In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00424-CR

KENNETH FINLEY, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2016-410,111; Honorable John J. "Trey" McClendon III, Presiding

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October 15, 2018

MEMORANDUM OPINION

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

Appellant, Kenneth Finley, was convicted following a jury trial of theft of property with an aggregate value of less than $2,500, with two prior theft convictions, and sentenced to confinement for a period of two years.[1] In a single issue, he asserts the trial court erred by not giving a jury instruction (regarding whether statements made by

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[1] *See* TEX. PENAL CODE ANN. § 31.03(a), (e)(4)(D) (West Supp. 2018) (a state jail felony).

Appellant incident to his arrest could be considered by the jury) because there was sufficient evidence to warrant such an instruction pursuant to article 38.22 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (West 2018).[2] We affirm.

BACKGROUND

In August 2016, an indictment issued alleging that on or about July 7, 2016, Appellant unlawfully appropriated, by acquiring or otherwise exercising control over, property, to-wit: watches, of an aggregate value of less than $2,500, from the owner thereof, without the owner's effective consent, and with intent to deprive the owner of those watches. The indictment further alleged Appellant had previously been convicted of two prior theft offenses, thereby raising the range of punishment for the offense to that of a state jail felony. A two-day jury trial was held on November 7 and 8.

The State's evidence established that on the night of July 7, 2016, Appellant was observed, by asset protection personnel, while walking in the jewelry department of a Lubbock Walmart store. Appellant selected several watches, ripped off the tags, and concealed the watches on his person. He then proceeded to leave the store. When he walked through the door leading to the parking lot, he was approached by Walmart employees without incident.[3]

He was escorted to the asset protection office where he emptied the watches from his pockets and sat down alone on a sofa. Walmart employees ran Appellant's name

[2] Hereafter, we will cite provisions of the Texas Code of Criminal Procedure simply as "article ___, section ___" or "art. ___, § ___."

[3] The entire incident was recorded by video cameras. The videotapes were admitted at trial.

through Walmart's computer database, but it did not appear. Had he been carrying some type of identification, he would have been permitted to leave the store. Instead, because he had no identification on him, the employees called the police in accordance with corporate policy.

Officer Juan Sierra of the Lubbock Police Department was dispatched to Walmart. His body camera videotaped his encounter with Appellant. When he entered the asset protection office, Appellant was sitting alone on a sofa without any restraints. He was not handcuffed and appeared calm. On approaching him, Officer Sierra casually asked, "What's the deal?" Appellant responded that he "just shouldn't did it."

After the statement, Officer Sierra and Appellant engaged in a conversation wherein the officer asked Appellant questions to ascertain his identity. After ascertaining his identity, he handcuffed Appellant. Appellant then returned to the sofa while Officer Sierra examined the watches and the videotape of the incident. While he was watching the video, Appellant stated he "was ready to go." Shortly thereafter, Appellant was escorted to the police cruiser and taken to jail. The entire encounter lasted approximately twelve minutes.

During its closing argument, the State mentioned Officer Sierra's videotape and Appellant's statement that he "shouldn't have done it." The State also mentioned the items in his possession when he was stopped and the store's videotape of the entire incident. There were no other references to Appellant's statement.[4] Appellant did not

[4] Neither the State nor Appellant's counsel referenced the statement in their opening statements. Appellant never filed a motion to suppress the statement nor did he voice any objection when either Walmart's or Officer Sierra's videotapes were offered into evidence.

object to the jury charge, and after being instructed by the trial court, the jury found Appellant guilty of theft.

In a single issue, Appellant claims the trial court erred by failing to instruct the jury concerning its use of his statements to Officer Sierra. He asserts the evidence at trial raised a fact issue whether he was in custody at the time he made the statements, warranting a general instruction on voluntariness under article 38.22. He further asserts that the harm caused by the trial court's failure to give an appropriate instruction was egregious.[5] We disagree as to both assertions.

STANDARD OF REVIEW

A trial court has an absolute duty to *sua sponte* prepare a jury charge that accurately sets out the law applicable to the case. *Oursbourn v. State*, 259 S.W.3d 159, 179-81 (Tex. Crim. App. 2008). *See* art. 36.14 (West 2007). When statutes, such as those applicable in this case, require an instruction under certain circumstances, that instruction is a part of the "law applicable to the case," and the trial court commits error when it fails to instruct the jury on what is required by that statute. *Oursbourn*, 259 S.W.3d at 180-81.

ARTICLE 38.22 INSTRUCTIONS

Article 38.22 contains two separate sections relating to a trial court's duty to provide an instruction concerning the jury's use of a statement by the accused: (1) section

[5] Although a "voluntariness" issue must be raised, and an accused should request a jury instruction that relates to the theory of voluntariness, if the accused fails to present a proposed jury instruction or fails, as here, to object to the lack of one, any potential error in the charge is reviewed for egregious harm. *Oursbourn v. State*, 259 S.W.3d 159, 174 (Tex. Crim. App. 2008) (referencing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)).

6 pertaining to procedural requirements that must be followed when a question regarding the voluntariness of a statement has been raised, and (2) section 7 pertaining to certain warnings that must be given when the statement is obtained during a custodial interrogation.

