Opinion issued December 9, 2010

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00380-CR

WILLIE FOSTER HAYNES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1184258

MEMORANDUM OPINION

A jury convicted appellant, Willie Foster Haynes, of being a felon in

possession of a firearm.[1] Appellant pleaded true to the enhancement paragraphs and the trial court assessed punishment at 37 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. In four issues, appellant contends (1) he did not voluntarily choose to proceed pro se at trial; (2) the evidence was legally insufficient to show knowing possession; (3) the evidence was factually insufficient to show knowing possession; and (4) the trial court failed to instruct the jury regarding the admissibility of his custodial statements. As modified, we affirm the judgment of the trial court.

Background

Appellant sped past Officers Nathaniel Wackman and Scott Reinert while they were patrolling in an unmarked car. The officers followed appellant and saw him u-turn under the highway and then switch lanes several times without signaling. Appellant then stopped in a parking lot without pulling into a marked space or turning off his headlights.

Officer Wackman, who was in uniform, pulled behind appellant, approached the car, and identified himself as a law enforcement officer. Officer Wackman asked for appellant's license and insurance, but appellant did not have insurance. Officer Wackman ordered appellant out of the car and arrested him for driving without insurance. Officer Wackman handcuffed appellant and asked if there was

[1] *See* TEX. PENAL CODE ANN. § 46.04(a) (Vernon Supp. 2010).

anything in the car that the officers should know about. Appellant responded that he had a loaded gun under his seat. Officer Wackman then asked what appellant had been arrested for in the past and appellant responded he had been arrested for "possession and robbery." Officer Wackman interpreted possession to mean drug possession. Appellant also stated these arrests led to final convictions. A third officer arrived in a marked car and ran a criminal history on appellant showing an outstanding warrant for credit card abuse. Officer Wackman asked Reinert to look for the gun, which was clearly visible underneath the driver's seat from Reinert's perspective by the open driver's side door.

Appellant was indicted for being a felon in possession of a firearm and trial counsel was appointed. At a pretrial hearing, appellant requested to represent himself at trial. Appellant stated the only reason he wanted to represent himself was because the trial court refused to appoint a new attorney for him. The trial court asked about appellant's age, education, and legal experience. The trial court verbally warned appellant that he would not receive special treatment, that he would be responsible for knowing the law like a lawyer, that neither the trial court nor stand-by counsel would try the case for him, and that his choice would be to his own advantage or peril. The trial court also informed him of the crime charged and the range of punishment. Appellant signed written warnings regarding self-representation and repeatedly stated he understood the risks.

At trial, the jury heard testimony from Officers Wackman and Reinert and several fingerprint experts. Officer Wackman testified without objection to appellant's statements regarding the gun and his prior criminal history. He also testified that he would have searched the vehicle incident to arrest even without the statements. Officer Reinert demonstrated for the jury how the gun was sticking out from underneath the driver's seat and testified that no search was made of the car until after appellant's statements. The fingerprint experts testified that appellant's prints taken at trial matched those on the jail records for his prior conviction for credit card abuse in 2003. However, no identification could be made from a partial latent print pulled from the gun.

Appellant rested without presenting any defense evidence and the jury found him guilty. No additional evidence was heard at the punishment phase and appellant pleaded true to the enhancement paragraphs detailing his convictions for credit card abuse, possession of a controlled substance, and robbery. The trial court sentenced appellant to 37 years' confinement.

Voluntarily Pro Se

In his first issue, appellant argues he did not voluntarily relinquish his right to counsel when he chose to proceed pro se at trial.

