Opinion issued July 28, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00497-CR

CECIL WALTER MAX-GEORGE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Case No. 1246004

MEMORANDUM OPINION

A jury found appellant, Cecil Walter Max-George, guilty of possession of marijuana in an amount of more than four ounces and less than five pounds.[1] After

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[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(3) (Vernon 2009).

finding the enhancement paragraphs true, the jury assessed appellant's punishment at twenty years' confinement and a $5,000 fine. In three issues, appellant argues that (1) the trial court erred in refusing to include his requested instruction under Texas Code of Criminal Procedure article 38.23; (2) the trial court abused its discretion in admitting evidence of firearms and ammunition seized from appellant's residence because it affected the jury's finding on punishment; and (3) the trial court abused its discretion in denying appellant's motion for a continuance.

We affirm.

Background

On December 26, 2009, at around 2:30 a.m., Deputy S. Brown, of the Harris County Sheriff's Office, was sitting in a parking lot in his patrol car writing reports when he observed a man looking into a vehicle with a flashlight. The vehicle was parked in front of a closed business that was part of a strip mall. As Deputy Brown approached to investigate, he was met by appellant, who had come from inside the building. Deputy Brown identified himself and asked appellant what he was doing, and appellant told Deputy Brown that he was looking inside his friend's car. Deputy Brown also smelled burnt marijuana coming from appellant's person. Deputy Brown asked appellant for his identification, but appellant told him that it was inside the business and that he would go get it. Appellant entered the building

and Deputy Brown followed. Appellant gave Deputy Brown his identification, and Brown noticed a "very strong odor of unburnt marijuana" inside the building. Deputy Brown also observed a small amount of marijuana in plain view on a bookshelf to the left of the door.

At that time, Deputy Brown asked appellant and another man who was present in the front room of the building to step outside while he checked for outstanding warrants. As the men complied, other officers began to arrive. The officers asked appellant if any other people remained inside the building. Appellant told them that there were others inside the building, so Deputy Brown and Deputy B. Frazur once again entered the building to find its other occupants. Deputy Brown testified that they did so because "if there is anything illegal in there or we also need to check to make sure, I mean, there's nobody else in there. It's an officer safety issue to see what's inside." He testified that they did not search for any illegal items or materials at that time—they performed a "protective sweep" in which they looked only for people. Deputies Brown and Frazur found two other people hiding in a restroom, checked them for concealed weapons, and escorted them outside the business. In the course of checking the premises for other people, Deputy Brown notice several potted marijuana plants, but he testified that he did not count them at that time because he was focused on looking for people.

Deputies Brown and Frazur left the building after they completed their protective sweep and contacted officers with the narcotics division of the Sheriff's Office. Once the narcotics officers arrived, they sought a search warrant based on Deputy Brown's observation in the course of his encounter with appellant and the three other men. Once they had the search warrant, the officers returned to the building and searched the premises for illegal narcotics and weapons. The officers discovered fifty-nine marijuana plants, heat lamps and other marijuana growing paraphernalia, two semiautomatic handguns, and a shotgun.

Article 38.23 Charge Instruction

In his first issue, appellant argues that the trial court erred in denying his request for an instruction pursuant to Code of Criminal Procedure article 38.23.

A. Facts Relevant to Appellant's Claim of Charge Error

Appellant argues that the evidence at trial raised a disputed fact issue regarding whether he gave Deputy Brown consent to enter the building, and he was, therefore, entitled to an instruction under article 38.23.

Prior to trial, appellant, who represented himself before the trial court, moved to suppress the evidence obtained by the officers pursuant to the search warrant, arguing that Deputy Brown's initial entry into the building was unlawful. At the suppression hearing, Deputy Brown testified that, after he asked appellant for his identification, appellant went into the building to get it and Brown followed

directly behind him. He testified that appellant did not express in any way that Brown was not to come into the building, appellant did not shut the door behind him, and appellant never told him to get out of the office building once he had entered.

On cross-examination, Deputy Brown stated that he followed appellant because it was the middle of the night and appellant was using a flashlight to look around, which Brown considered suspicious, and because he had a suspicion that the business might not actually belong to appellant or that appellant could have been breaking into the vehicle or the business. When appellant asked him, "What gave you the right to go into the office?", Deputy Brown testified, "It's an officer safety issue. I don't know what's inside."

