AFFIRMED; Opinion Filed August 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00879-CR

DAVID GASTON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 15th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 069347

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Nowell

A jury convicted appellant of driving while intoxicated, third or more. In two issues, appellant argues the trial court erred by denying his motion to suppress and including an improperly worded instruction in the jury charge. We affirm the trial court's judgment.

MOTION TO SUPPRESS

After appellant was arrested for driving while intoxicated, his blood was drawn pursuant to a warrant and tested; his blood-alcohol content was 0.282. In his first issue, appellant argues the trial court erred by denying his motion to suppress

the blood test results because the police officer's affidavit in support of the warrant did not establish probable cause. Appellant asserts the affidavit omits material facts and includes false statements that were intentionally made in reckless disregard for the truth. The State responds that appellant failed to show that any incorrect statements were made knowingly, intentionally, or with reckless disregard for the truth.

Under both the United States and Texas constitutions, a search warrant to extract blood from a person who the police believe committed an intoxication offense must be based on probable cause that evidence of that offense will be found through the execution of a blood-draw search warrant. *Hyland v. State*, 574 S.W.3d 904, 910 (Tex. Crim. App. 2019) (citing U.S. CONST. amend. IV; TEX. CONST. art. I, § 9). Probable cause "exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality of a crime or evidence pertaining to a crime will be found." *Id.* (quoting *Washington v. State*, 660 S.W.2d 533, 535 (Tex. Crim. App. 1983)). When determining whether probable cause exists to support the issuance of a search warrant, the magistrate considering the probable cause affidavit is confined to the four corners of the search warrant affidavit as well as to logical inferences the magistrate might draw based on the facts contained in the affidavit. *Id.* at 910-11. The determination of whether probable cause exists is a "totality of the circumstances" inquiry based on the magistrate's reasonable reading of the

affidavit, but the magistrate may not act as a mere "rubber stamp." *Id.* at 911 (quoting *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012)).

Generally, a reviewing court applies a presumption of validity to a magistrate's determination that a search warrant affidavit supports a finding of probable cause. *Id.* (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978)). As a result, when reviewing a magistrate's probable cause determination, a reviewing court ordinarily must "view the magistrate's decision to issue the warrant with great deference." *Id.* (quoting *Jones v. State*, 364 S.W.3d 854, 857 (Tex. Crim. App. 2012)). When a reviewing court examines a magistrate's probable cause determination, it "must uphold the magistrate's decision so long as the magistrate had a substantial basis" for the finding. *Id.* However, the presumption of validity may be overcome if the defendant can show the presence of false statements in the search warrant affidavit that were either made deliberately or with reckless disregard for truth. *Id.* (citing *Franks*, 438 U.S. at 171). Such statements must be purged from the affidavit, and it is then up to the reviewing judge to determine whether probable cause exists absent the excised statements. *Id.* (citing *Franks*, 438 U.S. at 171-72).

To succeed in suppressing evidence based on *Franks v. Delaware*, an appellant must prove by a preponderance of the evidence both that the officer intentionally or recklessly made false statements in the warrant affidavit and the affidavit's remaining content (without the false statements) could not support a finding of probable cause. *Woodberry v. State*, No. 05-18-00728-CR, 2019 WL

2863867, at *4 (Tex. App.—Dallas July 2, 2019, no pet.) (mem. op., not designated for publication) (citing *Franks*, 438 U.S. 155). When reviewing a trial court's ruling on a *Franks* motion, we give great deference to the trial court as the sole fact-finder and judge of the witnesses' credibility and weight of the evidence, and its ruling will be overruled only if it is outside the bounds of reasonable disagreement. *Id.* (citing *Hinojosa v. State*, 4 S.W.3d 240, 247 (Tex. Crim. App. 1999); *Edwards v. State*, No. 05-98-00974-CR, 2000 WL 1048520, at *4 (Tex. App.—Dallas July 31, 2000, pet. ref'd) (not designated for publication)).

After appellant filed his motion to suppress, the trial court conducted a *Franks* hearing. Officer Michael Free testified at the hearing. On February 27, 2018, Free responded to a call from the Spring Market, a grocery store, about a potential counterfeit bill. While at the Spring Market, he overheard a phone call from a store employee to the store manager; the employee told the manager: "The guy that we always have to turn away for being a drunk, he just pulled in the parking lot and almost hit me." After overhearing the call, Free went outside the store where he saw a parked car; he believed the ignition was off, but the headlights were on. A man, later identified as appellant, exited the car from the driver's seat and went into the store. No other person was nearby.

