Affirmed and Memorandum Opinion filed July 19, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00257-CR

JONATHAN YOUNG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1421419

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

A jury found Jonathan Young guilty of possession with intent to deliver a controlled substance. The trial court sentenced him to 30 years' imprisonment. He raises three issues on appeal regarding the insufficiency of the evidence, the denial of his motion to suppress, and the jury charge. We affirm.

FACTUAL BACKGROUND

On March 16, 2014, law enforcement officers were conducting surveillance on an apartment complex in an area known to be used to distribute large amounts

of cocaine. The targets of the investigation were two brothers, Gilberto and Pedro Escalante. Surveillance team members Jeffrey Vincent of the Drug Enforcement Agency, Marshum Sinegal of the Houston Police Department, and James Wright of the Pasadena Police Department testified at trial. Patrol officer Jeremy Medina and K-9 officer James Lockley, both of the Houston Police Department, also testified.

Vincent saw the following events in a well-lit parking area in the complex. At 9:25 pm, Gilberto drove a white Tahoe into the parking lot. He parked, then walked into an area out of Vincent's sight. At 10:30 pm, Pedro drove a gray pickup truck into the lot. He parked, then walked to the same area where Vincent lost sight of Gilberto. Within 10 or 15 minutes, a white Pontiac entered the parking area. The driver, whom Vincent did not know at the time, parked and walked to the same area as Gilberto and Pedro. The driver was later identified as appellant. Nobody else entered or exited the Pontiac. Nobody gave anything to the occupants of the Pontiac.

Appellant was carrying an off-white, plastic shopping bag in his hand. It did not appear to be weighted. At 11:00 pm, Pedro and appellant came back into Vincent's view. Appellant was holding the same bag, but this time it was weighted. Vincent could see an object with a rounded corner pushing against the bag. From his training and experience as a DEA agent, Vincent knew the object was the same shape as a packaged kilogram of cocaine. Appellant returned to the Pontiac and drove out of the parking area.

Vincent suspected narcotics were being transported in the Pontiac. He radioed the surveillance team, which was stationed throughout the area; announced what he saw; and described the Pontiac.

Sinegal was watching the front gate through which vehicles enter and exit the property. After he heard Vincent's notification, he saw the gray truck and the

Pontiac leave the complex. The truck went west, and the Pontiac went east. Sinegal waited for both vehicles to leave the complex, because he knew the surveillance team members outside the complex "would take care of their jobs." During his observation of the Pontiac, the car did not stop, nobody got in or out of the car, and nobody gave anything to the car's occupants.

Wright's task was to monitor radio communications and monitor any vehicle that might exit the apartment complex and go east. He had been stationed at a nearby drug store for a few hours. He heard Vincent's notification and saw the Pontiac as it left the complex. He followed the Pontiac when it left the property. According to Wright, nobody got in or out of the car, nobody gave anything to the car's occupants, and the Pontiac did not stop while he was watching it. Sinegal caught up in his car and let Wright know he could pull off since Sinegal could see the Pontiac. Wright turned off and stopped watching the Pontiac.

Sinegal saw a car try to pass the Pontiac on the passenger side, but it pulled back suddenly because the Pontiac swerved from the center lane into that car's lane. When the other car pulled back, Sinegal tried to pull up alongside the passenger side of the Pontiac, but he also had to pull back because the Pontiac swerved left and then swerved right into Sinegal's lane. Sinegal radioed for patrol officers to stop the Pontiac for failing to maintain a single lane of traffic, a traffic violation. He then pulled off into a nearby parking lot. In his rearview mirror, he saw a patrol car turn on its flashing lights and saw the Pontiac pull over.

Medina and his partner, Officer Contreras, were in that patrol car. Medina testified they stopped the Pontiac because they were advised by Sinegal it had committed a traffic violation; they did not see the violation themselves. As Medina walked toward the parked Pontiac, both appellant and a woman in the front passenger seat were making what he characterized as furtive movements; they

were "reaching down, trying to conceal something or placing something down" while he was approaching the car. Medina went to the passenger side of the Pontiac while his partner went to the driver side. The woman identified herself as Treniece Sam and said the Pontiac belonged to her. Sam was reaching in the direction of a white, plastic bag that contained a brick-like package. Medina's partner detained appellant for driving with an expired license. Medina detained Sam, but the record does not specify the basis for her detention. Medina and his partner asked appellant and Sam for permission to search the vehicle, and both appellant and Sam consented to the search. Medina decided to call for a K-9 officer before they searched the car.