A. The Right to Self-Represent

Federal and state law guarantee a criminal defendant the right to the assistance of counsel, as well as the right to waive counsel and represent himself. *See* U.S. Const. amend. VI & XIV; *see* TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 2005); *Faretta v. California*, 422 U.S. 806, 807, 818–20, 95 S. Ct. 2525, 2527, 2532–33 (1975); *Hatten v. State*, 71 S.W.3d 332, 333 (Tex. Crim. App. 2002). A defendant should be warned of the dangers and disadvantages accompanying the waiver of the right to counsel and decision to self-represent. *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541; *Hatten*, 71 S.W.3d at 333. Such a decision, to be constitutionally effective, must be made competently, voluntarily, knowingly, and intelligently. *Godinez v. Moran*, 509 U.S. 389, 400–01, 113 S. Ct. 2680, 2687 (1993); *Faretta*, 422 U.S. at 834–36, 95 S. Ct. at 2541; *Collier v. State*, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997). Here, neither party raises the issue of competence. The decision is made voluntarily if it is uncoerced. *Collier*, 959 S.W.2d at 626. The decision is made knowingly and intelligently if made with a full understanding of the right to counsel, which is being abandoned, as well as the dangers and disadvantages of self-representation. *Id.*

B. Analysis

Appellant argues his waiver was involuntary because the trial court forced him to choose between representing himself or using counsel already appointed.

Appellant asserts the trial court should have appointed new counsel or at least inquired into the reasons behind his request for new counsel. An indigent defendant's right to counsel does not compel the trial court to appoint counsel agreeable to the accused. *Carroll v. State*, 176 S.W.3d 249, 256 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (citing *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000)). Likewise, a defendant may not manipulate the right to counsel so as to obstruct the orderly procedure in the court or interfere with the fair administration of justice and must, in some circumstances, yield to the general interest of prompt and efficient justice. *Id.* A defendant is not entitled to his personal choice of appointed counsel, therefore he is required to accept the attorney appointed by the trial court unless (1) defendant waived his right to counsel and chose to represent himself or (2) defendant adequately demonstrated why appointment of new counsel was necessary. *Id.*

Appellant had the burden to justify appointment of new counsel, but nothing in the record indicates his reasons for requesting a change. *See id.* The record also contains no evidence of coercion. Appellant therefore cannot show his decision to self-represent was involuntary. *See Collier*, 959 S.W.2d at 626. Additionally, the trial court admonished appellant and made all necessary inquiries to demonstrate a constitutional waiver of the right. The trial court explained that appellant would not receive special treatment and would be expected to know rules of procedure

and evidence like a lawyer. The trial court detailed the charged offense and the range of punishments emphasizing the severity of the consequences. The trial court also repeatedly asked whether appellant understood and had appellant sign a written version of the warnings. The record shows appellant's decision to proceed pro se was knowing, intelligent, and voluntary. *See Collier*, 959 S.W.2d at 626. We overrule appellant's first issue.

Sufficiency of the Evidence

In his second and third issues, appellant argues the evidence was legally and factually insufficient to show his knowing possession of the firearm.

A. Elements of the Offense

To prove a defendant is a felon in possession of a firearm, the State must establish the accused was previously convicted of a felony offense and possessed a firearm after the conviction and before the fifth anniversary of his release from confinement at any location other than the premises at which the person lives. *See* TEX. PEN. CODE ANN. § 46.04(a)(2) (Vernon Supp. 2010); *James v. State*, 264 S.W.3d 215, 218 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control. *See* TEX. PEN. CODE. ANN. § 6.01(b) (Vernon 2003); *James*, 264 S.W.3d at 218.

If the firearm is not found on the defendant or is not in his exclusive possession, the evidence must affirmatively link him to the firearm. *James*, 264 S.W.3d at 218–19. An affirmative link demonstrates that the defendant was conscious of his connection with the weapon and knew what it was. *Id.* at 219. Factors that may establish an affirmative link include: (1) the firearm was in plain view; (2) the defendant was the owner of the car in which the firearm was found; (3) the defendant was the driver of the car in which the firearm was found; (4) the defendant was in close proximity and had ready access to the firearm; (5) the firearm was found on the same side of the car as the defendant; (6) firearm was found on the defendant; (7) the defendant attempted to flee; (8) conduct by the defendant indicated a consciousness of guilt, including extreme nervousness or furtive gestures; (9) the defendant had a special connection or relationship to the firearm; (10) the place where the firearm was found was enclosed; (11) occupants of the automobile gave conflicting statements about relevant matters; and (12) affirmative statements connect the defendant to the firearm, including incriminating statements made by the defendant when arrested. *Id.* The number of factors present is not as important as the logical force of the factors in establishing the elements of the offense. *Id.*