Free spoke to appellant inside the store and noticed appellant had slurred speech, was unsteady on his feet, and smelled of alcohol; appellant admitted he had been drinking throughout the day. Appellant initially denied driving the vehicle.

However, Free testified that later: "[w]e were talking outside and he muttered that he did not know why we were arresting him, that his driving was not that bad." Appellant was in possession of the keys to his car.

Free completed a preprinted form affidavit for a search warrant to obtain appellant's blood. The form includes multiple numbered paragraphs, each containing a brief statement; some paragraphs include blank lines for the affiant to use to conform the affidavit to the specific facts in a given case. As completed by Free, the affidavit states:

> 3. The suspect has possession of and is concealing human blood, which constitutes evidence that the suspect committed the offense described in paragraph 4 below.
>
> 4. On or about the 27 day of Feb., 2018, the suspect did then and there operate a motor vehicle in a public place in Grayson County, Texas while intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, controlled substance, drug, or a dangerous drug into the suspect's body.[1]
>
> 5. The suspect was operating a motor vehicle in a public place in Grayson County, Texas on the above date at approximately 1845 a.m./p.m. based on the following facts:
>
> __√__ A. I observed the suspect doing so.
>
> __√__ B. The suspect admitted to me that the suspect had been operating a motor vehicle in a public place in Grayson County, Texas just ____ minutes prior to my arrival.

[1] The entirety of paragraph 4 is preprinted language except the date, which Free entered into the form by hand.

> ____ C. A witness, (name and address) told me that he/she witnessed the suspect operating a motor vehicle in a public place in Grayson County, Texas just ____ minutes prior to my arrival.[2]

Additionally, Free's affidavit states: "Call from citizen that subject ran them off road in Spring Market parking lot. Unsteady on Feet. Slured [sic] speech. Odor of alcohol about his breath. Refused to take SFST test. Admitted to have been drinking [sic] alcohol throughout the day."

Appellant challenged two statements in Free's probable cause affidavit: (1) Free observed appellant operating a motor vehicle in a public place in Grayson County (paragraph 5A), and (2) appellant admitted to Free that he was operating a motor vehicle in a public place minutes before Free arrived (paragraph 5B). Appellant also challenged the affidavit for facts Free omitted: Free did not state the caller was a store employee and he did not speak to the caller, the officers were at the store on an unrelated case, and he was inside the store when he observed appellant.

Free testified he selected paragraph 5A based on the totality of the circumstances: he overheard the store employee's statement that the "guy we always have to turn away for being drunk . . . almost hit me," appellant exited the driver's side of the vehicle less than a minute after Free overheard that call, appellant stated his driving "was not that bad," and appellant had his car keys in his pocket. Free

[2] The entirety of paragraph 5 is preprinted language except the time and the check marks, which Free entered into the form by hand. He did not complete the blank in subsection B.

testified he believed his representation that he saw appellant driving was an honest description of what happened. The following exchange occurred at the hearing during Free's testimony:

> Q. Did you see the defendant operating a motor vehicle in a public place?
> A. I do believe I did.
> . . . .
> Q. What was the basis for that?
> A. I not only heard the call, but within a minute I exited the store and I observed Gaston exiting the vehicle.
> Q. You do not make reference to overhearing the call in your affidavit, do you?
> A. No, ma'am.
> Q. My question is, what is it that you are basing this statement on in your affidavit that you witnessed Mr. Gaston operating a motor vehicle in a public place?
> A. I believe that he was operating a motor vehicle in a public place.
> Q. I'm not asking what you believe. I'm asking you what facts you base that belief on.
> A. The whole circumstance. I overheard the conversation. I exited the store. I observed him exiting the vehicle. I didn't observe anybody else around the vehicle. Also, the manager of the store identified Gaston.

Free also testified he selected paragraph 5B on the form affidavit based on appellant's inquiry: "Why are you arresting me, my driving wasn't that bad."

