Opinion filed August 25, 2017

In The

Eleventh Court of Appeals

Nos. 11-15-00196-CR, 11-15-00197-CR, & 1-15-00198-CR

RICKEY WAYNE SPEER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 91st District Court

Eastland County, Texas

Trial Court Cause Nos. 23734, 23735, & 23736

M E M O R A N D U M O P I N I O N

In a single trial, the jury convicted Rickey Wayne Speer of two offenses of violating motor fuel tax requirements, third-degree felonies, in Cause Nos. 23735 and 23736, as well as one offense of state jail felony theft of $1,500 or more but less than $20,000 in Cause No. 23734.[1] At punishment, the jury found two enhancement

[1]*See* TEX. TAX CODE ANN. § 162.405 (West Supp. 2016); TEX. PENAL CODE ANN. § 31.03(e)(4) (West Supp. 2016).

paragraphs to be true in each of the two motor fuel tax cases and assessed Appellant's punishment for the state jail theft at confinement for two years in a state jail facility with a $10,000 fine and for each of the two felonies at confinement for forty years in the Institutional Division of the Texas Department of Criminal Justice.

Appellant argues his appeal of the three convictions in a single brief. He brings four issues on appeal, challenging the trial court's denial of his motion to suppress evidence of the warrantless inspection of items on Appellant's property, the denial of Appellant's requested jury instruction, and limitations on Appellant's voir dire examination. Because the trial court committed no reversible error, we affirm the trial court's judgment in each of the three cases.

Background Facts

Truett Ray Hart testified that his property had been broken into a number of times. On September 2, 2014, he discovered a small black utility trailer parked on his Eastland County farm near the fence that separated his property from that portion of his neighbor Mike McPhail's property where McPhail stored equipment, fencing materials, and feed equipment. Hart set up game cameras to catch activity around the trailer.

After midnight that night, he went to check on the trailer. When he arrived, he saw two pickups. One was a white Chevrolet or GMC with a flat tire; it was parked on the side of the road. A man was beside that pickup. The other pickup was on Hart's property, parked in the weeds behind his grandmother's old house. Hart said that the pickup did not belong there. The utility trailer had been pushed closer to the fence and some of McPhail's fencing materials had been loaded onto it. Hart testified that he fired his shotgun and yelled for whomever was there to come out. There was no response. That pickup was later found to be registered to Appellant. Hart called the Eastland County Sheriff's Department and the Texas Department of Public Safety.

Chief Deputy Sheriff Donald Braley responded to Hart's call. Deputy Braley testified that a 55- to 60-gallon steel fuel tank was found abandoned on Hart's property, in addition to the utility trailer. The tank contained red, off-road diesel fuel. Hart and Deputy Braley looked at pictures from Hart's game camera that showed two unidentified men working around the utility trailer loading McPhail's fencing materials. One of the men had the same body build as Appellant. Deputy Braley said Hart told him that various parts, including the wheels, had recently been stolen from his four-wheeler. Deputy Braley also testified that he traced the white Ford pickup that had been abandoned on Hart's property to Appellant.

Later that same day, Deputy Braley drove to the property in Comanche County where Appellant kept the trailer in which he lived to tell Appellant about finding his pickup. When he arrived, no one was at home. Over objection, Deputy Braley described what he saw and photographed while he was on the property, including a white Chevrolet pickup that was similar to the one that Hart said he had seen on the highway in front of his house the night before. Deputy Braley denied that he searched any person or building on the property that day. When Deputy Braley ran the tags on the white Chevrolet pickup, he found that it was registered to Ray Wells.

Deputy Braley photographed various objects located near Appellant's trailer and at the entrance to the property where he lived. Deputy Braley went back to his office to call the State Comptroller's Office. He asked them to send an inspector to Appellant's residence to test the various tanks he had seen on Speer's property for red diesel.

Kenneth Lee Rainey testified that he had bought red diesel and various fencing materials from both Wells and Appellant. Rainey denied knowing that the materials were stolen or that his red-diesel purchases were illegal. He did admit, however,

that there were no shipping documents or monthly invoices and that the purchases were exclusively cash transactions. Rainey testified that he had asked Wells and Appellant whether the diesel and fencing materials were "hot" and that the men denied that they were. Rainey said he believed them because they made no effort to hide the deliveries. Rather, they made the deliveries to him in the middle of town in the middle of the day. Rainey was on probation for state jail felony theft.

