Affirmed and Opinion filed October 3, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00665-CR
NO. 14-16-00666-CR

DARRIUS DESHUNE THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause Nos. 1472708 & 1472707

O P I N I O N

Appellant Darrius Thomas challenges his convictions for possession of child pornography and sexual performance by a child. In a single issue, he asserts that the trial court erred in denying his motion to suppress incriminating photos his girlfriend found on his smart phone because she illegally obtained the evidence in violation of Texas Penal Code section 33.02, thus mandating exclusion. *See* Tex. Code Crim. Proc. art. 38.23(a). To prove a violation of section 33.02, appellant was required to

present evidence that, among other things, his girlfriend knowingly accessed his iPhone's photo application while knowing that she did not have appellant's "effective consent" to do so. Tex. Penal Code § 33.02. We conclude that the trial court could have found that no violation of section 33.02 occurred because the record supports a finding that appellant's girlfriend did not know she lacked appellant's effective consent when she accessed the iPhone's photo application. Accordingly, exclusion of the challenged evidence was not required, and we affirm the judgments.

Background

Appellant and Arlene Doe met online and began dating.[1] A few months into the relationship, appellant moved into Arlene's apartment, where she lived with her three children.

Appellant and Arlene shared some financial responsibilities. While the two of them co-habitated, appellant once paid Arlene's rent, as well as another bill Arlene owed. Appellant also provided to Arlene a four-digit PIN (personal identification number) code for his debit card so she could make necessary purchases or pay bills using his card. He testified that he "allowed her to use [his] debit card on many occasions." Arlene also used appellant's credit card with his permission.

Appellant owned two "smart phones": an Android and an iPhone.[2] Arlene claims she once paid appellant's iPhone bill in cash at appellant's request, though appellant disputes this.[3] Arlene accessed appellant's Android on one occasion, when

[1] To protect the privacy of the child complainant in this case, we refer to her mother by a pseudonym, "Arlene Doe."

[2] A "smart phone" is a "cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity." *Riley v. California*, 134 S. Ct. 2473, 2480 (2014).

[3] The record does not reveal the dollar amount of the bill, how much was paid, or what time period the payment covered.

appellant was not around, for "no real reason." Arlene later told appellant she had accessed his Android and he was not upset. Arlene does not recall if the Android was password-protected when she did this. Appellant contends his Android phone was not password-protected.

Appellant's iPhone, however, was password-protected with a four-digit numeric code. There is no evidence that appellant expressly disclosed to Arlene the passcode to unlock his iPhone. Appellant testified that he never gave Arlene "blanket consent" to access the contents of his iPhone, but he also never expressly prohibited her from doing so. According to appellant, on one occasion when the two were "joking around," Arlene asked if she could have his iPhone, and appellant told her "no."

Appellant stored pictures of Arlene and her children on his iPhone. Arlene testified that she used the iPhone to take pictures of appellant, though appellant disputes this. Together, the couple "pretty often" looked at photos and videos, as well as social media posts, on appellant's iPhone. During these instances, appellant always possessed the iPhone, and there is no indication in the record that Arlene unlocked appellant's iPhone using his passcode.

One day, Arlene realized that appellant's iPhone was wrapped up in a cardigan she brought to work. One of Arlene's co-workers urged her to "go through" the phone before returning it to appellant. In previous long-term relationships, Arlene had reviewed the contents of her significant others' cell phones. Arlene wanted to look at photos stored on the iPhone and delete any "unflattering" pictures of her. At the suppression hearing, Arlene repeatedly stated that she did not think she was "doing anything wrong by looking at his phone," though she later agreed that she felt like she was invading appellant's privacy by doing so.

Arlene attempted to access the iPhone by entering appellant's debit card PIN code, which successfully unlocked the iPhone. The PIN code for appellant's debit card was in fact the same four digits as the passcode for his iPhone, though appellant never told Arlene the passcode for his iPhone. Arlene said she did not have to guess the passcode, but she did not remember how she knew the passcode for appellant's iPhone. Once she successfully unlocked the iPhone, Arlene opened the photo application and discovered several pictures of her daughter asleep in bed, including "[p]ictures angled at between her legs, pictures of her panties," and a picture with her daughter's genitals exposed.

