Reversed and Remanded and Opinion filed December 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00949-CR

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DESHUN THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209TH District Court
Harris County, Texas
Trial Court Cause No. 786,932

O P I N I O N

Appellant was convicted by a jury of aggravated robbery and sentenced to 55 years imprisonment. On appeal he raises four points of error. We reverse.

Background

On the night of April 7, 1998, Charles McCulloch, then a salesperson at a local car dealership, went to the Executive Club in search of a woman by the name of Elena Rodriguez to whom he had lent one of his company's cars. After finding Rodriguez and convincing her

to return the keys to the car and disclose its location, he and two of his employees, Kevin Collesano and Amanda Flores, all entered his Jeep and set out to retake the car. Upon arrival at Rodriguez's apartment complex, McCulloch and the two employees spotted what they thought was the car belonging to the dealership. McCulloch then exited the Jeep, examined the car, and confirmed that it was the Nissan 240SX belonging to the dealership, at which point he turned to Flores and instructed her to drive it back to the dealership. As McCulloch turned and began walking back to his Jeep, however, he was accosted by an individual brandishing a handgun and standing some ten to fifteen feet away. This individual, later identified by McCulloch as Appellant, then said "give me your watch." McCulloch refused and proceeded back to his Jeep when the gunman shot him. Collesano and Flores, subsequently provided statements to the police describing the incident.

Later that evening Rodriguez arrived at her apartment and learned from police on the scene that McCulloch had been shot. Early the next morning, on April the 8th, Rodriguez gave a statement to the police relating the conversation which occurred between her and McCulloch the night before and told them that she didn't know who had shot him. Montha Guatero, a friend of Rodriguez who also worked at the Executive Club and who was with Rodriguez on the evening of the shooting, likewise provided a statement to police on the same morning in which she failed to name Appellant as the gunman. Three months later, on July 1, 1998, Rodriguez then went the police, recanted her prior statement, and provided a new one naming Appellant as the gunman. Around the same time, Guatero also met with police and, in an oral statement, followed suit and said that she and Rodriguez had met with Appellant in the early hours of April 8 and that he admitted shooting McCulloch. Pursuant to this new information, the police then procured an arrest warrant for Appellant and executed it around 2 a.m. on July 2, 1998.

Once the arrest had been made, the police sought permission from Patricia Thomas, Appellant's mother and owner of the home where Appellant lived and was arrested, to search Appellant's room. After inquiring into the extent of her access to Appellant's room, the police concluded that she had authority to consent to its search. Police then asked Ms. Thomas to

sign a consent to search form and she replied that "she didn't want to sign anything." Not satisfied with this refusal, one of the officers went to his car, secreted a tape recorder inside his shirt, and began seeking verbal consent from Ms. Thomas. Concluding that he had finally received her consent, the police then searched Appellant's room and found a handgun later confirmed to be the one used to shoot McCulloch. Challenging his conviction, Appellant now raises four points of error. We reverse.

Authority to Consent to Search

In Appellant's first point of error, we must decide whether the trial court erred by denying his motion to suppress evidence of the gun found in his room. Appellant contends that the trial court's failure to suppress the gun found by police was error as the State failed to prove that Appellant's mother possessed authority to consent to the search of Appellant's room. We are not persuaded.

Consent to search is one of the well-established exceptions to the constitutional requirements of both a warrant and probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973); *Carmouche v. State*, 10 S.W.3d 323, 331 (Tex. (Tex. Crim. App. 2000). The Fourth Amendment allows persons with common authority over property to consent to the search of the property. *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *Partrick v. State*, 906 S.W.2d 481, 490 (Tex. Crim. App. 1995). "Common authority" is mutual use of the property by persons generally having joint access or control for most purposes. *Illinois v. Rodriguez*, 497 U.S. 177, 179, 110 S.Ct. 2793, 2797, 111 L.Ed.2d 148 (1990); *Patrick*, 906 S.W.2d at 490. The state must show, by clear and convincing evidence, that the individual consenting to the search possessed authority over the area sufficient to consent. *See Woodberry v. State*, 856 S.W.2d 453, 457 (Tex. App.– Amarillo 1993, no writ). Finally, where a trial court's ruling on a motion to suppress involves an application of law to fact questions not turning upon an

evaluation of credibility and demeanor, as here, we apply a *de novo* standard of review. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

Before denying Appellant's motion to suppress the gun found in his room, the trial court heard testimony that Appellant paid Ms. Thomas $200 per month rent and kept his room locked when not at home. Ms. Thomas testified that the room was Appellant's private room and that she only entered it while he was present and for purposes of cleaning. Based on these facts and citing *Woodberry v. State*, Appellant argues that Ms. Thomas was without authority to consent to the search of Appellant's room. *Woodberry v. State*, 856 S.W.2d 453 (Tex. App.– Amarillo 1993, no writ).