Appellant also testified at the suppression hearing. He stated that one of the other men present in his building had gone out to the car to find his cigarettes and that he did not have a flashlight. After the other man returned to the building, appellant noticed Deputy Brown arrive outside and went outside to meet him. After the deputy asked him for identification, appellant stated, "[I]t's in my office, let me get it. Wait right here." Appellant testified that the door closed on its own behind him after he entered the building and that Deputy Brown "barged in" and told the other man "to get out." Appellant stated that he then told the deputy, "Hey, listen, you need to get out. This is my business. This is where I live at."

After appellant handed the deputy his business card, he again told the deputy to get out of the building. He concluded by telling the trial court that the officers never offered him a consent to search form and that he never gave the officers consent to enter his office, not even impliedly. The trial court denied appellant's motion to suppress.

At trial, Deputy Brown testified that, after he asked appellant for identification, appellant went inside the building to get it, and Brown followed him in. When Deputy Brown entered the building, he saw a bed where appellant's three-year-old son was sleeping.

On cross-examination, in response to appellant's question whether Deputy Brown felt that it was an emergency situation, Brown testified he did not feel that he needed to have his gun drawn as he approached appellant.[2] Deputy Brown also testified that appellant never gave him verbal consent to enter the building and when appellant asked, "And you didn't have my consent to come inside my building, am I correct?", Deputy Brown answered, "Correct." Brown also testified that appellant did not affirmatively "do anything to tell [him] not to be there." Brown testified that appellant did not tell him to wait outside or otherwise indicate that he should not follow and that appellant did not try to close the door behind him or try to stop Brown from entering in any way.

[2] Appellant represented himself at trial.

After appellant rested his case in chief, appellant asked the trial court to address his requested instruction, which provided in relevant part:

> A peace officer making an arrest without a warrant may not enter a residence to make the arrest unless a person who resides in the residence consents to the entry or exigent circumstances require that the officer making the arrest enter the residence without the consent of a resident or without a warrant.
>
> Exigent circumstances is defined as an emergency situation.
>
> Our law provides that in any case where the jury believes the evidence [was] 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, or has a reasonable doubt that the evidence was obtained in violation of the provisions stated above, the jury shall disregard any such evidence so obtain[ed].

After making some arguments regarding the sufficiency of the affidavit supporting the search warrant, the trial court concluded, "And we've heard all of the evidence that anybody had to offer [about the affidavit for the search warrant]." Appellant then stated, "Okay. But he explicitly stated he did not get my consent to search." The State pointed out that appellant had failed to present any affirmative evidence controverting Deputy Brown's version of events leading up to his initial entry into the building, but had only cross-examined the witnesses. Appellant then cited the Fourth Amendment and article 38.23, stating, "[I]f this evidence was obtained in violation of the law—." The trial court stated: "And there is no evidence that there's been anything obtained in violation of the law."

At this time, appellant pointed out that he had not given his testimony on the issue before the jury and that he had not been aware that he was allowed to testify. The State asked that appellant be allowed to re-open the case. The trial court granted the request.

Appellant testified that after Deputy Brown asked for his identification, appellant told Brown to "wait right here" and "let me go get it." Appellant testified that the door closed completely behind him and that he was getting his business card off the desk when Deputy Brown "barged in stating to [the other man in the room] to 'Get outside now.'" Appellant turned to Deputy Brown and said, "Hey, what are you doing? I told you I own the business. You need to get out. I live here." After Deputy Brown asked him to step outside, appellant replied, "I'm not going anywhere. Don't you see my son is sleeping right here?" Appellant testified that after he again refused to step outside at Deputy Brown's request Deputy Frazur arrived, became "enraged" when appellant refused to leave, "charged at [appellant], stepping on the bed, waking up [appellant's] son," and forcibly removed appellant from the room. Appellant further testified that no officer asked him to give consent to search until approximately 7:30 a.m. and that he refused his consent at that time.

After he testified, the trial court again asked if there were any objections to the charge. Appellant again stated that he wanted an article 38.23 instruction

included "based on the issue that there is a dispute concerning whether the evidence was obtained within the legal means of the law." The State responded that there was "no contradictory statement by the Defense stating anything to the opposite of what the officers have stated" and that the determination of whether the evidence was legally obtained is an issue of law that had already been ruled on.