In cases where a question has been raised concerning the voluntariness of the statement of an accused, article 38.22, section 6 sets out rules governing the admissibility of that statement. *Oursbourn*, 259 S.W.3d at 171. However, before the trial court's duty to instruct under section 6 is triggered, there are certain statutory procedures that must be followed. *See Smith v. State*, 532 S.W.3d 839, 843 (Tex. App.—Amarillo 2017, no pet.) (citing *Oursbourn*, 259 S.W.3d at 175). One of those procedures is a hearing outside the presence of the jury wherein the trial court must make a determination, as a matter of law and fact, that the statement was voluntary. Here, because Appellant never alerted the trial court to any "voluntariness" issue, no hearing was held outside the presence of the jury, and there was no finding by the trial court on the issue. As such, section 6 is inapplicable and Appellant was not entitled to an instruction under its provisions. *Smith*, 532 S.W.3d at 843-44 (finding that a defendant is not entitled to a section 6 instruction unless he has litigated the issue of voluntariness before the trial court).

If, however, there is sufficient evidence that raises a fact issue whether defendant made the statement as the result of a custodial interrogation, then he is entitled to a general instruction on voluntariness, even if the procedural requirements of article 38.22, section 6 were not met. *See* art. 38.22, § 7 (providing "[w]hen the [voluntariness] issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement"). For the issue to be "raised by the evidence," there

must be a genuine factual dispute whether the statement was voluntary, or, as in this case, whether Appellant was in custody when the statement was made. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 294 (1986). *See also Aldaba v. State*, 382 S.W.3d 424, 430 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd), *cert. denied*, 599 U.S. 579, 130 S. Ct. 1704, 176 L. Ed. 2d 193 (2010).

"'Custodial interrogation' is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. A person is in "custody" if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996) (citing *Stansbury v. California*, 511 U.S. 318, 322-23, 115 S. Ct. 2382, 128 L. Ed. 2d 293 (1994)).

The Texas Court of Criminal Appeals has identified at least four general situations that may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way; (2) when a law enforcement officer tells the suspect he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect he is free to leave. *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009), *cert. denied*, 562 U.S. 850, 131 S. Ct. 103, 178 L. Ed. 2d 64 (2010); *Dowthitt*, 931 S.W.2d at 255. For the purposes of the first three situations, the level of restriction must be to the degree associated with an arrest as opposed to an investigative detention. *Dowthitt*, 931 S.W.2d at 255. In the fourth situation, the officer's knowledge of probable

cause to arrest must be manifested to the suspect, and satisfaction of this factor does not automatically establish custody. *Id.*

ANALYSIS

We determine whether a person is in custody on an *ad hoc* basis considering all the objective circumstances. *Herrera v. State*, 241 S.W.3d 520, 532 (Tex. Crim. App. 2007); *Dowthitt*, 931 S.W.2d at 255. Furthermore, the record as a whole must clearly establish that the defendant's statement was the product of the custodial interrogation; *Herrera*, 241 S.W.3d at 526, and the accused bears the burden of proving that fact. *See Gardner*, 306 S.W.3d at 294; *Herrera*, 241 S.W.3d at 526.

When Officer Sierra arrived at the asset protection office, Appellant was sitting on a sofa without restraints. He was not wearing handcuffs and appeared calm. As the officer was approaching Appellant, he asked, "What's the deal?" Officer Sierra did not tell Appellant he was not free to leave or exhibit in any fashion that he had probable cause to arrest him for anything. He had not mentioned any crime and had not initiated an investigation into the reason Appellant was being detained. Appellant responded that he "just shouldn't did it." Thereafter, Officer Sierra asked Appellant questions to ascertain his identity and once that was done, detained Appellant while he conducted his investigation. This evidence is undisputed.

Under these circumstances, we find there was no evidence Appellant was in custody or that his statement was the result of a custodial interrogation and the trial court did not commit error by not including a general instruction on voluntariness in the jury charge. *See Nada Eid Badr v. State*, No. 05-12-00457-CR, 2013 Tex. App. LEXIS 6495,

at *2-3, *8-13 (Tex. App.—Dallas May 28, 2013, no pet.) (mem. op., not designated for publication) (shoplifter not in custody when officer first approached her in loss prevention office, asked why she was there, and she responded that "she did something wrong" and "took property without paying for it"). Neither is there any evidence in the record that Walmart's asset protection officers were potential state agents of any law enforcement department. *See Elizonda v. State*, 382 S.W.3d 389, 394-96 (Tex. Crim. App. 2012). Because Appellant has not cited any evidence that he claims placed in dispute the voluntariness of his statements to the officer or whether he was in custody, we conclude no issue was raised sufficient to warrant an instruction under article 38.22, section 7. *See Aldaba*, 382 S.W.3d at 430-31.

Moreover, even if we were to determine the trial court erred by not giving a *sua sponte* general voluntariness instruction pursuant to section 7, we would conclude, based upon the entire record, that any error in failing to give that instruction was not egregious because it was harmless beyond a reasonable doubt. *See* TEX. R. APP. P. 44.2(a). For these reasons, Appellant's single issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle

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