In *Woodberry*, the appellant rented a room from a married couple, Mr. and Mrs. Scott. *Id.* at 455. The police, suspecting that appellant had participated in a robbery, received consent from Mrs. Scott to search Woodberry's room and discovered evidence leading to his conviction. *Id.* at 455. On appeal, Woodberry argued that the trial court erred in denying his motion to suppress the illegally obtained evidence as Mrs. Scott was without authority to consent to a search of his room. Based on evidence that Woodberry paid rent and only allowed Scott access to the room for purposes of cleaning, the court held that the State failed to show by clear and convincing evidence that Scott had authority to consent to the search. *Id.* at 457. In reaching this holding, the court likened the relationship between Scott and Woodberry as one of a hotel maid and hotel occupant. *Id.* While the facts of our case are not unlike those of *Woodberry*, they are more similar to those in *Sorensen v. State*. *See Sorensen v. State*, 478 S.W.2d 532, 533 (Tex. Crim. App. 1972).

In *Sorensen*, the defendant, age 20, rented a bedroom from his mother. Though he was the room's sole occupant, appellant's mother had never been instructed to stay out. Furthermore, she occasionally entered it to gather and leave his laundry and pick up after him. Under these circumstances the Court of Criminal Appeals found that Appellant's mother had "equal, if not superior right to be on the premises", and that such access negated her son's

expectations of privacy therein. *Sorensen*, 478 S.W.2d at 534. Thus, the court determined that her consent to the search of the room bound everyone else having rights in the bedroom. *Id*. Likewise, we feel that the facts of our case conform closely to those of *Sorensen*; accordingly, we hold *Sorensen* controls and that Ms. Thomas possessed authority to consent to the search of Appellant's room. While the facts in *Woodberry* allowed the court to characterize the relationship between the consenting party and appellant as one of hotel maid and hotel occupant, we decline to do so in this instance. As in *Sorensen*, Appellant was a post-teen – then 23 – who exclusively occupied his room while paying rent. Also like *Sorensen*, Appellant's parent occasionally entered the room for purposes of cleaning. Finally, in neither case did the appellant instruct his parent to stay out of the room. We overrule Appellant's first point of error.

Voluntariness of Consent

In his second point of error, Appellant argues that the trial court's failure to suppress the gun found by police was error as the State failed to prove by clear and convincing evidence that Appellant's mother voluntarily consented to the search of Appellant's room. Voluntariness of consent to search is a question of fact determined from the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Carmouche v. State*, 10 S.W.3d 323, 331 (Tex.Crim.App.2000) . The State has the burden to prove the consent was voluntary by clear and convincing evidence. *See State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997). In doing so, the State must show the consent was positive and unequivocal, and not the result of duress or coercion. *See Erdman v. State*, 861 S.W.2d 890, 895 (Tex.Crim.App.1993). Finally, where a trial court's ruling on a motion to suppress involves an application of law to fact questions not turning upon an evaluation of credibility and demeanor, as here, we apply a *de novo* standard of review. *See Martinez v. State*, 17 S.W.3d 677, 684 (Tex. Crim. App. 2000).

At trial, the State adduced testimony from detective William Valerio, the officer purporting to have obtained Ms. Thomas' consent to search Appellant's room. During this testimony, Valerio read the following transcript of his recorded conversation with Thomas occurring prior to the search of Appellant's room:

> "I asked [Ms. Thomas], you said it's all right if we go ahead and look? And she responded by saying, 'that's up to you.' ' Just go.' I asked, you don't care? And she responded, 'uh-huh.' I asked again, are you sure? And she responded by saying 'I don't have nothing to hide.' ' I don't know.' Then I said – I asked, so its okay if we go look in your son's room? And she responded, 'uh-huh.' And then I told her, they are going to go ahead and start looking. And detective Davis inserted, this is your son's room there? And she responded by saying 'yes', 'uh-huh', or 'yes.'"

