Affirmed and Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00792-CR

MARTHA LYNN BISHOP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 835,973

O P I N I O N

Appellant, Martha Lynn Bishop, was convicted by a jury for possession of cocaine with intent to deliver. TEX. HEALTH & SAFETY CODE ANN. § 481.112(f) (Vernon Supp. 2001). The jury assessed punishment at 60 years confinement in the Institutional Division of TDCJ. Raising three issues for review, appellant contends the trial court erred in denying her motion to suppress evidence and motion for mistrial. We affirm.

Background

On January 6, 2000, during the course of conducting narcotics surveillance, officer Virgil Price observed appellant and suspected drug trafficker William Adare in a restaurant

parking lot. Price witnessed a number of furtive interactions and transactions between appellant, Adare, and a third man. He followed appellant when she drove away from the meeting. According to a signed affidavit, Price observed appellant failing to maintain a single lane on more than one occasion. He contacted another officer driving a marked police vehicle and instructed him to stop appellant for the traffic violation. Price arrived at the scene where the officer was detaining appellant. Price stated, in his affidavit, that he obtained verbal permission from appellant to search her vehicle. Appellant signed a sworn affidavit wherein she denied the State's claim that she voluntarily gave permission to search her vehicle. Approximately 77 pounds of cocaine was discovered during the search. Prior to trial, appellant filed a motion to suppress all evidence surrounding the contraband. She argued that Price seized it as the result of an unlawful traffic stop. The trial court denied appellant's motion after considering the evidence outlined in the affidavits submitted by appellant and Price.

Legality of Traffic Stop

In her first issue, appellant contends the trial court erred in denying her motion to suppress evidence. Appellant bases this contention on the State's failure to show probable cause for the initial traffic stop.

When reviewing the trial court's ruling on a motion to suppress evidence, we apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historical facts and reviewing de novo the trial court's application of the law of search and seizure. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex. Crim. App. 1997). Because the trial court did not make explicit findings of historical fact in the instant case, we will review the evidence in a light most favorable to the trial court's ruling. *See Carmouche*, 10 S.W.3d at 327-28. Finally, we will review de novo the trial court's determinations of reasonable suspicion and probable cause. *See Carmouche*, 10 S.W.3d at 328; *Guzman*, 955 S.W.2d at 87.

Before addressing the merits of appellant's first issue, we examine the State's contention that appellant did not present evidence of a warrantless detention and search. The burden of proof is initially on the defendant when she files a motion to suppress evidence based on an illegal arrest. *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986); *Telshow v. State*, 964 S.W.2d 303, 307 (Tex. App.—Houston [14th Dist.] 1998, no pet.). As the movant, defendant must produce evidence that defeats the presumption of proper police conduct. *Id*. She meets this initial burden with proper proof that a search or seizure occurred without a warrant. *Id*. The burden of proof then shifts to the State to produce evidence of a warrant. *Id*. If evidence of a warrant is produced, the burden shifts back to the defendant to show the invalidity of the warrant. *Id*. at 10. Where the State cannot produce evidence of a warrant, it must prove the reasonableness of the seizure. *Id*.

The trial court decided appellant's motion to suppress after reviewing affidavits submitted by appellant and the State. Appellant did not aver or contend that the State failed to obtain a warrant. Without affirmative evidence showing the absence of a warrant, the State never bears the burden of proving reasonable suspicion to detain and probable cause to arrest. *Telshow*, 964 S.W.2d at 307. Appellant failed to present affirmative testimony that she was arrested without a warrant; therefore, the burden never shifted to the State to either produce evidence of a warrant or prove the reasonableness of detention pursuant to one of the recognized exceptions to the warrant requirement. *Id*. at 308.

In her supplemental letter brief, appellant argues that this disposition would conflict with the Court of Criminal Appeals' decision in *Rodriguez v. State*. 844 S.W.2d 744 (Tex. Crim. App. 1992). Finding this case distinguishable, we disagree. In *Rodriguez*, appellant filed a motion to suppress evidence obtained from an alleged illegal seizure. *Id*. at 745. Rodriguez's affidavit was offered in support of the motion to suppress. He stated that police failed to produce a warrant for his arrest. *Rodriguez v. State*, 870 S.W.2d 597, 599 (Tex. App.—Houston [1st Dist.] 1993, no writ) (op. after remand). During the hearing, appellant called no witnesses and did not formally introduce any evidence in support of his motion, but merely testified to his version of the facts. *Id*. On appeal, Rodriguez

argued that the trial court erred in denying his motion to suppress. *Id*. In affirming the court's decision, the First Court of Appeals did not consider appellant's statement in the affidavit supporting his motion, i.e., that the arrest was made without a warrant. *Rodriguez v. State*, 834 S.W.2d 592, 595 (Tex. App.—Houston [1st Dist.] 1992), *rev'd*, 844 S.W.2d 744 (Tex. Crim. App. 1992). Instead, the court found that appellant failed to meet his burden of showing a warrantless arrest:

> [A]ppellant produced no evidence at all to support his motion to suppress. Although appellant composed an affidavit, he never offered it into evidence. Nor did he request that the trial court take judicial notice of the affidavit or his motion. There was no stipulation of evidence, and [Rodriguez] called no witnesses at the hearing. He merely offered oral argument to support his motion.