K-9 handler Lockley responded to Medina's call. His dog, Chelsea, alerted on the horizontal seam of the driver door, indicating she smelled narcotics. Lockley looked in the car and saw loose currency in plain view on the driver seat. He had an officer remove the currency. He resumed the search, and Chelsea alerted on the passenger door. Lockley opened the passenger door, and Chelsea grabbed more currency positioned between the seat and the center console. Chelsea next alerted on the plastic bag on the passenger floorboard. Lockley looked in the bag and saw what appeared to a brick of cocaine.

After photos were taken of the Pontiac and its contents, Sinegal removed the bag from the car. He saw several articles of female clothing, a brick-type package, and half of a brick-type package. He took custody of the bag and its contents and tagged it into an evidence lockbox at the Houston Police Department headquarters.

Kari Hoffman is a forensic analyst in the controlled substances division of the Houston Forensic Science Center. She tested the powder in the two packages that were in the plastic bag. Both contained cocaine. The combined weight of the powder from both packages was 1,514.47 grams.

Sinegal testified that at the time relevant to this case, the wholesale value of one kilogram of cocaine was $28,000. The street value of one gram of cocaine, as it is typically sold, is $100. Therefore, the street value of the cocaine found in the Pontiac is approximately $150,000. Sinegal testified that anything more than one ounce of cocaine is not for personal use, and the only intent of a person with approximately 1,500 grams (1.5 kilograms) of cocaine is to sell it.

ANALYSIS

I. Sufficiency of the Evidence

In his second issue, appellant asserts the evidence is legally insufficient to support the jury's finding that he "knowingly and intentionally" possessed a controlled substance with intent to deliver.

A. Standard of review

When reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether a rational jury could have found the elements of the offense beyond a reasonable doubt. *See Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). We consider all evidence in the record, whether it was admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *See Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

B. Legal standards for knowing possession

The State was required to prove appellant knowingly (not intentionally, as appellant suggests) possessed with intent to deliver a controlled substance listed in penalty group I, which includes cocaine. *See* Tex. Health & Safety Code Ann. § 481.112(a); *see also id.* § 481.102(3)(D) (identifying cocaine as a member of penalty group I). "Knowingly possessed" requires proof that (1) appellant exercised "actual care, custody, control, or management" over the substance and (2) he knew the substance was contraband. *See id.* § 481.002(38) (definition of possession); *Evans v. State*, 20 S.W.3d 158, 161 (Tex. Crim. App. 2006).

Appellant does not dispute that cocaine weighing approximately 1,500 grams was found in the Pontiac, nor does he challenge the proof regarding intent to deliver. Instead, he asserts the State did not prove he knowingly exercised care, custody, or control over the cocaine. Accordingly, the only elements at issue are "knowingly" and "possessed."

An accused's connection to the contraband must be more than fortuitous. *Evans*, 202 S.W.3d at 161–62. Mere presence in the same place as the controlled substance is insufficient to justify a finding of possession. *Id.* at 162. Presence or proximity, when combined with other evidence, either direct or circumstantial, may establish possession. *Id.* When a defendant does not have exclusive possession of the place where the contraband was found, the reviewing court must examine the record to determine if there are additional, independent facts that "affirmatively link" the defendant to the contraband. *See Poindexter v. State*, 153 S.W.3d 402,

406 (Tex. Crim. App. 2005). The requirement of "affirmative links" is aimed at protecting innocent bystanders from conviction based solely on their proximity to someone else's contraband. *Id.* However, "[t]he mere fact that a person other than the accused might have joint possession of the premises does not require the State to prove that the defendant had sole possession of the contraband, only that there are affirmative links between the defendant and the drugs such that he, too, knew of the drugs and constructively possessed them." *Id.* at 412. The following non-exclusive factors have been recognized as tending to establish affirmative links: (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the contraband; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt. *See Evans*, 202 S.W.3d at 162 n.12; *Black v. State*, 411 S.W.3d 25, 29 (Tex. App.—Houston [14th Dist.] 2013, no pet.). It is "not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial." *Evans*, 202 S.W.3d at 162.

C. Evidence is sufficient to support finding of knowing possession

Prior to entering the vehicle, appellant had exclusive possession of the plastic bag that, when subsequently searched, was found to contain cocaine.