Arlene contacted police. When officers arrived, Arlene showed them the photos in question on appellant's iPhone. Based on information Arlene provided and documented in the police report, Harris County Sheriff's Office Deputy Garrett Hardin obtained a search warrant to search the iPhone and its contents for evidence of a crime. Given Arlene's relationship with appellant, their living arrangements, and the sharing of finances with one another, Deputy Hardin believed that Arlene had appellant's consent to access his iPhone. Deputy Hardin relied exclusively on Arlene's statements to establish probable cause for the warrant. The search warrant affidavit contained no information indicating appellant had consented to Arlene accessing the iPhone.

Appellant was charged by indictment on separate counts of possession of child pornography and sexual performance by a child.[4] Appellant moved to suppress the evidence obtained from his iPhone, arguing that the photos must be excluded under Texas's exclusionary rule[5] because Arlene illegally obtained the photos and, as such,

[4] *See* Tex. Penal Code §§ 43.25 (sexual performance by a child), 43.26 (possession or promotion of child pornography).

[5] *See* Tex. Code Crim. Proc. art. 38.23(a).

evidence illegally obtained could not support probable cause to issue the search warrant. After a hearing, the trial court denied the motion.

Appellant pleaded guilty and received five years' confinement on each count, to run concurrently. Appellant now appeals, raising as his sole issue whether the trial court erred in denying the motion to suppress.

Analysis

Appellant contends the photos from his iPhone should have been excluded under the state exclusionary rule because Arlene obtained them "in violation of . . . [the] laws of the State of Texas." *See* Tex. Code Crim. Proc. art. 38.23(a). According to appellant, Arlene violated Penal Code section 33.02, which prohibits knowingly accessing a computer without the owner's effective consent. *See* Tex. Penal Code § 33.02. The State responds that Arlene had appellant's "effective consent" to access his iPhone and thus article 38.23 did not require exclusion.[6]

A. Governing Law and Standard of Review

In relevant part, the Texas exclusionary rule 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. . . .

Tex. Code Crim. Proc. art. 38.23(a).

[6] The State alternatively argues that Deputy Hardin reasonably believed that Arlene had apparent authority to consent to the search, and thus the fruits of the subsequent search are excepted under the "good faith" exception to the exclusionary rule. *See* Tex. Code Crim. Proc. art. 38.23(b) ("It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause."). Because we resolve the appeal based on the exclusionary rule, we need not address the State's alternative argument.

Article 38.23 is "broader than its federal counterpart." *Miles v. State*, 241 S.W.3d 28, 34 (Tex. Crim. App. 2007). The Fourth Amendment (as well as article I, section 9 of the Texas Constitution) applies only to government action; it does not extend to the conduct of private citizens. *See Tovar v. State*, No. 14-00-01432-CR, 2002 WL 834507, at *2 (Tex. App.—Houston [14th Dist.] May 2, 2002, no pet.) (not designated for publication). In contrast, article 38.23 applies to illegal searches or seizures conducted by law enforcement officers or "other persons," even when those private individuals are not acting in conjunction with, or at the request of, government officials. *Miles*, 241 S.W.3d at 32, 36; *see also id.* at 35 ("To avoid the prospect of implicitly encouraging or condoning vigilante justice by [Prohibition-era] citizen groups, the Legislature applied its statutory exclusionary rule to both law-enforcement officers and private persons."). The Court of Criminal Appeals stated that the "plain language" of article 38.23 leads to this "inescapable conclusion":

> [I]f an officer violates a person's privacy rights by his illegal conduct making the fruits of his search or seizure inadmissible in a criminal proceeding under Article 38.23, that same illegal conduct undertaken by an "other person" is also subject to the Texas exclusionary rule. If the police cannot search or seize, then neither can the private citizen.

Id. at 36 (footnote omitted).