Id. Relying on Article 28.01 of the Code of Criminal Procedure, the Court of Criminal Appeals subsequently reversed, holding that the appellate court "should have considered [Rodriguez's] motions ***and*** the attached affidavit in determining whether appellant met his burden of proof . . . ." *Rodriguez*, 844 S.W.2d at 745 (emphasis added).[1]

Unlike the affidavit in *Rodriguez*, appellant's affidavit contains no statement that the search was performed without a warrant. Appellant did claim that she was the subject of a warrantless arrest in her unsworn motion to suppress; however, an unsworn motion is not evidence. *See Green v. State*, 682 S.W.2d 271, 290-91 (Tex. Crim. App. 1984) (holding an unsworn motion by appellant's attorney requesting a psychiatrist does not constitute "evidence" for purposes of Texas Code of Criminal Procedure article 46.02); *Moore v. State*, 700 S.W.2d 193, 204 (Tex. Crim. App. 1985) (holding that allegations in a motion for new trial do not constitute evidence). Therefore, appellant failed to shoulder her burden of rebutting the presumption of proper police conduct as required under *Russell*. Accordingly, appellant's first issue is overruled.

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[1] In pertinent part, Article 28.01 provides: "[w]hen a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court . . . ." TEX. CODE CRIM. PROC. ANN. Art. 28.01 § 1(6) (Vernon 1989).

Voluntariness of Consent to Search

In her second issue for review, appellant contends the State failed to prove that she freely and voluntarily consented to the warrantless search of her vehicle. Specifically, appellant argues that the State failed to prove appellant freely and voluntarily consented to the warrantless search of her vehicle. For the reasons below, we find appellant has waived this issue.

Before a party may raise an issue on appeal, the record must show that the complaint was made to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1. Therefore, a motion is one means of preserving error. When viewed from the perspective of preserving error, a motion to suppress is nothing more than a specialized objection to the admissibility of evidence. *Morgan v. State*, 688 S.W.2d 504, 513 (Tex. Crim. App. 1985); *Hill v. State*, 643 S.W.2d 417, 419 (Tex. App.—Houston [14th Dist.] 1982), *aff'd*, 641 S.W.2d 543 (Tex. Crim. App. 1982). Thus, a motion to suppress evidence must meet the requirements of any other objection. *Mayfield v. State*, 800 S.W.2d 932, 935 (Tex. App.—San Antonio 1990, no writ). An accused may not rely upon an objection for the first time on appeal, if the objection was not raised in the trial court. *Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986). Further, a defendant must have specifically stated the basis for his objection, unless the particular ground was apparent from the context. TEX. R. EVID. 103(a)(1); TEX. R. APP. P. 33.1(a)(1)(A); *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). Where the trial record reveals that an appellant's issue for review does not comport with his objection at trial, he preserves nothing for review. *Russell v. State*, 665 S.W.2d 771, 779 (Tex. Crim. App. 1983).

Appellant contended, in her motion to suppress, that all the evidence obtained during the traffic stop and search was illegally seized because"[t]he traffic stop and search were done without probable cause and without a warrant . . . [and] no felony or breach [of] peace was committed . . . ." Plainly, appellant's voluntariness issue does not comport with her objection at trial, nor was the objection apparent from the context of her

affidavit. Therefore, appellant has preserved nothing for review. Accordingly, we overrule appellant's second issue.

Improper Jury Argument

In her final issue for review, appellant asserts that the trial court erred in denying her motion for mistrial after the prosecutor engaged in improper jury argument. Specifically, appellant points to the prosecutor's reference, during the punishment phase of trial, to a matter outside the record. We disagree.

Permissible jury argument must fall within one of the following four general areas: 1) summation of the evidence, 2) reasonable deduction from the evidence, 3) answer to argument of opposing counsel, or 4) plea for law enforcement. *Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992). Error in jury argument occurs when a prosecutor injects facts not supported by the record. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). However, the harm from improper jury argument will generally be cured by an instruction to disregard, unless the statements were so manifestly improper as to inflame and prejudice the minds of the jury. *Id*. Finally, we review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000).

During the punishment phase of trial, the prosecutor began his closing argument with the following statement: "I talked to a lot of people yesterday and this morning about what I should ask for." Appellant immediately objected with an assertion that counsel's statement was outside the record. The trial judge sustained appellant's objection, instructed the jury to disregard the statement, and denied appellant's motion for mistrial. The prosecutor never revisited the subject. The prosecutor's statement pertained to events outside the record; therefore we find the State engaged in improper jury argument. However, we conclude that the court's instruction to disregard the prosecutor's statements cured any error which might have occurred as a result of improper jury argument. *See Sattiewhite v. State*, 786 S.W.2d 271, 278 (Tex. Crim. App. 1989) (opining that a

reviewing court must assume the jury conducted itself as directed by the trial court). We hold the trial court did not abuse its discretion in denying appellant's motion for mistrial because any error resulting from the prosecutor's improper argument was cured by the court's instruction. Accordingly, we overrule appellant's third issue and affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed August 9, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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