In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00116-CR
No. 07-16-00061-CR
No. 07-16-00062-CR
No. 07-16-00063-CR
No. 07-16-00064-CR

JON M. MCKINNEY, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 371st District Court
Tarrant County, Texas
Trial Court No. 1402488R, Honorable Mollee Westfall, Presiding

February 18, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Jon M. McKinney, appellant, appeals his convictions for one count of sexual performance by a child, three counts of possession of child pornography and one count of indecency with a child. Through four issues, he contends that 1) the trial court failed to instruct the jury pursuant to article 38.23 of the Texas Code of Criminal Procedure, 2) the offenses of sexual performance of a child and possession of child pornography are

unconstitutionally vague, and 3) the evidence is insufficient to support his conviction for indecency of a child as alleged in count seven of the indictment.[1] We affirm.

Issue One—38.23 Instruction

Appellant initially asserts that the trial court erred in failing to *sua sponte* include in its charge an instruction under art. 38.23 of the Texas Code of Criminal Procedure.[2] The charge was purportedly required because the police conducted a search of his cell phone without a warrant and before granting them consent to search it. Apparently, the cell phone was given to the police by a third-party without appellant's consent, and the police looked at its contents before communicating with appellant. That constituted an unlawful search, according to appellant, and entitled him to the art. 38.23 instruction. We overrule the issue.

A trial court has the duty to submit an art. 38.23 instruction *sua sponte* when three elements are met. *Contreras v. State*, 312 S.W.3d 566, 574 (Tex. Crim. App. 2010). They are that 1) the evidence heard by the jury raises an issue of fact, 2) the evidence on that issue of fact is affirmatively contested, and 3) the contested issue of fact is material to the lawfulness of the conduct being attacked, *e.g.* the lawfulness of the search. *Id.* No such instruction is required, though, when the facts are uncontested

[1] The appeal was transferred from the Second Court of Appeals. Thus, we apply its precedent where applicable and existent. *See* TEX. R. APP. P. 41.3.

[2] Article 38.23(a) and (b) state:

> (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.
>
> (b) 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. PRO. ANN. art. 38.23 § (a) & (b) (West 2005).

and only their significance is in dispute. In such situations, the court, not the jury, is obliged to resolve the matter. *Robinson v. State*, 377 S.W.3d 712, 721-22 (Tex. Crim. App. 2012) (holding that "[t]he question whether the appellant was required to use his turn signal was therefore a question of law, not fact, and the admissibility of any evidence that Muñoz obtained as a result of the traffic stop does not depend on the reasonableness of his *belief* that the appellant was legally required to signal. The appellant was not entitled to an Article 38.23(a) instruction that the jury must disregard that evidence in the event it should find that Muñoz's belief was unreasonable.").

Here, appellant does not assert that there was a purported factual issue created by the evidence and affirmatively contested by the litigants. Instead, he simply asserts that ". . . the disputed issue of fact is whether or not Appellant's phone was illegally seized and searched." And, in his view, it was illegally searched since a third-party acquired and delivered it to a police officer without the authority of appellant, and the officer searched the device without a warrant and before obtaining consent from appellant. No one denies that these events happened. Nor did appellant cite us to conflicting evidence regarding their occurrence. Instead, he simply broaches their significance and believes them to illustrate an unlawful search. The latter topic, however, involved a question of law for the court to decide, not the jury. So, per *Robinson* and *Contreras*, the trial court did not err in omitting the art. 38.23 instruction from its charge.

Issue Two – Constitutional Nature of the Charges

Appellant next argues that the penal statutes under which he was convicted are unconstitutionally vague. He does not cite us to that portion of the record whereat the

contentions were raised below. Nor did our perusal of the record reveal the argument to have been first brought to the attention of the trial court. As our Court of Criminal Appeals has held, a defendant may not assert for the first time on appeal a facial challenge to the constitutionality of a statute. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). Much like the allegation in *Karenev* that the harassment statute was "unconstitutionally vague," *Id.* at 429, the purported vagueness of the statutes at bar was not raised below. Thus, it was not preserved for review. So, we overrule the issue.

Issue Three – Sufficiency of the Evidence

Finally, appellant contends that the evidence was insufficient to support his conviction for indecency by exposure. Allegedly, it was ". . . insufficient to prove [he] acted 'with intent to arouse of gratify [his] sexual desire.'" We overrule the issue.

When the legal sufficiency of the evidence is attacked, we peruse the record and view all the evidence it contains in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Orr v. State*, No. 02-11-00381-CR, 2012 Tex. App. LEXIS 8367, at *3 (Tex. App.—Fort Worth October 4, 2012, no pet.) (mem. op., not designated for publication) (involving a conviction for indecency with a child by exposure). "This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

Next, one "commits indecency with a child by exposure if, with the intent to arouse or gratify the sexual desire of any person, he exposes his genitals, knowing a

child younger than seventeen years of age is present." *Orr,* 2012 Tex. App. LEXIS 8367, at *4-5, *citing,* TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (West 2011). "The requisite intent to arouse or gratify the sexual desire of a person can be inferred from the defendant's conduct, remarks, or all the surrounding circumstances." *Id.* "There is no requirement for an oral expression of intent, and the conduct itself is sufficient to infer intent." *Id.* "There is also no requirement that a male offender's penis be erect." *Id.* Finally, a "child only has to be present for the offense to be effectuated and does not have to be aware of the exposure." *Id.*

Here, the record contains evidence of appellant videoing a female child as he (appellant) lays atop a bed with his legs spread and a cushion under his knees. The child can be seen playing at the foot of the bed before the camera focuses upon his "flaccid" penis and remains there for a number of seconds. Eventually, the child enters a closet to remove stuffed animals. At that point the girl can be seen clothed in a t-shirt like top. The top ends at her hips. Below her hips, the child simply has on a pair of under-panties.

Other evidence presented at trial and taken from appellant's cell phone include numerous pictures of the same child wet and naked in and next to a bathtub. The child appears to be posing for the pictures, and those poses include close-ups of the young girl's genitalia as she leans backwards over the side of the bathtub.

From the totality of the foregoing, a rational factfinder may conclude beyond reasonable doubt that appellant enjoyed photographing naked little girls (*e.g.* one other female child appeared in the bathtub photos as well). This, coupled with appellant videoing his genitalia in a room with a scantily clad little girl mere feet from him, is some

evidence upon which rational factfinders could determine, beyond reasonable doubt, that appellant exposed his penis with the intent to arouse and gratify his sexual desire.

The judgments are affirmed.

Brian Quinn
Chief Justice

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