Neither Appellant nor the State argues that Ms. Thomas's alleged consent resulted from duress or coercion; therefore, we need only determine whether her consent, if any, was positive and unequivocal. Because this inquiry requires that we examine the totality of the circumstances, we first note that the police failed to obtain a search warrant for the premises and that Ms. Thomas refused to sign a consent to search form. Next we will parse the above statement from which Detective Valerio deduced consent to search.

In his first query, Valerio sought to confirm that he had received Thomas's consent to search to which she answered "that's up to you", and "[j]ust go." Neither of these statements positively and unequivocally demonstrate consent to search. Thomas's first response – "that's up to you" – suggests indecision on her part. Her second response – "[j]ust go" – is likewise equivocal in that a rational person might interpret it as permission to "go ahead and search", or as Thomas suggests, that she wanted the police out of her home. The latter interpretation appears quite plausible in that the police carried out the arrest and seizure at around 2 a.m. Obviously harboring similar doubts as to Ms. Thomas's consent, Valerio responded by asking "you don't care?", to which Thomas replied "Uh-huh." Again, we cannot impute consent to this response. Assuming that "uh-huh" means "yes", her response could mean that she either objected, i.e., "yes, I do care", or that she consented, i.e., "no, I don't care."

Not yet assured of consent, Valerio again asked "are you sure?" to which Thomas replied "I don't have nothing to hide"; "I don't know." Clearly, neither of these two statements conferred consent to search. Realizing this, Valerio then asked "so its okay if we go look in your son's room?" to which Thomas again responded "uh-huh." While this final reply of "uh-huh"appears to provide Thomas's consent to search, we feel that her subsequent testimony on cross examination confirms such consent. During this testimony the State asked whether she heard herself, in the conversation recorded by Detective Valerio, giving the officers permission to search Appellant's room to which she replied "[w]ell, he kept bribing me to search it; and I said do what you got to do so you can hurry up and get out of here." Based on the last two statements by Thomas, we conclude that the State raised positive and unequivocal proof of her consent to search Appellant's room. We overrule Appellant's second point of error.

Article 38.23

In his fourth point of error, Appellant contends that the trial court erred by refusing to submit a proper charge, under Article 38.23 of the Code of Criminal Procedure, regarding both Thomas's consent to search Appellant's room and her authority to consent to the search. Specifically, Appellant argues that the court's charge was nothing more than an abstract statement of Texas search and seizure law which failed to apply the law to the facts of the case. Before reaching the merits of Appellant's fourth point of error, however, we address the State's claim that Appellant waived this point by failing to object to the State's first reference to the gun.

Preservation of error for appellate review requires that the complaining party enter a timely and specific request, objection, or motion and obtain a ruling thereon. TEX. R. APP. P. 33.1(a)(1). Citing *Jackson v. State*, the State argues that Appellant waived his right to a jury instruction under Article 38.23 as he did not object to the prosecutor's reference to the gun until after two witnesses were shown the gun and identified it. *See Jackson v. State*, 888

S.W.2d 915 (Tex. App. – Houston [1st Dist.] 1994, no writ). We do not agree. In *Jackson*, the appellant challenged a conviction for possession of cocaine, arguing that the police obtained the drugs as a result of an illegal search and seizure. *See Id*. at 913. On appeal, the court found that Jackson had waived the right to complain about the admission of the drugs and various paraphernalia by his failure to object when the State first tendered the items into evidence. *Id*. at 914. The facts of the instant case, however, do not lend themselves to the same outcome as *Jackson*.

On the morning of trial, and outside the hearing of the jury, the trial court held a pretrial conference concerning Appellant's motion to suppress the gun found by police in his bedroom. During this conference, the prosecution informed the trial judge that any reference to the gun would be for demonstrative purposes only and that other references to the gun as the one used by Appellant would occur after the predicate had been laid and its admissibility ruled upon. Appellant agreed and stated that he would enter his objection to the gun's admissibility when the State proffered such evidence. An examination of the record shows that this is precisely what occurred. While the prosecutor did elicit identification testimony concerning the gun from two witnesses prior to Appellant's objection, she did not offer the gun into evidence nor did the court rule on its admissibility. Accordingly, Appellant's later objection to the admissibility of the gun was timely pursuant to Rule 33.1.