The following colloquy occurred:

[appellant]: [T]he officer stated that he never got my consent to come in. And I believe—

[trial court]: I believe the search was done pursuant to warrant, was it not?

[appellant]: [T]he illegal entry wasn't done pursuant to a warrant. It was done pursuant to—basically there was no consent, no authority, there was nothing. In fact . . . it was derived from the exploitation of an illegal entry. . . .

[trial court]: Is there any dispute that he asked for identification, someone came in and he followed that person in?

. . . .

[appellant]: Yes, exactly, Your Honor. But at no time did I state that he had my consent to follow me.

[trial court]: Did he follow some other person in?

[appellant]: No, he followed me in, Your Honor. And at that time I informed him . . . that I was the business owner outside. And I also stated that when he came in and barged in, that you need to get out. He did not.

> [prosecutor]: The State stands by its previous argument, Your Honor, that there is no material issue here and that the Defendant has not presented evidence which entitles him to the charge.

The trial court then denied appellant's requested charge.

On appeal, appellant argues that he was entitled to the article 38.23(a) instruction because "there was a factual dispute regarding the legality of . . . Officer Brown's initial entry into appellant's home/business, which is how Brown developed probable cause to obtain a search warrant for the premises."

B. Standard of Review

We review jury charge error in a two-step process. *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005). First we determine whether error exists in the charge. *Id.* If there is error, we then review the record to determine whether sufficient harm was caused by the error to require reversal of the conviction. *Id.* When the accused has properly objected to the error in the jury charge, reversal is required unless the error was harmless. *Id.* at 743; *see also Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (discussing harm analysis on issues of charge error). However, if no objection was made at trial, reversal is proper only if the error is so egregious and created such harm that it might be fairly said that the defendant did not have a fair and impartial trial. *Almanza*, 686 S.W.2d at 171.

C. Right to Instruction under Article 38.23

Article 38.23 provides:

> 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. ANN. art. 38.23(a) (Vernon 2005). A defendant's right to the submission of an instruction under article 38.23(a) "is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible." *Jones v. State*, 338 S.W.3d 725, 740 (Tex. App.—Houston [1st Dist.] 2011, pet. filed) (quoting *Madden v. State*, 242 S.W.3d 504, 509–10 (Tex. Crim. App. 2007)).

To be entitled to the submission of a jury instruction under article 38.23, the appellant must meet three requirements: (1) the evidence heard by the jury must raise a fact issue; (2) the evidence on that fact must be affirmatively contested; and (3) that contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence. *Id.* (citing *Madden*, 242 S.W.3d at 510). "[I]f other facts, not in dispute, are sufficient to support the lawfulness of the challenged

conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence." *Madden*, 242 S.W.3d at 510. Thus, the disputed fact must be essential to determining the lawfulness of the challenged conduct. *Id.* at 511.

The Fourth Amendment will tolerate a warrantless search if the police (1) have probable cause coupled with exigent circumstances; (2) have obtained voluntary consent; or (3) conduct a search incident to a lawful arrest. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). Here, it is undisputed that Deputy Brown did not make his initial entry into the building incident to an arrest, but appellant's consent would be immaterial if Brown had probable cause coupled with exigent circumstances.

In this context, 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 . . . or evidence of a crime will be found." *Id.*; *Estrada v. State*, 154 S.W.3d 604, 609 (Tex. Crim. App. 2005) (quoting *McNairy v. State*, 835 S.W.2d 101, 107 (Tex. Crim. App. 1991)). Situations creating exigent circumstances usually include factors pointing to some danger to the officer or victim, an increased likelihood of apprehending a suspect, or the possible destruction or removal of evidence. *McNairy*, 835 S.W.2d at 106.

Deputy Brown testified that he observed a man using a flashlight to look into a car parked in front of a closed business at 2:30 in the morning the day after Christmas, and that this was suspicious behavior. He also testified that, as appellant approached him, he noticed that appellant smelled strongly of burnt marijuana. This testimony was sufficient to establish probable cause. *See Estrada*, 154 S.W.3d at 609 (holding that evidence of smell of marijuana along with other observations of suspicious activities established probable cause).