Application of article 38.23(a) is generally unwarranted unless the defendant's privacy or property interest is illegally infringed in the securing of evidence. *See Halili v. State*, 430 S.W.3d 549, 554-55 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Modern day smart phones "place vast quantities of personal information literally in the hands of individuals." *Riley*, 134 S. Ct. at 2485. "Searching a person's cell phone is like searching his home desk, computer, bank vault, and medicine cabinet all at once." *State v. Granville*, 423 S.W.3d 399, 415

(Tex. Crim. App. 2014). Given these realities, people enjoy a reasonable, subjective, and legitimate expectation of privacy in the contents of their smart phones. *See id*. at 405-09; *Royston v. State*, No. 14-13-00920-CR, 2015 WL 3799698, at *3 (Tex. App.—Houston [14th Dist.] June 18, 2015, pet. ref'd) (mem. op., not designated for publication); *Lemons v. State*, 298 S.W.3d 658, 662 (Tex. App.—Tyler 2009, pet. ref'd) ("[A] person has a privacy interest in information contained in a cellular phone."). Likewise, ownership of such devices gives rise to recognized property interests, including the right to exclude others from the contents of one's smart phone. *See* Tex. Penal Code § 1.07(a)(35) (defining "owner" as "a person who . . . has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor . . ."). Article 38.23(a) is therefore implicated.

As applied to the conduct of private persons, however, article 38.23(a) does not apply if no violation of law occurred in obtaining the evidence at issue. *See Halili*, 430 S.W.3d at 554-55. A defendant challenging the admissibility of evidence under article 38.23(a) on the ground it was wrongfully obtained by a private person in a private capacity must establish initially that the private person obtained that evidence in violation of law. *See Pham v. State*, 175 S.W.3d 767, 772 (Tex. Crim. App. 2005); *Kane v. State*, 458 S.W.3d 180, 187 (Tex. App.—San Antonio 2015, pet. ref'd); *Mayfield v. State*, 124 S.W.3d 377, 378 (Tex. App.—Dallas 2003, pet. ref'd); *Carroll v. State*, 911 S.W.2d 210, 219-20 (Tex. App.—Austin 1995, no pet.); *see also Baird v. State*, 379 S.W.3d 353, 357 (Tex. App.—Waco 2012), *aff'd*, 398 S.W.3d 220 (Tex. Crim. App. 2013). If the defendant produces evidence of a statutory violation, the burden shifts to the State to prove compliance. *See Pham*, 175 S.W.3d at 772. However, the ultimate burden of persuasion is "properly and permanently" placed upon the shoulders of the moving party. *Id.* at 773 (internal

quotation omitted). "'When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case.'" *Id.* (quoting *Mattei v. State*, 455 S.W.2d 761, 766 (Tex. Crim. App. 1970)).

A motion to suppress, such as appellant filed, is the proper vehicle to challenge the fruits of an allegedly unlawful search. *Jackson v. State*, 973 S.W.2d 954, 956-57 (Tex. Crim. App. 1998) (per curiam). We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *Pabst v. State*, 466 S.W.3d 902, 904 (Tex. App.—Houston [14th Dist.] 2015, no pet.). At a suppression hearing, the trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented. *Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex. Crim. App. 2007). When, as here, the trial court does not make explicit findings of fact, we imply the necessary fact findings that would support the trial court's ruling if the evidence, viewed in the light most favorable to the trial court's ruling, supports those implied fact findings. *State v. Kelly*, 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006). We give almost total deference to the trial court's determination of historical facts, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Guzman*, 955 S.W.2d at 89. We afford the same amount of deference to the trial court's application of the law to facts if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Id.*

We review de novo the trial court's application of the law to facts if resolution of those ultimate questions does not turn on an evaluation of credibility and demeanor. *Id.* If the trial court's ruling regarding a motion to suppress is reasonably supported by the record and is correct under any theory of law applicable to the case, the reviewing court must affirm. *Young v. State*, 283 S.W.3d 854, 873 (Tex. Crim.

App. 2009) (per curiam) (citing *Romero v. State*, 800 S.W.2d 539, 543-44 (Tex. Crim. App. 1990)).

With this framework in mind, we turn to appellant's complaint.