Free acknowledged he did not include all relevant facts in his affidavit, but testified he was not attempting to cause the magistrate to sign an affidavit under a false assumption. He testified: "I believe I put everything in the affidavit truthfully" and "I don't think anything in there [the affidavit] was false." He also testified the statements he made were not knowingly or intentionally false, they were not made

in reckless disregard of the truth considering the totality of the circumstances, and everything he included was based on his observations.

At appellant's request, the trial court entered findings of fact and conclusions of law. The trial court found appellant did not establish by a preponderance of the evidence that Free intentionally and knowingly made a false statement in disregard for the truth with respect to paragraph 5A of the affidavit. Rather, based on the totality of the circumstances, the trial court found: "Officer Free had a good faith belief that he observed the defendant operating a motor vehicle." The trial court likewise found appellant did not establish by a preponderance of the evidence that Free knowingly and intentionally made a false statement in reckless disregard for the truth with respect to paragraph 5B.

Having reviewed the record, we conclude that, based on Free's testimony, the trial court could have concluded Free did not intentionally or knowingly provide incorrect information or fail to include information in the affidavit. Rather, the trial court could have credited Free's testimony that he believed he saw appellant operate the vehicle, "I believe I put everything in the affidavit truthfully," and "I don't think anything in there [the affidavit] was false." Giving great deference to the trial court as the sole fact-finder and judge of the witness's credibility and weight of the evidence, we cannot conclude the trial court's ruling was outside the bounds of reasonable disagreement. The trial court did not err by determining appellant did not meet his burden to prove by a preponderance of the evidence both that Free

intentionally or recklessly made false statements in the warrant affidavit and that the affidavit's content could not support a finding of probable cause. We overrule appellant's first issue.

JURY CHARGE

Appellant's second issue also concerns Free's affidavit in support of the search warrant. In his second issue, appellant asserts the trial court erred by including an incorrect jury instruction. When we review a jury charge, we first determine whether error occurred. *See Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). If error did occur and it was preserved at trial, then we must reverse if the error caused some harm. *Rogers v. State*, 550 S.W.3d 190, 191 (Tex. Crim. App. 2018). "Some harm" means actual harm and not merely a theoretical complaint. *Id.* There is no burden of proof associated with the harm evaluation. *Id.*

1. Article 38.23 & Jury Instructions

Appellant requested a jury instruction pursuant to article 38.23 of the code of criminal procedure, but objected to the language the trial court included in the charge. Article 38.23 provides:

> (a) 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 of 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. art. 38.23(a). The jury charge states in part:

> No evidence obtained by an officer in violation of the United States or Texas Constitutions or the laws thereof are [sic] admissible at trial against a defendant.
>
> The law provides that a peace officer may apply for a search warrant to draw blood from a person by submitting a sworn affidavit of facts to a judge or magistrate. In the affidavit, the peace officer may use hearsay information and make reasonable deductions or inferences from facts based on his training, education and experience.
>
> If a defendant establishes by a preponderance of the evidence that a peace officer intentionally or knowingly, or with reckless disregard for the truth, made a false statement or statements in the affidavit for a search warrant signed by that officer, then the search warrant is void and evidence obtained from that warrant cannot be considered as evidence by the jury. Evidence only showing such statements were made with negligence or innocent mistake are not sufficient to void the warrant.
>
> The term "preponderance of the evidence" means the greater weight of credible evidence.
>
> The term "reckless disregard for the truth" means that the peace officer who signed the affidavit for a search warrant had either obvious reasons to doubt the veracity of the information or in fact entertained serious doubt as to the truth of the statement.
>
> Therefore, if you believe by a preponderance of the evidence that when Officer Free indicated in the affidavit for search warrant that the suspect was operating a motor vehicle in a public place in Grayson County, Texas on the above date at approximately 1845 a.m./p.m., based on the following facts: (A.) I observed the suspect doing so; and (B.) The suspect admitted to me that the suspect had been operating a motor vehicle in a public place in Grayson County, Texas just ____ minutes prior to my arrival, and that such statements were false, and that Officer Free submitted such statements intentionally or knowingly or with reckless disregard for the truth of those statements, and not with negligence or by innocent mistake, and such statements were not

> reasonable inferences or deductions based on the officer's training, education or experience, then in such event you will wholly disregard any evidence obtained by the peace officer(s) in this case pursuant to the search warrant and not consider it for any purpose.