B. Standard of Review

In his second and third issues, appellant argues the evidence was legally and

factually insufficient to show his knowing possession of the firearm. When evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). The standard of review articulated in *Jackson v. Virginia* applies to both legal and factual sufficiency challenges to the elements of a criminal offense. *See Jackson*, 443 U.S. at 320, 99 S. Ct. at 2789; *see Brooks v. State*, PD-0210-09, 2010 WL 3894613, at *14, 21–22 (Tex. Crim. App. Oct. 6, 2010); *see also Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet. h.) (construing majority holding in *Brooks*). We are permitted to consider all evidence in the trial-court record, whether admissible or inadmissible, when making a sufficiency determination. *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006) (citing *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999)). We do not resolve any conflicts of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact. *See Dewberry*, 4 S.W.3d at 740.

C. Analysis

Appellant argues the State's only evidence of knowing possession is

inadmissible. Appellant asserts that Officer Wackman arrested him for driving without insurance, questioned him without first warning him of his rights, and that questioning established the only link between appellant and the gun. Both the gun and appellant's statements were admitted without objection at trial. Regardless, in a sufficiency review we consider all the evidence, whether admissible or inadmissible, and appellant's statements demonstrate his knowledge of the gun. *See Powell*, 194 S.W.3d at 507.

Even without his admissions, the State provided evidence for six of the eleven factors listed above to demonstrate an affirmative link between appellant and the gun. Officer Reinert testified the gun was in plain view sticking out from underneath the seat as he stood next to the open driver's side door. Officer Wackman testified that he would have searched the car incident to arrest even without appellant's statements. Appellant owned, drove, and was the only occupant of the car. Appellant was in close proximity to the gun under his seat and Officer Reinert testified the driver could have accessed the gun. The gun was found on the same side as appellant and the car was enclosed. The State does not need to show all the factors to establish an affirmative link as long as the logical force of the evidence demonstrates knowledge. *See James*, 264 S.W.3d at 219.

Appellant further argues that that no latent fingerprints on the gun were suitable for identification. The fact that the State could not match appellant's

fingerprints to a latent fingerprint from the gun does not make the remaining evidence insufficient. *See id.* at 221. Appellant also asserts Officer Wackman contradicted himself at trial by testifying that he arrested appellant but then confirmed appellant was wanted under a valid warrant. We do not agree that Officer Wackman's testimony was contradictory, but regardless this Court does not determine the Officer's credibility as a witness. *See Dewberry*, 4 S.W.3d at 740. We conclude the State submitted sufficient evidence that a rational trier of fact could have found defendant knowingly possessed the firearm beyond a reasonable doubt. *See Drichas*, 175 S.W.3d at 798. We overrule appellant's second and third issues.

Jury Charge Error

In his fourth issue, appellant argues the trial court had a duty to include an instruction in the jury charge on the admissibility of his statements to Officer Wackman and the trial court erred by not including such an instruction.

A. Standard of Review

We review claims of jury charge error by first determining whether error occurred. *Sakil v. State*, 287 S.W.3d 23, 25 (Tex. Crim. App. 2009). If so, we then evaluate whether sufficient harm resulted so as to require reversal. *See id.* at 25–26. If the defendant did not object at trial, we reverse only if the error was so

egregious and created such harm that the defendant did not receive a fair and impartial trial. *Id*. at 26.