At the suppression hearing, Deputy Brown also testified that he followed appellant into the building's office because he had a suspicion that the business might not actually belong to appellant or that appellant could have been breaking into the vehicle or the business, and because it was the middle of the night and appellant was using a flashlight to look around, which was also suspicious. When appellant asked him, "What gave you the right to go into the office?", Deputy Brown testified, "It's an officer safety issue. I don't know what's inside." At trial, Deputy Brown testified that when he saw someone outside the closed business, he was not sure what to think because "there's graffiti in the area. Possibly could be breaking into a building, could be breaking into the vehicle." Deputy Frazur, who arrived while Deputy Brown was inside the office with appellant, testified that for reasons of officer safety, he wanted to be able to clearly see appellant and the other officers at all times.

Based on this testimony, the trial court reasonably could have found that Deputy Brown's warrantless entry was justified by the need to protect himself from a suspicious person who might have been going inside the building to retrieve a weapon, to prevent appellant from escaping following a theft of a vehicle or business, or to prevent appellant from destroying evidence of a potential theft or drug related crime. *See Estrada*, 154 S.W.3d at 609; *cf. Miles v. State*, 241 S.W.3d 28, 42 (Tex. Crim. App. 2007) (observing that exigent circumstances requiring immediate arrest include theft offenses in which perpetrator may disappear along with stolen property) (citing TEX. CODE CRIM. PROC. ANN. art. 18.16 (Vernon 2005)); *see also United States v. Blount*, 123 F.3d 831, 838 (5th Cir. 1997) ("The exigent circumstances analysis focuses upon the reasonableness of the officers' investigative tactics leading up to the warrantless entry.").

We observe that appellant did not argue that there was no probable cause or exigent circumstances before the trial court or on appeal. We hold that, based on Deputy Brown's uncontroverted testimony on these issues, the trial court could have properly concluded that the initial entry into the building was permissible because the State established both probable cause and exigent circumstances. Therefore, the trial court did not err in concluding that the question of appellant's

consent was immaterial in determining whether the initial entry was lawful.[3] *See Madden*, 242 S.W.3d at 510 (holding that when facts not in dispute support admissibility of evidence, disputed fact issue is not submitted to jury because it is not material to ultimate admissibility of evidence); *Gutierrez*, 221 S.W.3d at 685 (providing that consent to search and existence of probable cause coupled with exigent circumstances are both exceptions to Fourth Amendment's prohibition against warrantless searches).

We overrule appellant's first issue.

Admission of Firearms and Ammunition

In his second issue, appellant argues that the trial court erred in admitting the two handguns and related ammunition into evidence.

A. Facts Relevant to Admission of Firearms and Ammunition

Deputy Brown testified that officers discovered "two pistols, semiautomatic pistols and a shotgun" during their search of the building, and he testified to the general location where the shotgun was found. Appellant did not object to this testimony. The shotgun itself was admitted into evidence, and appellant affirmatively stated that he had no objection to its admittance into evidence.

[3] We note that, on appeal, appellant does not challenge the sufficiency of the warrant, nor does he challenge the trial court's ruling on the motion to suppress.

The State also sought to admit the two handguns and the associated ammunition and magazines. At that point, appellant objected on the basis that the exhibits were highly inflammatory and had "nothing to do with the current case." The State responded that the weapons "were out of the same transaction" as the marijuana charge and that "the fact that he has pistols and weapons in his possession at the same time as the marijuana goes to the basis of the case that this is one large act by [appellant] to create marijuana, to grow marijuana, to have the protection needed to continue an operation like this." The trial court overruled appellant's objection.

B. Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). A trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). If the trial court's decision is correct on any theory of law applicable to the case, we will uphold the decision. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). Furthermore, improper admission of evidence is harmless if the same or similar evidence is admitted without objection at another point in the trial. *Smith v. State*, 236 S.W.3d

282, 300 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (citing *Leday v. State*, 983 S.W. 713, 717 (Tex. Crim. App. 1998)).