B. Application

Appellant's motion to suppress focused solely on whether Arlene's initial view of the photos on his iPhone constituted "evidence obtained" in violation of the Constitution or state law, thus requiring exclusion. Tex. Code Crim. Proc. art. 38.23(a). As constitutional protections against warrantless searches apply only to searches conducted under governmental authority,[7] and not to the actions of private individuals, the inquiry before us is limited to whether Arlene violated the "laws of the State of Texas." *Id.*; *see also Franklin v. State*, No. 01-05-01129-CR, 2007 WL 1018377, at *4 (Tex. App.—Houston [1st Dist.] Apr. 5, 2007, pet. ref'd) (mem. op., not designated for publication) ("The Texas statutory exclusionary rule also does not require the exclusion of the evidence because [the private citizen] did not violate any laws or constitutions in conducting the search."); *Mayfield*, 124 S.W.3d at 378 ("If a defendant challenges the admissibility of evidence under this article on the ground it was wrongfully obtained by a private person in a private capacity, the defendant must establish that the private person obtained that evidence in violation of law.").

The only state law appellant argues Arlene violated is Texas Penal Code section 33.02, which provides:

> A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.

[7] *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Tin Man Lee v. State*, 773 S.W.2d 47, 48-49 (Tex. App.—Houston [1st Dist.] 1989, no pet.); *King v. State*, 746 S.W.2d 515, 518 (Tex. App.—Dallas 1988, pet. ref'd).

Tex. Penal Code § 33.02(a) ("Breach of Computer Security"). Section 33.02 is a law that, if violated, would invoke the exclusionary rule. *See Kane*, 458 S.W.3d at 187-88; *Halili*, 430 S.W.3d at 554.

We thus consider the required elements of section 33.02 to determine whether appellant produced evidence to establish that Arlene committed an offense under that statute. As appellant argues, Arlene committed an offense because she "knowingly accesse[d] a computer, computer network, or computer system"—the photo application of appellant's iPhone—without appellant's "effective consent."[8] The statute does not define the term "effective consent," but the Penal Code defines "consent" as "assent in fact, whether express or apparent." Tex. Penal Code § 1.07(a)(11). For assent in fact to occur, there must be an actual or real agreement after thoughtful consideration. *See Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013). For there to be apparent assent, the assent must be clear and manifest to the parties' understanding, despite there being no express communication. *Id*.; *Grimm v. State*, 496 S.W.3d 817, 824 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The parties agree that appellant never consented *expressly* to Arlene's iPhone access. Thus, it was appellant's burden to prove that Arlene did not have "apparent assent," meaning an actual agreement after thoughtful consideration that, while not stated expressly, was no less clear to the understanding for not having been verbalized explicitly. *See Baird*, 398 S.W.3d at 229.

Importantly, the "knowing" mental state required by section 33.02 applies to both the "access" and "effective consent" elements of the offense. *See Muhammed v. State*, 331 S.W.3d 187, 192 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

[8] Neither party disputes that appellant's iPhone qualifies as a "computer" or "computer system" under the statute. *See Granville*, 423 S.W.3d at 405 n.16 ("'In reality, a modern cell phone is a computer . . . .'") (quoting *United States v. Wurie*, 728 F.3d 1, 8 (1st Cir. 2013), *aff'd*, *Riley v. California*, 134 S. Ct. 2473 (2014)).

In *Muhammed*, we held that, "to obtain a conviction under this statute, the State must prove that the defendant knowingly accessed a computer, computer network, or computer system, knowing that this act was without the effective consent of the owner."[9] *Id*. Accordingly, appellant was required to show that Arlene knowingly accessed his iPhone's photo application, and that when Arlene accessed the iPhone, she knew she did not have appellant's effective consent. *See id.*; *accord also Harrison v. State*, 76 S.W.3d 537, 541 (Tex. App.—Corpus Christi 2002, no pet.) (to be convicted under Parks & Wildlife Code section 61.022, which criminalizes taking a wildlife resource without the consent of the landowner, defendant must be shown to have been acting without the consent of the owner, and must have known that he was acting without the owner's consent). A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. Tex. Penal Code § 6.03(b).[10] Appellant could make this showing with circumstantial evidence. *See Muhammed*, 331 S.W.3d at 193; *Gilder v. State*, 469 S.W.3d 636, 639 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) ("Proof of a culpable mental state generally relies on circumstantial evidence.") (citing and quoting *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989) ("Establishment of culpable mental states is almost invariably grounded upon inferences to be drawn by the factfinder from the attendant circumstances.")). In denying the motion to suppress, the trial court implicitly found that appellant did not meet this burden.