In the hearing on Appellant's motion to suppress, Brett Tanner Froh was the only witness called to testify. He testified that he was an investigator with the State Comptroller Public Accounts State Police. At the time of trial, he had been a certified peace officer with the Criminal Investigation Division for about a year and a half. On September 4, 2014, Investigator Froh was contacted by Eastland County Sheriff's Department personnel about two suspects believed to have stolen farm equipment and red diesel fuel. The sheriff's department had responded to a call from a farmer about some people on his land. The people ran away and left their pickup behind. Records showed that the pickup belonged to Appellant. Investigator Froh went to the land in Comanche County, where Appellant lived, to investigate with officers from the Eastland County Sheriff's Department and the Comanche County Sheriff's Department. Investigator Froh said that it was standard practice to take law enforcement backup for comptroller employees' safety and that he had been warned that Appellant and Wells "had a past." They found a tank containing red diesel on the property.

Investigator Froh said that the sheriff's department had called him because the comptroller handles motor fuel tax inspections. Investigator Froh testified that Section 162.008 of the Motor Fuel Tax Code[2] gives the comptroller inspection authority to go out to any premises where they believe fuel "might be manufactured,

[2]Tax § 162.008.

stored, made, held or offered for sale, to do an inspection under the Motor Fuel Tax Code." Investigator Froh's job was to go out and look for tanks, gauge the tanks, and take samples. When asked whether he had conducted his investigation pursuant to a warrant, Investigator Froh explained that he did not need a warrant because it was actually a criminal offense for a person to refuse to allow him to perform an investigation.

The officers also contacted Wells, who lived on and either leased or owned the Comanche County property where Appellant lived. Wells told the officers that the tanks belonged to Appellant, who lived in a trailer at the back of the property. Investigator Froh located Appellant and told Appellant that he was there to conduct a motor fuel tax inspection. Appellant replied that he wanted to talk to his attorney. Investigator Froh told Appellant that he was not under arrest and that he was free to contact his attorney but that the inspection would proceed nevertheless. Appellant told Investigator Froh that there was red diesel in the large GMC Kodiak truck on the property. Appellant denied to Investigator Froh that he had driven the truck on a public roadway but admitted to a sheriff's deputy that he had driven it on a public roadway. Red diesel is untaxed diesel to be used exclusively for agricultural purposes. Investigator Froh also found 100 gallons of red diesel in a tank near the truck, and next to that tank, a smaller container with red diesel. On a flatbed trailer, there was an empty 500-gallon tank that had residue of what appeared to Investigator Froh to be red diesel. Investigator Froh testified that thieves use similar tanks with pumps and hoses to steal fuel. Appellant signed the inspection form, and Investigator Froh left. On September 18, Investigator Froh secured two "third-degree" warrants from Eastland County for Appellant's arrest. He was arrested in Comanche County a few days later. Neither Appellant nor Wells had any permit to sell or transport red diesel or any other motor fuel. Appellant denied ownership of the 500-gallon tank.

Motion to Suppress

In his first and second issues, Appellant challenges the trial court's denial of his motion to suppress. Appellant does not argue the infirmity or unconstitutionality of the Tax Code provisions the State relies on to justify the search. Indeed, in his brief, Appellant specifically assures this court:

> Here, Speer does not argue that the statutory framework of the applicable tax code is unconstitutional in its provision for inspection of premises where diesel is sold. Neither does he argue that such inspections require probable cause.

At the same time, however, Appellant argues that, before Investigator Froh conducted his inspection, Deputy Braley conducted an unlawful, warrantless search of the premises and that the search was not supported by probable cause and exigent circumstances and violated Appellant's legitimate expectation of privacy. Appellant argues that Investigator Froh's subsequent inspection:

> [C]onstituted a continuation and expansion of Braley's illegal search regardless of the regulatory scheme provided by the applicable statutes. In light of the initial illegality of Braley's search, the applicability of the statutory scheme becomes irrelevant.

We interpret Appellant's argument as a complaint that the results of Investigator Froh's inspection should be suppressed because Investigator Froh's inspection was the fruit of Deputy Braley's unlawful search.

Only Investigator Froh testified at the hearing on Appellant's motion to suppress. No evidence of Deputy Braley's activity relating to any search was before the trial court in the hearing on the motion. Investigator Froh could not testify to the actions of Deputy Braley that occurred when Investigator Froh was not present. Throughout the trial, however, Appellant continued to object to Investigator Froh's testimony. We shall therefore liberally construe Appellant's brief and consider all evidence relating to Appellant's complaint.