Specifically, while conducting surveillance, Vincent saw appellant get out of the Pontiac holding an empty plastic bag, then disappear from view. Ten or fifteen minutes later, appellant reappeared into Vincent's view. He was carrying the same plastic bag, but this time it was weighted, and Vincent could see an object with a rounded corner pushing against the bag. Appellant does not dispute he had sole control over the bag during his walk to the car.

Appellant got back into the car, taking the weighted bag in with him. From the time he drove out of the parking lot to the time of the traffic stop, nobody got in or out of the Pontiac, and nobody handed anything to the occupants of the Pontiac.

The record contains evidence of the affirmative links between appellant and the cocaine once appellant entered the Pontiac.[1] In reviewing this evidence, we are mindful that although Sam was in the car with appellant, the State was not required to prove appellant had sole possession of the cocaine. The State was obligated to show only that there are affirmative links between appellant and the drugs "such that he, too, knew of the drugs and constructively possessed them." *Poindexter*, 153 S.W.3d at 412.

Presence during the search. Appellant was driving the Pontiac when it was searched. Medina testified he and Sam consented to the search. That testimony is uncontroverted.

Contraband in plain view. While conducting surveillance, Vincent saw a rounded corner of a brick-like package pressing against the inside of the bag when appellant carried it to the Pontiac. When Medina looked in the car as part of the

[1] We assume without deciding that an affirmative-links analysis is required to determine if appellant had possession of the contraband once he was in the vehicle, even though the record shows appellant had exclusive possession of a bag that may have contained the contraband.

traffic stop, he also saw a plastic bag containing a brick-like package in plain view on the front passenger floorboard.

Proximity and access to contraband. Appellant was in the driver's seat, and the bag was on the floorboard near the front passenger seat. Convenient access to the contraband is an accepted factor that may affirmatively link an accused to contraband found in a vehicle. *See Garcia v. State*, 218 S.W.3d 756, 763 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (evidence sufficient to affirmatively link driver to "very large amount—more than 500 grams—of cocaine" found on floorboard near driver seat); *Robinson v. State*, 174 S.W.3d 320, 326 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (cocaine in compartment located in back wall of truck, which could be seen and accessed only by folding down truck's back seat, was "within the vicinity and easily accessible" to driver).

***Furtive gestures*.** Both appellant and Sam made furtive gestures during the traffic stop. Medina said they were "reaching down, trying to conceal or place something down."

Odor of contraband. The drug dog alerted to the odor of cocaine in three spots: currency on the driver seat, currency between the seat and the center console, and the plastic bag.

Right to possess place searched. Sam owned the Pontiac. However, "[p]ossession does not necessarily turn on ownership"; "rather, the crucial inquiry is who exercised 'actual care, custody, control, or management.'" *Haggerty v. State*, 429 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (quoting Tex. Penal Code Ann. § 1.07(a)(39)). Appellant was driving the Pontiac with Sam's permission. *See Lair v. State*, 265 S.W.3d 580, 588 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (although he did not own vehicle in which narcotics were found, defendant was affirmatively linked to narcotics because "he was the

driver before and after his meeting with [the narcotics seller] and at the time the officers stopped him for a traffic violation.").

Enclosed space. The cocaine was found in a closed vehicle. Before the search, appellant got out of and back into the Pontiac. He held an empty plastic bag when he got out of the car and a weighted plastic bag when he got back in. By contrast, Sam did not enter or exit the car. Neither appellant nor Sam accepted anything from someone outside the car.

Cash. Currency was discovered in two places in the Pontiac, as well as on appellant's person. During his opening statement, counsel for the State said Lockley would testify as to the amount of money found. However, he did not, and the record does not contain any evidence of the amount.

No evidence of other factors. There is no evidence appellant was under the influence of narcotics, possessed other contraband, made incriminating statements, or attempted to flee when he was arrested. There is also no evidence of other contraband or drug paraphernalia in the Pontiac or on appellant's person.

In summary, appellant drove into an apartment complex late at night in an area known to be used to distribute large amounts of cocaine. He walked into a part of the complex where two suspected drug dealers, Pedro and Gilberto Escalante, had gone. He carried a plastic bag that did not appear to be weighted when he walked into that area. He carried the same bag when he left, but at that time it appeared weighted, and a rounded corner of a brick-like object was visibly pressing against the inside of the bag. A kilogram of cocaine is packaged in a brick-like package with rounded corners.