B. Charge Error under Article 38.22

Appellant contends that nothing in the record indicates he was given warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), and article 38.22 of the Code of Criminal Procedure at the time of his arrest. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005). Therefore, he argues his statements in response to Officer Wackman's questions after his arrest raise a voluntariness issue under article 38.22. Appellant, acting pro se, did not request such an instruction, but he asserts the trial court should have *sua sponte* included one as law applicable to the case.[2]

A statement of an accused may be used as evidence against him if it appears that it was freely and voluntarily made without compulsion or persuasion. *See* TEX. CRIM. PROC. ANN. art. 38.21 (Vernon 2005). Article 38.22 of the Code of Criminal Procedure governs the admissibility of an accused's written and oral statements while under custodial interrogation. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22; *Oursbourn v. State*, 259 S.W.3d 159, 171 (Tex. Crim. App. 2008). When a challenge is raised under article 38.22, a "general" voluntariness

[2] We presume without deciding that appellant's statements were made during a custodial interrogation. *See Aldaba v. State*, No. 14-08-00417-CR, 2009 WL 1057685, at *4 (Tex. App.—Houston [14th Dist] Apr. 16, 2009, pet. ref'd).

instruction may be appropriate. *Id.* at 174. The types of "general" instructions that may be appropriate include an article 38.22, section 6, voluntariness instruction and a section 7 instruction regarding the warnings required to be given by law enforcement.[3] *Id.* at 173. It is the defendant's responsibility to delineate which type of involuntariness he is claiming so that the trial court can determine the appropriate instruction.[4] *Id.* at 174.

A trial court has the absolute duty to prepare a jury charge that accurately sets out the law applicable of the case. *See* TEX. CRIM. PROC. ANN. art. 36.14 (Vernon 2007); *Oursbourn*, 259 S.W.3d at 179. When a statute, such as article 38.22, requires an instruction under certain circumstances, that instruction is "law applicable to the case." *Oursbourn*, 259 S.W.3d at 180. The trial court must give the instruction for law applicable to the case regardless of whether it has been specifically requested. *Id.* at 179–80. However, if the defendant did not request such instruction, we review the effect of the instruction's omission under the *Almanza* egregious harm standard. *See id.* at 182 (citing *Ellison v. State*, 86

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[3] The statutory warnings encompass those required by *Miranda* and include the right to remain silent, any statements can be used against the accused, the right to an attorney prior and during questioning, the right to have an attorney appointed, the right to terminate an interview, and the requirement that a waiver of these rights must be knowing, intelligent, and voluntary. *See* TEX. CRIM. PROC. ANN. art. 38.22 §§ (2)–(3) (Vernon 2005).

[4] Appellant never raised voluntariness to the trial court and fails to specify on appeal which section of 38.22 applies. We address both sections 6 and 7.

S.W.3d 226, 228 (Tex. Crim. App. 2002)); *see also Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

1) 38.22, Section 6: General Voluntariness

Article 38.22, section 6 is triggered when a question is raised as to the voluntariness of the statements. *Oursbourn*, 259 S.W.3d at 175. A question is raised when a party notifies the trial court or the trial court raises the issue itself. *Id.* The procedure for a section 6 challenge is as follows: (1) a party notifies the trial court that there is an issue about the voluntariness of the statement, or the trial court raises the issue *sua sponte*; (2) the trial court holds a hearing outside the presence of the jury; (3) the trial court decides whether the confession was voluntary and makes written findings of fact and conclusions of law in support of the ruling; (4) if the trial court decides that the confession was voluntary, it will be admitted, and a party may offer evidence before the jury contesting voluntariness; (5) if such evidence is offered before the jury, the trial court shall give the jury a voluntariness instruction. *See id.* at 175 n.55. Only after the trial court is notified, or raises the voluntariness issue on its own, does the chain of other requirements come into play culminating in the defendant's right to a jury instruction. *Id.* at 175.