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review.[3] We give almost total deference 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, but we review de novo application-of-law-to-fact questions that do not turn on credibility and demeanor.[4] When, as here, the trial court does not issue or announce findings of fact, findings that support the trial court's ruling are implied if the evidence, viewed in a light most favorable to the ruling, supports those findings.[5]

The State argues that Appellant failed to preserve his contention that Deputy Braley needed exigent circumstances in order to enter Wells's property to make contact with Appellant. We understand Appellant's argument to be that the State did not justify a warrantless search, which requires both probable cause and exigent circumstances.[6] The threshold issue is whether Deputy Braley's actions constituted a search and whether statements made by Appellant were the result of custodial interrogation. These were not the issues Appellant raised before the trial court in his motion to suppress. They were, however, issues in the case-in-chief. The Texas Court of Criminal Appeals has cautioned:

> The standards of procedural default . . . are not to be implemented by splitting hairs in the appellate courts. As regards specificity [of an objection], all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to

[3]*Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[4]*Amador*, 221 S.W.3d at 673; *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).

[5]*Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013).

[6]*Id.* at 151.

> understand him at a time when the trial court is in a proper position to do something about it.
>
> We have extended this concept even so far as to hold that a party need not state his objection with specificity in order to preserve error so long as the record otherwise makes it clear that both the trial court and the opposing party understood the legal basis. After all, the reason that any objection must be specific in the first place is so that the trial court can avoid the error or provide a timely and appropriate remedy, and the opposing party has an opportunity to respond and, if necessary, react. So long as it appears from an appellate record that these policies have been satisfied, it should not matter to the appellate court whether the objecting party used a particular "form of words"—or any particular words at all, if meaning is adequately conveyed by context.[7]

In the hearing on the motion to suppress, it was made clear to the trial court that Investigator Froh was first contacted in connection with suspected criminal activity involving theft of farm equipment and theft of red diesel fuel. He agreed that it was not a routine inspection. Deputy Braley's actions were only minimally presented to the trial court, and it was clear that Appellant was claiming that the officers had improperly used Investigator Froh to perform a more thorough search in furtherance of their criminal investigation. We shall, therefore, address Appellant's contentions in the interest of justice.

On appeal, Appellant argues that Deputy Braley did conduct a search of the property where his trailer was located and that the search provided the information leading to Investigator Froh's being called to the property to conduct an investigation. As the fruit of the unlawful search, Appellant urges, the violations viewed by Investigator Froh during Investigator Froh's investigation and inculpatory statements of Appellant must be suppressed.

[7] *Thomas v. State*, 408 S.W.3d 877, 884–85 (Tex. Crim. App. 2013) (citations omitted) (alterations in original) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)).

The State correctly notes that an officer is permitted to enter the curtilage of a house in an effort to contact its occupants when the occupants have not manifested an intent to restrict access, such as by locking a gate or posting a sign instructing a visitor not to enter, and when the officer does not deviate from the normal path of traffic.[8]

The record reveals that the trailer in which Appellant lived was at the back of the property. Nothing in the record suggests any notice that entry on the land was forbidden, and nothing suggests that Deputy Braley deviated from the normal path of traffic. The pickup and other equipment were in plain view. We have closely examined the record and can detect no evidence of Deputy Braley's conducting a search of any other area in which Appellant had a legitimate expectation of privacy. The police are not required to close their eyes to avoid seeing objects in plain view, either from the road or on the path to the residence of the person the police are attempting to contact.

While Deputy Braley did look inside a tank that contained red diesel, that tank and the white pickup belonging to Speer were apparently abandoned on Hart's property and were not located on the property where Appellant lived. Hart had called the sheriff's department and asked them to investigate, thereby inviting Deputy Braley and the other officers onto his property. Deputy Braley denied conducting any searches on the property where Appellant lived, and no evidence controverted his denial. There is no evidence in the record that Investigator Froh or any law enforcement officer entered Appellant's home or searched Appellant's person.

As this court has explained: "For purposes of the Fourth Amendment, a 'search' occurs when the government violates a subjective expectation of privacy

[8]*Buchanan v. State*, 129 S.W.3d 767, 773 (Tex. App.—Amarillo 2004, pet. ref'd).

that society considers objectively reasonable."[9] No person can reasonably have an expectation of privacy in property he voluntarily abandons. Thus, "when a defendant voluntarily abandons property, he lacks standing to contest the reasonableness of the search of the abandoned property."[10] The record reflects that the tank and pickup had been abandoned on Hart's property.

When Investigator Froh and Deputy Braley went to the property where Appellant lived, they spoke with Wells, the owner of the property or the person who was named on the lease. Wells denied any connection to the large trailer-mounted tank or to any smaller tank or other equipment near Speer's trailer. Speer admitted to Investigator Froh that the GMC Kodiak truck contained red diesel that he had taken from his father without permission.