"Although the parties may disagree about the logical inferences that flow from undisputed facts, where there are two permissible views of the evidence, the

fact finder's choice between them cannot be clearly erroneous." *Evans*, 202 S.W.3d at 163 (internal quotations omitted) (reversing court of appeals' determination of legal insufficiency because intermediate court erred by not viewing reasonable inferences in light favorable to jury's verdict). Considering all the evidence and reasonable inferences therefrom in the light most favorable to the verdict, and giving due deference to the jury as sole judge of the credibility of the witnesses, we conclude a rational jury could have found beyond a reasonable doubt that appellant (1) knew the substance in the plastic bag was cocaine, and (2) exercised care, control, custody, or management over the cocaine. As noted, it is undisputed that the bag contained approximately 1.5 kilograms of cocaine, and appellant does not challenge the evidence that a person with that much cocaine intends only to sell it. Accordingly, the evidence is legally sufficient to support the jury's finding that appellant knowingly possessed a controlled substance with intent to deliver. We overrule appellant's second issue.

II. Motion to Suppress

In his first issue, appellant argues the trial court improperly denied his motion to suppress the evidence resulting from his arrest. Construed liberally, appellant's brief complains of the absence of the officers' personal knowledge to initiate the stop. Appellant further contends that any reasonable suspicion officers had to stop the Pontiac did not support his prolonged detention waiting for a police dog. Appellant failed to preserve this alleged error regarding the duration of the stop as it did not form the basis of his motion to suppress in the trial court. Nonetheless, we conclude that the trial court did not err in denying the motion to suppress on either basis.

A. Standard of review

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Wade v. State*, 422 S.W.3d 661, 666 (Tex. Crim. App. 2013); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented at a suppression hearing. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). We give almost total deference to the trial court's determination of historical facts that depend on credibility and demeanor.

By contrast, we review de novo the court's application of the law to the facts, because resolution of those ultimate questions does not turn on the evaluation of credibility and demeanor. *See Guzman*, 955 S.W.2d at 89. When, as in this case, there are no written findings of fact in the record, we uphold the ruling on any theory of law applicable to the case and presume the trial court made implicit findings of fact in support of its ruling so long as those findings are supported by the record. *State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000). We view this evidence on a motion to suppress in the light most favorable to the trial court's ruling. *Wiede*, 214 S.W.3d at 24. If supported by the record, a trial court's ruling on a motion to suppress will not be overturned. *Mount v. State*, 217 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

B. Error not preserved

Appellant asserts on appeal that the police had no reasonable suspicion to justify detaining him any longer than it would take to issue him a citation for driving with an expired license. As a result, he says, the detention was unlawful, and the evidence resulting from the detention should have been suppressed. In order to preserve an issue for appeal, a timely objection must be made that states the specific ground of objection, if the specific ground was not apparent from

context. *See* Tex. R. App. P. 33.1(a)(1)(A); *Douds v. State*, 472 S.W.3d 670, 673 (Tex. Crim. App. 2015). The requirement of a timely, specific objection serves two purposes: (1) it informs the trial judge of the basis of the objection and affords the judge an opportunity to rule on it, and (2) it affords opposing counsel an opportunity to respond to the objection. *Douds*, 472 S.W.3d at 674.

The Court of Criminal Appeals has "long eschewed hyper-technical requirements for error preservation." *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016). Specific words are usually not required to preserve a complaint; rather, a party need only "let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him." *Id.* Still, a general or imprecise objection "will not preserve error for appeal unless the legal basis for the objection is *obvious* to the court and to opposing counsel." *Buchanan v. State*, 207 S.W.3d 772, 775 (Tex. Crim. App. 2006) (emphasis in original).

At the hearing on his motion to suppress, appellant did not complain about the length of his detention. Instead, the exclusive subject of the hearing was the validity of the traffic stop. Appellant elicited testimony on cross-examination that Vincent did not see the traffic violation, Sinegal did not see the plastic bag believed to contain narcotics, and Medina did not see the traffic violation or the bag. His argument was because none of those officers had the requisite personal knowledge to effect a lawful traffic stop, the evidence resulting from that stop should be suppressed. Appellant's counsel said:

> Pretextual stops are valid when the person who observed the violation effects the stop. In this particular case the stop was effected by officers who did not personally observe the violation. So, therefore it is not a pretextual stop.
>
> . . .
>
> We would just say on balance as to what was stated and given to us,

> we don't see that there's enough for a pretextual stop and we would ask that you suppress the evidence.