Having found that Appellant did not waive his right to a jury instruction under Article 38.23, we now address his claim that the instruction given by the court was deficient. Article 38.23 provides the following:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was

> obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. Art. 38.23(a) (Vernon Supp. 2000). It is well settled law that a jury charge, including an instruction under Article 38.23(a), must clearly apply the law to the very facts of the case rather than state mere abstract propositions of law and general statements of principles contained in the statutes. *See Chubb v. State*, 821 S.W.2d 298, 301 (Tex. App. – Corpus Christi 1982, writ ref'd) (citing *Hill v. State*, 640 S.W.2d 879, 883 (Tex. Crim. App. 1982)); *Moreno v State*, 916 S.W.2d 654, 657 (Tex. App.– (Tex. App.—El Paso 1996, no writ).

In the present case, the trial court provided the following Article 38.23(a) instruction to the jury with regard to the gun seized in Appellant's room:

> You are instructed that no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> Therefore, if you believe or have a reasonable doubt thereof that the evidence in question was obtained in violation of any provisions of the Constitution or laws of the State of Texas, or the Constitution or laws of the United States of America, then in such event you will wholly disregard such evidence and not consider it as any evidence whatsoever.

Analyzing the trial court's article 38.23 instruction, we note that, with the exception of the first four words, its first paragraph represents a verbatim recitation of the initial paragraph of article 38.23(a) . Notably absent in the first paragraph is any reference to the search and seizure principles of Texas and Federal law. It utterly fails to provide the jury with any guidance regarding concepts of search and seizure and represents nothing more than an abstract proposition of law. The second paragraph of the court's charge likewise borrows heavily from the second paragraph of Article 38.23 and completely fails to raise any facts which the jury might apply to the law of search and seizure. Taken as a whole, the trial court's article 38.23 portion of the charge was little more than a reprint of the same provision found in the Code of Criminal Procedure and as such fails to "clearly apply the law to the very facts of the case."

Accordingly, we hold that the trial court erred in its submission of this portion of the jury charge.

Having found error in the charge, we must now determine whether the error requires reversal. In *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App.1985), the court of criminal appeals held that article 36.19 of the Texas Code of Criminal Procedure prescribes the manner in which jury charge error is reviewed on direct appeal. *See Hutch v. State*, 922 S.W.2d 166, 170 (Tex.Crim.App.1996); *Thacker v. State*, 999 S.W.2d 56, 64 (Tex. App. – Houston [14th Dist.] 1999, pet. ref'd). First, an appellate court must determine whether error exists in the jury charge. *Hutch*, 922 S.W.2d at 170. Second, the appellate court must determine whether the error caused sufficient harm to require reversal. *See id.* at 170-71. Whether harm is sufficient to require reversal depends upon whether the error was preserved. *See id.* at 171. Error properly preserved by objection to the charge requires reversal if the error caused any harm. *See id.* If the error was not properly preserved, reversal is not required unless the error caused egregious harm. *See id.* Finally, the Court of Criminal Appeals has expressly held that the harmless error rule of article 36.19 applies to the appellate review of errors predicated upon a disregard of the article 38.23 requirement of a jury instruction concerning evidence allegedly obtained in violation of the law. *Atkinson v. State*, 923 S.W.2d 21, 27 (Tex. Crim. App. 1996).

A review of the record shows that Appellant did timely object to the trial court's failure to include, in the article 38.23 portion of the jury charge, an application of the applicable search and seizure law to the facts of the case. Finding, then, that Appellant properly preserved this jury charge error, we must reverse upon a finding of any harm. To determine whether harm exists, we must evaluate "the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza*, 686 S.W.2d 171. Some harm means any harm, regardless of degree. *Arline v. State*, 721 S.W.2d

348, 351 (Tex.Crim.App.1986). We may affirm cases involving preserved charging error only if no harm has occurred. *Id*. But we must measure the error's harmfulness at least in part against the likelihood that the verdict was actually based on another theory of culpability unaffected by the erroneous charge. *Govan v. State*, 682 S.W.2d 567, 570-71 (Tex.Crim.App.1985), overruled on other grounds, *Brown v. State*, 716 S.W.2d 939, 945 (Tex.Crim.App.1986); *see also Atkinson*, 923 S.W.2d at 27. Thus, Appellant may prevail on appeal only if he shows some actual harm regardless of the theory on which the jury based its verdict.