C. Analysis

Appellant objected to the introduction of the handguns and ammunition themselves into evidence on the basis that these exhibits were highly inflammatory and had "nothing to do with the current case." However, appellant did not object to Deputy Brown's testimony that the police found weapons and ammunition when they searched the premises. Appellant also affirmatively stated that he had no objection to the admittance of the shotgun into evidence. Thus, the jury heard unobjected-to evidence that weapons and ammunition were found in appellant's building. We conclude that any potential error made by the trial court in admitting the handguns and ammunition was harmless because similar evidence was admitted without objection. *See id.*

We overrule appellant's second issue.

Motion for Continuance

In his third issue, appellant argues that the trial court erred in denying his motion for continuance.

A. Facts Relevant to Motion for Continuance

Appellant filed a motion for continuance on May 24, 2010, nine days before the trial began on June 1, 2010. He claimed that he had subpoenaed "Sean Everett

Lowery" and "Jarel Holmes," two of the other individuals who were present at his business when Deputy Brown arrived and who were also removed from the building.

In his motion, appellant argued that the two individuals were material defense witnesses, and he stated that "through due diligence [appellant] requested that [the witnesses] be procured to give testimony in any hearing held on [appellant's] behalf." The motion also listed the matters on which appellant wanted the witnesses to testify—i.e. "about what time did the witnesses arrive at [appellant's] warehouse," "who did the witnesses arrive with," "in what manner did the deputy come into [appellant's] office," and other similar questions. The motion stated that the witnesses were not absent by the procurement or consent of appellant, requested the State to provide the addresses of the witnesses, and stated that the motion was not made for purposes of delay. Appellant sought a thirty-day continuance, signed the motion, and included his unsworn declaration that "the foregoing is true and correct" under penalty of perjury.

Appellant also made arguments in support of his motion for continuance on the record. Appellant again repeated the list of topics on which he would ask Lowery and Holmes to testify, but he did not make any statement or provide any evidence regarding what their actual testimony on those topics would be. During appellant's argument in support of his motion, he also stated that the subpoena he

issued for both Lowery and Holmes was for them to appear for pretrial proceedings. There was no evidence that he had attempted to subpoena them for trial.

B. Standard of Review

We review the trial court's ruling on the motion for continuance for an abuse of discretion. *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996); *see Harrison v. State*, 187 S.W.3d 429, 433–34 (Tex. Crim. App. 2005). To establish an abuse of discretion, an appellant must show that he was actually prejudiced by the trial court's ruling. *See Janecka*, 937 S.W.2d at 468. A criminal action may be continued on the written motion of a party for sufficient cause shown. *Harrison*, 187 S.W.3d at 434 (citing TEX. CODE. CRIM. PROC. ANN. art. 29.03 (Vernon 2006)). The motion must be sworn to by someone who has personal knowledge of the facts relied on for the continuance. *Id.* (citing TEX. CODE. CRIM. PROC. ANN. art. 29.08 (Vernon 2006)).

When the defendant's motion for continuance is based on an absent witness, it is necessary to show (1) that the defendant has exercised diligence to procure the witness's attendance; (2) that the witness is not absent by the procurement or consent of the defense; (3) that the motion is not made for delay; and (4) the facts expected to be proved by the witness. *Id.* It must appear to the trial court that the facts expected to be proved are material. *Id.*; *see* TEX. CODE CRIM. PROC. ANN. art.

29.06 (Vernon 2006). "Mere conclusions and general averments are not sufficient for the court to determine their materiality, and the motion for continuance must show on its face the materiality of the absent testimony." *Harrison*, 187 S.W.3d at 434.

Appellant's motion for continuance made only general averments regarding the questions that appellant would ask Lowery and Holmes. Appellant did not provide any statement at all of the facts he expected Lowery and Holmes to prove, either with his motion or in his argument before the trial court. Thus, the trial court had no basis on which to determine whether any facts Lowery and Holmes would admit into evidence would be material.

Furthermore, appellant stated in his argument before the trial court that the subpoenas referenced in his motion were for a pretrial appearance, and there is no evidence in record that appellant attempted to subpoena Lowery and Holmes to appear at trial. Thus, appellant failed to demonstrate that he exercised diligence to procure Lowery and Holmes' attendance. We conclude that the trial court did not err in denying the motion for continuance. *See id.*

We overrule appellant's third issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Matthews.[4]

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

[4] The Honorable Sylvia Matthews, Judge of the 281st District Court of Harris County, sitting by assignment.