Appellant argues the charge improperly placed the burden on him ("If a defendant establishes by a preponderance of the evidence . . ."); misapplied the law in a manner calculated to confuse the jury ("In the affidavit, the peace officer may use hearsay information and make reasonable deductions or inferences from facts based on his training, education and experience."); and included an improper comment on the weight of the evidence ("Evidence only showing such statements were made with negligence or innocent mistake are not sufficient to void the warrant.").

2. Analysis

To be entitled to an article 38.23(a) instruction, "the defendant must show that (1) an issue of historical fact was raised in front of the jury; (2) the fact was contested by affirmative evidence at trial; and (3) the fact is material to the constitutional or statutory violation that the defendant has identified as rendering the particular evidence inadmissible." *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012). When a disputed, material issue of fact is successfully raised, the terms of the statute are mandatory, and the jury must be instructed accordingly. *Id.* Evidence to justify an article 38.23(a) instruction can derive "from any source," even if the evidence is "strong, weak, contradicted, unimpeached, or unbelievable." *Id.* (quoting *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004)). But it must,

in any event, raise a "*factual* dispute about how the evidence was obtained." *Id.* Where the issue raised by the evidence at trial does not involve controverted historical facts, but only the proper application of the law to undisputed facts, that issue is properly left to the determination of the trial court. *Id.* To perform this analysis, we consider the evidence presented at trial.

The evidence at trial is consistent with and similar to the testimony presented at the hearing on appellant's motion to suppress. The "parties did not offer conflicting testimony before the jury with regard" to what Free saw or included in the affidavit. *See Robinson*, 377 S.W.3d at 720. Rather, the parties continue to disagree about whether Free's testimony shows he saw appellant driving a car, whether Free included all relevant facts in his affidavit, and the legal consequences of Free's conduct. *See id.* "[T]his disagreement was for the trial court to arbitrate, according to the law, not for the jury to determine as if it were an ambiguous or contested question of historical fact." *Id.* Because appellant did not show a dispute about material historical facts, we conclude he was not entitled to an article 38.23 instruction. *See id.* Although appellant was not entitled to an instruction, one was given. Therefore, we must determine whether the instruction, as given, caused some harm to appellant.

The jury was instructed not to consider any evidence obtained by a peace officer pursuant to the search warrant if it believed by a preponderance of the evidence that Free's indication in the affidavit that he saw appellant operating a

motor vehicle was false and Free submitted the statements intentionally or knowingly or with reckless disregard for the truth of those statements and such statements were not reasonable inferences or deductions based on his training, education, or experience. The evidence at issue was the result of the blood-alcohol testing, which clearly showed appellant was intoxicated.

Because the instruction was included in the charge, appellant's counsel had the opportunity to argue—and did argue—that Free falsely represented he saw appellant operating a vehicle to obtain the warrant, Free should not be trusted, and the jury should find appellant not guilty and "send a message to our community that we want our officers to do their job correctly. We want them to be trained on how to do it so that they don't run roughshod over our Fourth Amendment rights." Appellant's counsel asked the jury not to consider the blood-test result, which she would not have had a basis to do if the instruction had not been included in the charge.

Additionally, the instruction provided appellant with more protection than he was entitled to. Had the jury charge not included the article 38.23 instruction, the jury would have considered the result of the blood-alcohol test for what it was—evidence of appellant's intoxication. With the instruction, the jury may have disregarded the test result, which would have benefited appellant.

We conclude that the inclusion of the instruction inured to appellant's benefit in this case. The jury was aware of appellant's request that it disregard the evidence

and the reasons why. Had the instruction not been included, these arguments would not have been presented to the jury, and the jury would have given the test result the weight it was due. However, because the erroneous instruction was given to the jury, the jury potentially disregarded evidence of intoxication, which would have operated to appellant's benefit.

3. Conclusion

Appellant was not entitled to an article 38.23 jury instruction. Considering the instruction that was given in this case, we conclude appellant did not suffer some harm as a result. We overrule appellant's second issue.

CONCLUSION

We affirm the trial court's judgment.

/Erin A. Nowell/
ERIN A. NOWELL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID GASTON, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-19-00879-CR V.	Trial Court Cause No. 069347.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Nowell. Justices Schenck and Molberg participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 20th day of August, 2020.