After careful review of the record we conclude that, without a proper article 38.23 jury instruction, Appellant has shown some harm under the harmless error rule of *Almanza* and article 36.19. Had the trial court submitted a proper charge regarding authority to consent and voluntariness of such consent, the jury could have excluded the gun discovered by police in Appellant's room. Without considering this highly incriminating piece of evidence, the jury might have chosen to believe Appellant's claim that his initial confession of self defense was coerced by his interrogator's threats that, unless he confessed, Appellant would be tried for capital murder and face "the lethal injection." This coercion claim draws additional support from the State's admission that Appellant did not tender the confession in his own writing but instead dictated it to a police detective who then put it in writing for Appellant's signature.

Likewise, the State's witness identification testimony, its third theory of culpability, was tenuous absent consideration of the gun. Testimony given at trial showed that two of the State's key witnesses, Guatero and Rodriguez – both models at a "gentlemen's club" who traded sex with McCulloch for use of one of his employer's cars, lacked credibility and that the jury might not have been persuaded by their testimony. For example, Rodriguez testified that in her initial statement to police on the night of the shooting, she didn't know who shot McCulloch. Three months later Rodriguez then testified that she provided the police with a new statement wherein she implicated Appellant. Guatero likewise testified that she had

initially provided a statement to police on the night of the shooting wherein she failed to implicate Appellant. Like Rodriguez, however, she later met with police and implicated Appellant. Each claimed that their initial statements were the result of death threats by Appellant.

The State's remaining identification witnesses, the complainant McCulloch and Kevin Collesano, provided somewhat tentative identifications. Before positively identifying Appellant, McCulloch testified that "I could see two completely different black people, and I couldn't describe either one of them and give - - and tell a sketch artist how they looked." Collesano likewise identified Appellant at trial but also testified that he was unable to pick Appellant out of the photo arrays he examined on the evening of the shooting. Additionally, Collesano couldn't reconcile his original description of the gunman given to police on the night of the shooting with Appellant's appearance at trial.[1] Added to this was Rodriguez's testimony admitting that she had previously called Appellant, then in jail and awaiting trial, and told him that she had "got some dope fiend . . . to do this incident against Mr. McCulloch", and that Appellant looked like this person.

In summary, we find that the State's evidence of the gun seized in Appellant's room was its strongest theory of Appellant's culpability and one that greatly bolstered the remaining two theories of culpability tendered by the State – witness identification and Appellant's admission. Had the jury been properly instructed under article 38.23 and chosen to disregard evidence of the gun, it is plausible that the jury might have experienced reasonable doubt as to Appellant's

[1] Collesano testified that his original description of the gunman, given on the night of the shooting, was that he had "broad shoulders, wide shoulders, heavy build. His jaw line was distinct . . . he was probably about 5' 8" . . . ." On cross examination, counsel for Appellant, stating that Appellant looked more like 5' 3" to 5' 4", asked Collesano whether Appellant now appeared to be 5' 8" to which Collesano answered "no." Counsel continued, stating that "he doesn't have a protruding jaw, does he?" Collesano replied "what I call protruding, yes sir." Finally, counsel asked "he doesn't have broad shoulders, does he?" Collesano answered "[w]ide, that's what I mean."

guilt based on the tenuous character of the State's witness identification testimony. In the same manner, the jury could also have chosen to believe Appellant's claim that his confession to police resulted from police threats that he would be tried for capital murder unless he confessed. Accordingly, we hold that Appellant has shown some harm under the harmless error rule of article 36.19 of the Texas Code of Criminal Procedure. In light of our holding, we need not reach Appellant's final point of error. Reversed and remanded for a new trial.

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Maurice Amidei
Justice

Judgment rendered and Opinion filed December 7, 2000.

Panel consists of Chief Justice Murphy, Justices Amidei, and Hudson.

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