiguity exists when a suspect's statement is subject to more than one reasonable interpretation under the circumstances. See *Williams v. State*, 257 S.W.3d 426, 433 (Tex.App.-Austin 2008, pet. filed) (citing *Dowthitt*, 931 S.W.2d at 257). An officer is not required to clarify any ambiguous remarks. *Id.* Once a person in custody invokes a Fifth Amendment right to remain silent, then the admissibility of such statements in court depends on whether that person's right was “scrupulously honored.” *Ramos*, 245 S.W.3d at 418.

*4 In this case, the video shows that Officer Mosqueda read appellant his rights, and appellant orally acknowledged his understanding of each right after Officer Mosqueda read it to him. Next, appellant was provided a written admonition of his rights, and appellant placed his initials beside each written statement acknowledging the right. Officer Mosqueda then asked appellant to read aloud each of those rights and indicate whether he understood. Appellant answered in the affirmative. Officer Mosqueda and appellant then engaged in a fuller discussion regarding appellant's understanding of “waiver” and “terminate.” Appellant indicated that he understood that the term “terminate” meant “to end.” After acknowledging his understanding of his right to remain silent, he indicated he

wished to waive it and agreed to speak with Officer Mosqueda, saying “If you got me, you got me, I might as well.”

Appellant then answered Officer Mosqueda's specific questions about the case for forty minutes, explaining the circumstances leading up to the murder, including the agreement he made to murder the complainant, naming the individuals involved, describing his own role in the murder, and indicating the amount of money he was owed for his actions. After forty minutes of questioning, when Officer Mosqueda asked, “What happened next,” appellant asked, “If I know, do I have to say?” In response, Officer Mosqueda commented that the interview was an opportunity for appellant to “get the matter off of [his] chest,” noting that they had gotten far into the interview. Appellant did not request to terminate the interview. Appellant admitted that he shot the complainant. At trial, Officer Mosqueda testified to appellant's confession without objection.

The totality of circumstances in this case supports the conclusion that appellant, knowingly, intelligently, and voluntarily waived his rights by acknowledging his understanding of his rights at least three times and discussing many incriminating facts for forty minutes with Officer Mosqueda. See *Hargrove v. State*, 162 S.W.3d 313, 318-19 (Tex.App.-Fort Worth 2005, pet. ref'd). Appellant's inquiry, “do I have to say,” is one question in the context of the entire interview throughout which appellant answered Officer Mosqueda's questions without hesitation and described many incriminating details after thrice acknowledging his understanding of his rights. See *id.* By inquiring, “do I have to say,” appellant, at best, expressed ambivalence toward waiving his rights, but appellant did not unambiguously or clearly express a definite desire to invoke his right to remain silent. See *Mayes*, 8 S.W.3d at 358-59 (concluding that a statement made by a suspect who “did not know if she wanted to talk” expressed ambivalence about speaking with law enforcement officers and was not an unambiguous assertion of the right to remain silent); see also *Dowthitt*, 931 S.W.2d at 257. At no point did appellant seek to end the interview, express a desire to remain silent, request an attorney, or invoke any of his rights. Officer Mosqueda was not obligated to seek clarification of appellant's ambiguous inquiry. See *Dowthitt*, 931 S.W.2d at 257. Under the totality of circumstances, appellant's statement, “do I have to say,” was ambiguous and Officer Mosqueda did not violate appellant's rights by continuing the interrogation.FN2 See *id.* Moreover, appellant's statement in this context was not an unambiguous request to terminate the interview. See *id.*

FN2. Appellant relies on the case of *Ochoa v. State* for support that his statement expressed an unambiguous statement to remain silent and terminate the interview. 573 S.W.2d 796, 800-01 (Tex.Crim.App.1978) (holding that a defendant's remark

about speaking with an attorney obligated the interviewing officer to cease the interrogation). However, Ochoa is factually distinguishable because, “[a]lthough [Ochoa] did not make a ‘formal request’ or absolute demand for a lawyer, he did in some manner indicate to [the officer] that he wanted to exercise his right to counsel.” *Id.* In this case, the record does not support a conclusion that appellant unambiguously exercised his right to remain silent.

*5 The record in this case reasonably supports the trial court's implied ruling, in admitting the statement, that appellant did not unambiguously assert his right to remain silent. See *id.* (concluding statement, “I can't say more than that. I need to rest,” was not an unambiguous invocation of the right to remain silent). Under these circumstances, there is no abuse of discretion by the trial court.

Furthermore, an error in the admission of evidence is cured when the same evidence comes in elsewhere without objection. *Anderson v. State*, 717 S.W.2d 622, 627 (Tex.Crim.App.1986); *Hudson v. State*, 675 S.W.2d 507, 511 (Tex.Crim.App.1984). Even if we were to presume that the trial court erred in admitting the videotape, Officer Mosqueda testified at trial without any objection that appellant admitted shooting the complainant.FN3 Therefore, even if appellant's statement were interpreted as a request to terminate the interview, the trial court's admission of the video would provide no grounds for reversal given that the same evidence was admitted at trial. See *Dowthitt*, 931 S.W.2d at 257. Accordingly, we overrule appellant's third issue.

FN3. Appellant's objections at the pre-trial suppression hearing and at trial were lodged only at suppression of the videotaped confession under article 38.22, section 3 of the Texas Code of Criminal Procedure; appellant did not complain either at trial or on appeal of Officer Mosqueda's testimony regarding appellant's confession in the interview.

Having found no merit in any of appellant's points, we affirm the trial court's judgment.

Tex.App.-Houston [14 Dist.],2008.

Baez v. State

Not Reported in S.W.3d, 2008 WL 4915682 (Tex.App.-Hous. (14 Dist.))

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