No statement made by Appellant was the result of custodial interrogation. There is no evidence in the record that any statement by Appellant was anything other than voluntary or volunteered. Appellant does not rely on Article 38.22 of the Code of Criminal Procedure[11] or argue that any statement by Appellant was not voluntary. Rather, he relies on the Fourth Amendment to the Constitution of the United States and Article I, § 9 of the Texas Constitution. That is, he contends that the statements were secured as a result of a violation of his privacy rights. For the reasons discussed above, we hold that neither any statement of Appellant nor any evidence in the case now before this court was fruit of an unlawful search.

The argument emphasized by Appellant, both before the trial court and on appeal, is that Investigator Froh's search violated Fourth Amendment privacy

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[9]*State v. Rodriguez*, No. 11-13-00277-CR, 2015 WL 5714548, *2 (Tex. App.—Eastland Sept. 24, 2015, pet. granted) (citing *Kyllo v. United States*, 533 U.S. 27, 33 (2001)).

[10]*Matthews v. State*, 431 S.W.3d 596, 608 (Tex. Crim. App. 2014) (quoting *Swearingen v. State*, 101 S.W.3d 89, 101 (Tex. Crim. App. 2003)).

[11]*See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (West Supp. 2016).

protections because he had no warrant and there was no evidence of exigent circumstances, even if the probable cause provided by Deputy Braley's warrantless entry on and exploration of the property where Appellant's trailer was located was lawful. The State argues, and Appellant does not disagree, that Section 162.008 of the Tax Code permits warrantless searches. This Tax Code provision provides in pertinent part:

> For the purpose of determining the amount of tax collected and payable to this state, the amount of tax accruing and due, and whether a tax liability has been incurred under this chapter, the comptroller may:
>
> > (1) inspect any premises where motor fuel, crude petroleum, natural gas, derivatives or condensates of crude petroleum, natural gas, or their products, methyl alcohol, ethyl alcohol, or other blending agents are produced, made, prepared, stored, transported, sold, or offered for sale or exchange;
> >
> > (2) examine the books and records required to be kept and records incident to the business of any license holder or person required to be licensed, or any person receiving, possessing, delivering, or selling motor fuel, crude oil, derivatives or condensates of crude petroleum, natural gas, or their products, or any blending agents;
> >
> > (3) examine and either gauge or measure the contents of all storage tanks, containers, and other property or equipment; and
> >
> > (4) take samples of any and all of these products stored on the premises.

Because the lawfulness of the search pursuant to these statutory provisions was not contested before the trial court and is not challenged before this court, we do not address the lawfulness of a search pursuant to this section of the Tax Code. We overrule Appellant's first and second issues.

Jury Instruction Regarding Illegally Obtained Evidence

In his third issue, Appellant argues that the trial court reversibly erred when it denied his requested jury instruction on illegally obtained evidence. In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends.[12] If error occurred, whether it was preserved determines the degree of harm required for reversal.[13] The State again argues that Appellant failed to preserve his complaint. We disagree. Appellant's argument, both at trial and on appeal, was clearly that, after Deputy Braley realized Appellant was not at home, he wandered about Speer's residence opening diesel tanks and photographing various items discovered in his visit.

Appellant correctly argues that, when a party raises each element of a defense, he is entitled to a jury instruction on that issue whether that evidence is "strong, weak, contradicted, unimpeached, or unbelievable."[14] The facts in the case now before this court, however, do not establish each element of the defense Appellant attempted to raise.

The facts in this case are not disputed. The disputes involve the law applicable to the case. The jury is the trier of fact. The jury does not determine law.[15] We hold that, on the record before this court, Appellant was not entitled to a jury instruction on illegally obtained evidence. We, therefore, overrule Appellant's third issue.

Limitations on Voir Dire

In his fourth issue, Appellant argues that the trial court improperly limited his voir dire of the jury panel when the trial court sustained the prosecution's objection

[12] *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

[13] *Id.*

[14] *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim .App. 2004) (quoting *Wilkerson v. State*, 933 S.W.2d 276, 280 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd)).