The section 6 analysis is triggered after a question is raised by either a party or the trial court. *Id.*. A defendant should raise the issue in a motion to suppress or

an objection in open court in order to notify the trial court. *See*, *e.g.*, *Montoya v. State*, Nos. 02-08-00287-CR, 2010 WL 1633387, at *6 (Tex. App.—Fort Worth Apr. 22, 2010, pet. ref'd, untimely filed) (holding trial objection to voluntariness raised question under section 6); *Redd v. State*, No. 14-08-01089, 2009 WL 4810190, at *3 (Tex. App.—Houston [14th Dist.] Dec. 15, 2009, pet. ref'd) (holding appellant chose not to pursue motion to suppress so no section 6 instruction required); *Fuentes v. State*, No. 01-09-00119-CR, 2009 WL 4359065, at *13 (Tex. App.—Houston [1st Dist] Dec. 3, 2009, pet. ref'd) (mem. op., not designated for publication) (holding pretrial motion to suppress raised question under section 6); *Gomez v. State*, No. 01-08-00251-CR, 2009 WL 1688233, at *10 (Tex. App.—Houston [1st Dist.] June 18, 2009, no pet.) (mem. op., not designated for publication) (holding trial court raised issue by *sua sponte* including section 6 instruction). Here, neither the trial court nor the parties raised the issue of voluntariness, so the trial court did not have a duty to include a section 6 instruction in the jury charge. *See Oursbourn*, 159 S.W. 3d at 175.

2) 38.22, Section 7: Compliance with Statutory Warnings

Section 7 applies the same procedures as section 6. *Id.* at 176. However, a section 6 challenge is triggered when a *question* is raised by a party or the trial court regarding voluntariness. A section 7 challenge is triggered when the *evidence* raises an issue regarding compliance with statutory warnings and whether

the defendant knowingly and intelligently waived his rights. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 2–3; *Oursbourn*, 259 S.W.3d at 175. The evidence raises an issue if there is a "genuine factual dispute." *Id*. at 176. A genuine factual dispute derives only from affirmative evidence. *See Soffar v. State*, AP-75-363, 2009 WL 3839012, at *30 (Tex. Crim. App. Nov. 18, 2009) (mem. op., not designated for publication) (holding testimony was not affirmatively contested so no section 7 factual dispute existed); *see Gomez*, 2009 WL 1688233, at *11 (holding cross-examination questions are not affirmative evidence). Mere argument or implication by counsel does not suffice to create a fact issue triggering a section 7 instruction to the jury. *Gomez*, 2009 WL 1688233, at *11.

Officer Wackman testified that he arrested appellant for driving without insurance and then asked him if there was anything in the car. No evidence was presented whether or not officers read appellant his statutory rights after his arrest. Without affirmative evidence, there was no factual dispute for the jury to resolve.[5] *See Soffar*, 2009 WL 3839012, at *30. Without a factual dispute, the trial court had no duty to include a section 7 instruction in the jury charge. *See Gomez*, 2009 WL 1688233, at *11. Neither section 6 nor section 7 apply in this case, therefore, the trial court had no *sua sponte* duty to include a voluntariness instruction and did

[5] Appellant, acting pro se, made one reference to his statements in his opening saying, "Well, the facts of the matter is, the day I was stopped, they said that I made a statement that the gun was in the car. I never had knowledge of the gun being in the car." Appellant said nothing about his article 38.22 rights.

not err by failing to include one. *See Oursbourn*, 259 S.W.3d at 180. We overrule appellant's fourth issue.

Reformation of Judgment

Finally, we note that the trial court's judgment does not accurately comport with the record in that it states appellant appeared in person with counsel. An appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source. *See* TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (citing *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd); *accord Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The record reflects that appellant knowingly, intelligently and voluntarily waived the right to counsel in writing through his signed *Faretta* warnings and orally by the trial court. The court asked appellant's appointed attorney to serve as stand-by counsel, but appellant represented himself. Accordingly, we modify the trial court's judgment to uncheck that box next to "Defendant appeared in person with Counsel," and check the box next to "Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court."

Conclusion

As modified, we affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Chief Justice Radack, Justice Higley, and Justice Massengale.

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