Douds compels us to conclude appellant did not preserve error regarding the length of his detention. Following a car accident in which he was the driver, Douds was subjected to a warrantless blood draw under the Texas Transportation Code to determine if he was intoxicated. In a written motion to suppress the blood test results, Douds asserted two bases for suppression: (1) he was arrested and searched without a valid warrant, reasonable suspicion, or probable cause, and (2) his blood had been obtained in violation of the terms of the Transportation Code's mandatory blood-draw statute. *Douds*, 472 S.W.3d at 671. At the hearing on the motion to suppress, the questioning focused on the facts regarding applicability of the Transportation Code provision. *Id.* at 672. In his appeal to this court, Douds argued the blood draw violated the Transportation Code and the Fourth Amendment. The en banc court held Douds preserved the Fourth Amendment argument. *Douds v. State*, 434 S.W.3d 842, 849 (Tex. App.—Houston [14th Dist.] 2014) (en banc). The Court of Criminal Appeals disagreed and reversed this court's judgment, concluding Douds waived any Fourth Amendment error:

> Viewing appellant's arguments in their entirety, we conclude that they can be fairly characterized as presenting a challenge to the admissibility of the blood evidence only on the basis of Officer Tran's application of the mandatory-blood-draw statute to appellant's case. Appellant's counsel's questions and arguments at the hearing were devoted solely to establishing that the statutory requirements for a mandatory blood draw had not been met.

Douds, 472 S.W.3d at 676. The fact that Douds asserted a Fourth Amendment violation in his written motion to suppress was not sufficient to preserve the error:

> We disagree that appellant's isolated statements [in the written motion to suppress] globally asserting that a blood draw was conducted without a warrant were enough to apprise the trial court that it must

> consider whether there were exigent circumstances to permit the warrantless search.

Id. at 674.

Like Douds, appellant made a global, isolated assertion in his written motion to suppress: "[Defendant] was arrested without lawful warrant, probable cause or other lawful authority in violation of the rights of [defendant] pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10 and 19 of the Constitution of the State of Texas." But appellant did not specify in his motion that he was challenging the length of his detention as unlawful, nor did he pursue that point at the hearing on the motion. Accordingly, we conclude appellant failed to preserve his argument that the cocaine should have been suppressed because the length of his detention was improper.

C. No error in denial of motion to suppress

Even if appellant had preserved error regarding the duration of his detention, as he did regarding the initiation of the traffic stop, we conclude the trial court did not err in denying appellant's motion to suppress. Appellant does not deny he committed a traffic violation, nor does he suggest the traffic stop was unreasonable. Rather, he argues that even if the traffic stop was reasonable when it began, it became unreasonable once its duration exceeded the time required to issue him a ticket.

When police officers signal that a driver should stop a moving vehicle, and the driver stops the vehicle in response, then the driver and all passengers inside the vehicle have been seized under the Fourth Amendment. *Overshown v. State*, 329 S.W.3d 201, 204 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The seizure

continues for the duration of the traffic stop, and the seizure terminates when the police inform the driver and passengers that they are free to leave. *Id.* at 205.

A traffic stop is reasonable when there exists either probable cause to believe that a traffic violation has occurred, or reasonable suspicion that someone in the vehicle is committing or has committed a criminal offense. *Id*. We evaluate the reasonableness of a traffic stop using an objective standard. *Id.*; *see also Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992).

Where there has been cooperation among police officers, the cumulative information known to the cooperating officers at the time of the stop is to be considered in determining whether reasonable suspicion or probable cause for the stop exists. *See Hoag v. State*, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987); *Mount v. State*, 217 S.W.3d 716, 728 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Moreover, the determination of reasonable suspicion or probable cause is not limited to the facts solely within the detaining officer's knowledge. *See Mount*, 217 S.W.3d at 728. Reasonable suspicion or probable cause can be based on information relayed to one officer by other officers and the sum of the information known to those officers cooperating with him. *See id.* at 728; *Fearance v. State*, 771 S.W.2d 486, 509 (Tex. Crim. App. 1988).

The traffic stop was reasonable for two independent reasons. First, Sinegal knew of appellant's traffic violations and shared that information with cooperating patrol officers. *Overshown*, 329 S.W.3d at 205. Second, based on his personal observation, Vincent suspected narcotics were being transported in the Pontiac, and he shared that information with the rest of the surveillance team. *Wiede*, 214 S.W.3d at 24. Once he was stopped, appellant was detained for driving with an expired license. He does not dispute he was properly detained on that basis.