[9] In *Muhammed*, the State agreed that the knowledge requirement applies to both the access and the consent elements of the offense. *Muhammed*, 331 S.W.3d at 192.

[10] Here, the alleged unauthorized access of appellant's iPhone photo application is a "circumstances" type offense. *See McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989) (explaining different types of "conduct elements" that may be involved in an offense). Thus, the culpable mental state of "knowingly" must apply to those surrounding circumstances. *Id*.

The State does not dispute that Arlene "knowingly accessed" a "computer" when she used appellant's passcode to unlock the iPhone and viewed the photo application.[11] The parties' arguments instead have focused heavily on whether Arlene had "apparent assent" to view the photos. But whether apparent assent exists on the present facts—a compelling issue argued persuasively by both sides—is a question we need not, and do not, decide. Assuming appellant proved that Arlene never had apparent assent to access his iPhone's photo application, appellant nonetheless did not prove that Arlene possessed the requisite culpable mental state, i.e., that she accessed his iPhone knowing that she lacked appellant's apparent assent. The trial court could have found that no violation of section 33.02 occurred because the record supports a finding that Arlene was not aware of the surrounding circumstances that she lacked appellant's effective consent when she accessed the iPhone's photo application.

The only evidence regarding Arlene's knowledge whether she had or did not have appellant's effective consent to access the iPhone's photo application came from Arlene herself. While she acknowledged it was "fair to say [she] had a feeling that [she] would invade [appellant's] privacy if [she] looked in that phone," she also testified that she "didn't feel that [she] did not have . . . the permission to look at his phone." At the suppression hearing, Arlene testified that she did not think she was doing "anything wrong" by looking at the iPhone. Further, "based upon all the

[11] A person "accesses" a computer under the statute by approaching, instructing, communicating with, storing data in, retrieving or intercepting data from, altering data or computer software in, or otherwise making use of any resource of a computer. *See* Tex. Penal Code § 33.01(1); *see also Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 WL 836775, at *11 (Tex. App.—Dallas Mar. 3, 2016, orig. proceeding [mand. denied]) (mem. op.) (person looking at phone log and text messages constituted "accessing" for purpose of Penal Code).

circumstances of [the] relationship," Arlene thought it was "okay" to look at appellant's iPhone. These circumstances, to which Arlene testified, included:

- Arlene accessing appellant's Android and her recollection that he was not upset by her doing so;
- Appellant taking photos of Arlene and her children with the iPhone;
- Arlene and appellant "pretty often" looking at photos on the iPhone;
- Appellant allowing Arlene to use his credit card and debit card;
- Appellant sharing the PIN to his debit card, which was the same as the passcode to his iPhone; and
- Appellant never prohibiting Arlene from accessing his iPhone.

As the sole finder of fact, the trial court was free to believe or disbelieve any or all of the evidence presented. *Wiede*, 214 S.W.3d at 24-25.

The trial court did not make explicit fact findings, but we imply necessary factual findings to support the trial court's ruling. *Kelly*, 204 S.W.3d at 818-19. Here, we imply a finding that Arlene did not know that she lacked appellant's effective consent, which is supported by the record from the suppression hearing. We give almost total deference to the trial court's implied determination that Arlene did not know that she lacked consent, as would be necessary to prove a violation of section 33.02. *Guzman*, 955 S.W.2d at 89; *see also Muhammed*, 331 S.W.3d at 192 (discussing elements of section 33.02). In the absence of a statutory violation, the exclusionary rule was not invoked and the trial court was not required to suppress the evidence. *See State v. Huse*, 491 S.W.3d 833, 847 (Tex. Crim. App. 2016); *see also Mayfield*, 124 S.W.3d at 378 ("If no violation of the law occurred, [article 38.23] does not apply."); *Kane*, 458 S.W.3d at 188 ("Because [the private citizen] did not violate section 33.02, [the defendant] failed to prove the evidence should have been excluded under article 38.23.").

For the above reasons, we overrule appellant's issue.

Conclusion

Having overruled appellant's sole issue, we affirm the trial court's judgments.

/s/ Kevin Jewell
Justice

Panel consists of Justices Boyce, Donovan, and Jewell.
Publish — Tex. R. App. P. 47.2(b).