[15] *See Madden v. State*, 242 S.W.3d 504, 509–11 (Tex. Crim. App. 2007).

to his attempt to inquire how the panel felt about responding to an Article 38.23 instruction. Article 38.23 provides in relevant part:

> 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.[16]

The State characterizes the inquiry as an inquiry regarding the constitutionality of the Tax Code. Appellant characterizes the inquiry as an inquiry into the jury panel's ability to follow an instruction to disregard illegally obtained evidence. He relies on *Nunfio v. State*[17] to support his argument that the trial court improperly limited his voir dire on that issue. *Nunfio*, however, was overruled by the Texas Court of Criminal Appeals in *Barajas v. State*.[18] The *Barajas* court reiterated earlier statements that an overly broad question may constitute a fishing expedition.[19] A trial court is within its discretion to prevent fishing expeditions. At the same time, an attorney may not ask overly specific questions, but attorneys must ask follow-up questions after making broad inquiries that were apparently viewed as appropriate when appellate courts found waiver for failure to ask such follow-up questions.[20]

When reviewing the trial court's refusal to allow a particular line of questioning during voir dire, we apply an abuse-of-discretion standard.[21] Litigants

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[16]TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005).

[17]*Nunfio v. State*, 808 S.W.2d 482, 484 (Tex. Crim. App. 1991).

[18]*Barajas v. State*, 93 S.W.3d 36, 40 (Tex. Crim. App. 2002).

[19]*Id.* at 42.

[20]*See, e.g.*, *Webb v. State*, 232 S.W.3d 109, 113–14 (Tex. Crim. App. 2007); *Brasher v. State*,139 S.W.3d 369, 373–74 (Tex. App.—San Antonio 2004, pet. ref'd); *see also Goff v. State*, 931 S.W.2d 537, 545 (Tex. Crim. App. 1996).

[21]*See In re Commitment of Hill*, 334 S.W.3d 226, 228 (Tex. 2011) (per curiam).

have a right to question potential jurors to uncover any bias or prejudice in order to intelligently exercise peremptory strikes. Consequently, abuse of discretion in this context turns on the propriety of the question.[22]

> When the trial court's denial of the right to ask a proper question prevents the litigant from determining whether grounds exist to challenge a potential juror for cause or prevents the litigant from intelligently using peremptory strikes, then the trial court abuses its discretion.[23]

While Appellant was not entitled to his requested jury instruction on illegally obtained evidence, it was only because the evidence did not properly raise the issue. That is, it was not until all the evidence had been presented that the trial court could know that the issue had not been raised. During voir dire, however, whether the evidence necessary for prosecution had been lawfully obtained was still an open question and a proper area for inquiry.

Appellant referred to the State's mention of the Tax Code provision that permits warrantless searches; then he asked the veniremembers whether they had heard of the Fourth Amendment. The State objected to the line of questioning to the extent Appellant may go into jury nullification. Appellant clarified the purpose of his questions, stating that he was going to ask for an Article 38.23 instruction. The trial judge responded, "I understand, but his objection is well taken. I will sustain the objection." At this point, Appellant had clearly stated that he intended to go into an area of permissible voir dire and did not intend to discuss jury nullification. The trial court erred in preventing this line of questioning. Our inquiry, however, does not end there.

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[22]*Id.* at 228–29.

[23]*State v. Treeline Partners, Ltd.*, 476 S.W.3d 572, 574 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989) (op. on reh'g)).

The Texas Court of Criminal Appeals instructs us to consider this type of voir dire error as nonconstitutional error under Rule 44.2(b) of the Texas Rules of Appellate Procedure.[24] Under Rule 44.2(b), we disregard all nonconstitutional errors that do not affect Appellant's substantial rights. A substantial right is affected "when the error has a substantial and injurious effect or influence in determining the jury's verdict."[25]

Although voir dire on an anticipated jury instruction is ordinarily a proper area of inquiry, once both sides have rested and closed and the possibility of the jury's receiving the instruction no longer exists, it is not immediately apparent how Appellant could be harmed by the trial court's sustaining the State's objection to the predicate question inquiring whether the members of the venire had heard of the Fourth Amendment to the Constitution of the United States. Nor does Appellant explain to us how this ruling by the trial court has actually harmed him.

Under the limited facts of this case, we hold that Appellant was not harmed by the trial court's error in sustaining the State's objection to a proper area of inquiry. We overrule Appellant's fourth issue.

Having overruled Appellant's four issues on appeal, we affirm the trial court's judgment in each cause.

August 25, 2017 PER CURIAM

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Dauphinot[26]

Bailey, J., not participating.

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[24]*Sanchez v. State*, 165 S.W.3d 707, 713 (Tex. Crim. App. 2005); *see* TEX. R. APP. P. 44.2(b).

[25]*Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001).

[26]Lee Ann Dauphinot, Retired Justice, Court of Appeals, 2nd District of Texas at Fort Worth, sitting by assignment.