Medina testified appellant and Sam consented to the search of the vehicle. Appellant did not contradict that testimony. When consent is given during a lawful detention (in this case, the traffic stop), any further detention is to effectuate the search pursuant to the consent, and that further detention needs no other justification. *Kelly v. State*, 331 S.W.3d 541, 550–51 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Accordingly, appellant's consent to the search obviates his complaint regarding the duration of the traffic stop.

We overrule appellant's first issue.

III. Jury Instruction

In his third issue, appellant argues the trial court should have granted his request for a jury instruction under article 38.23 of the Code of Criminal Procedure.

A. Standard of review

The first step in a jury-charge review is to determine if there is error in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If there is, we determine if appellant has been harmed by the error. Where, as here, charge error has been properly preserved by an objection or request for instruction, we must reverse if the error is calculated to injure the defendant's rights, that is, if there was "some harm." *Trevino v. State*, 100 S.W.3d 232, 242 (Tex. Crim. App. 2003).

B. Legal standards for Article 38.23 instruction

Article 38.23 provides in relevant part:

> (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. Ann. art. 38.23(a).

A defendant's right to an article 38.23(a) instruction is limited to disputed issues of fact material to his claim of a constitutional or statutory violation that would render evidence inadmissible. *Madden v. State*, 242 S.W.3d 506, 509–10 (Tex. Crim. App. 2007). The terms of the statute are mandatory, and when an issue of fact is raised, a defendant has a statutory right to have the jury charged accordingly. *Murphy v. State*, 640 S.W.2d 297, 299 (Tex. Crim. App. 1982). The only question is whether under the facts of a particular case an issue has been raised by the evidence so as to require a jury instruction. *Id.* Where no issue is raised by the evidence, the trial court acts properly in refusing a request to charge the jury. *Id.*

A defendant must meet three requirements before he is entitled to an article 38.23(a) instruction: (1) the evidence heard by the jury must raise an issue of fact; (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. *Madden*, 242 S.W.3d at 510. "If there is a dispute about whether a police officer was genuinely mistaken, or was not telling the truth, about a material historical fact upon which his assertion of probable cause or reasonable suspicion hinges, an instruction under Article 38.23(a) would certainly be appropriate." *Robinson v. State*, 377 S.W.3d 712, 721 (Tex. Crim. App. 2012). But, if there is no genuine dispute of fact, the legality of the conduct is determined by the trial judge alone, as a question of law. *Madden*, 242 S.W.3d at 510. And, if

other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence. *Id.*

C. Not entitled to instruction

Out of the presence of the jury, appellant's counsel requested an article 38.23(a) instruction to "allow[] the jury to make a decision on suppression and reasonable suspicion and stop." He did not identify what facts he contended to be in dispute or what evidence affirmatively contested those facts. Counsel for the State said, "I think what he's trying to get at is that the stop for failing to maintain a single lane was not valid in this particular case. However, it has not been contested by fact." Appellant's counsel did not dispute or add to this characterization.

In his brief, appellant relies on these facts:

- Wright saw no traffic violations and could not see into the Pontiac.
- Sinegal saw the Pontiac swerving and failing to maintain a single lane of traffic.
- Sinegal did not recognize and could not identify appellant or Sam.
- Sinegal never saw appellant with the plastic bag.
- Sinegal turned off the road before the traffic stop was effected and did not see it completed.

However, none of those facts is disputed; there is no evidence affirmatively contesting the officers' testimony as to those facts, and there is no conflict in the evidence. *See Madden*, 242 S.W.3d at 513 (holding trial court did not err in refusing to include an article 38.23(a) instruction because "there was no conflict in

the evidence that raised a disputed fact issue material to the legal question of 'reasonable suspicion' to detain [appellant]."). Each officer could see a piece of the puzzle. Appellant does not dispute the existence or nature of those pieces. Rather, he suggests the pieces do not complete the puzzle—that they are not sufficient to support probable cause of the traffic stop. That is a question of law for the trial court that we have addressed above, not a question of fact for the jury. *See id.* at 511 ("The jury, however, is not an expert on legal terms of art or the vagaries of the Fourth Amendment. It cannot be expected to decide whether the totality of certain facts do or do not constitute 'reasonable suspicion' under the law. That would require a lengthy course on Fourth Amendment law.").

The trial court did not err in refusing to grant appellant's request for a jury instruction under article 38.23(a). We overrule appellant's third issue.

CONCLUSION

We affirm the judgment of the trial court.

/s/ Sharon McCally
Justice

Panel consists of Justices Christopher, McCally, and Busby.
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