IN THE
TENTH COURT OF APPEALS

No. 10-15-00269-CR

RODNEY CLYDE SCHULTZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 21st District Court
Burleson County, Texas
Trial Court No. 14,030

MEMORANDUM OPINION

A jury found Appellant Rodney Clyde Schultz guilty of the offense of manufacturing four hundred grams or more of methamphetamine, and the trial court assessed his punishment at forty-five years' incarceration. Schultz appeals in four issues. We will affirm.

Sufficiency of the Evidence

We begin with Schultz's second issue, in which he argues that the evidence is legally insufficient to support his conviction. The Court of Criminal Appeals has expressed our constitutional standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011).

The Court of Criminal Appeals has also explained that our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326, 99 S.Ct. at 2793. Further, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper*, 214 S.W.3d at

13. Finally, it is well established that the factfinder "is entitled to judge the credibility of witnesses, and can choose to believe all, some, or none of the testimony presented by the parties." *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

To prove the offense charged in the indictment in this case, the State had to show that Schultz knowingly manufactured methamphetamine in the amount of four hundred grams or more. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.102(6) (West Supp. 2017), § 481.112(a), (f) (West 2017). Schultz argues that his mere presence at the location where a methamphetamine lab was discovered is insufficient to prove that he was manufacturing methamphetamine.

To obtain a conviction for manufacturing a controlled substance, the State must link the defendant either to an interest in the place where the manufacturing was taking place or to the actual act of manufacturing. *Webb v. State*, 275 S.W.3d, 22, 27 (Tex. App.—San Antonio 2008, no pet.). The purpose of this requirement is to protect the innocent bystander who merely inadvertently happens onto a methamphetamine lab. *Isham v. State*, 258 S.W.3d 244, 248 (Tex. App.—Eastland 2008, pet. ref'd).

> Manufacturing can be established through circumstantial evidence. *See McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985). Although mere presence at a drug laboratory is insufficient to support a conviction for manufacturing, it is a circumstance tending to prove guilt that, when combined with other facts, shows that the accused was a participant in the manufacturing. *See Green v. State*, 930 S.W.2d 655, 657 (Tex. App.—Fort Worth 1996, pet. ref'd). A link to manufacturing exists when there is "evidence of possession of a drug on one's premises combined with evidence that the lab has been used on the premises to manufacture the drug alleged, and in circumstances where the presence of the lab, because

> of its open location or odor or both, is shown to have been known to the defendant." *East* [*v. State*], 722 S.W.2d [170] 171-72 [Tex. App.—Fort Worth 1986, pet. ref'd].

Webb, 275 S.W.3d at 27; *see also Canida v. State*, 446 S.W.3d 601, 605 n.6 (Tex. App.—Texarkana 2014, no pet.).

The evidence presented at trial establishes that Schultz was arrested after law enforcement officers discovered him in a trailer that contained the components of a methamphetamine lab as well as methamphetamine in various stages of the manufacturing process. The underlying facts are largely undisputed and are based upon the testimony of Leslie Labertew, a former deputy with the Burleson County Sheriff's Office; Jessy "Jay" Boykin, a Texas state trooper; Pacer Lednicky, a deputy with the Burleson County Sheriff's Office; Gene Hermes, an investigator with the Burleson County Sheriff's Office; Robert Dimambro and Sherwin Sanders, members of the DPS Methamphetamine Initiative Group; and Minh Nguyen, a chemist with the DPS crime lab in Houston. The testimony was corroborated by videos taken from various police vehicles.

On April 3, 2013, Labertew was dispatched to investigate a report regarding a possible domestic dispute in progress at a rural location. The dispatcher reported that the caller had heard loud shouting or screaming and possible gun shots. Labertew recognized the property identified by the dispatcher as belonging to Schultz because he had investigated an earlier incident at the property in February 2013 when Brandy Burch

reported that Schultz had assaulted her. Schultz was interviewed at the property in February, and a hunting rifle Schultz had in the trailer was seized by the investigating officers.

Because Labertew was on the other side of the county when the call was dispatched, it took him approximately twenty minutes to arrive at Schultz's property. Two state troopers, Boykin and Chance Ensminger, also responded to the scene as Labertew's backup. None of the officers heard gunshots, screams, or any other sounds indicating a disturbance at the property. Labertew opened the closed gate to Schultz's property and proceeded down the driveway with the troopers following. The actual residence, an older mobile home, was located about fifty yards from the county road. A couple of small, wood-frame outbuildings were close to the trailer. Boykin parked his patrol car close to the outbuildings, using them as cover. He explained, "This is because in a lot of domestic violence issues or places that - - training and stuff we've had, you know, there's been a lot of peace officers killed when they put their self in the line of fire. So I didn't park where anybody else could see me."

Labertew parked close to the trailer, where a number of other vehicles were parked, including a pickup with a number of blue barrels in the bed. When no one came out of the trailer after his arrival, Labertew used his public address system to request that Schultz come out. After a few minutes, Schultz emerged from the trailer. Labertew performed a cursory search to check for weapons but did not find any. Labertew asked

Schultz where Burch was but Schultz did not respond to the inquiry—he just repeatedly questioned why Labertew was on his property. Labertew was concerned that Burch might be on the property and at risk. Labertew also asked Schultz whether anyone else was in the trailer, but Schultz still did not respond to Labertew's question.

While Labertew was calling for Schultz to come out of the trailer, Boykin and Ensminger were making their way toward Labertew, looking for other people or potential weapons while also attempting to hear if anything was going on inside the trailer. Boykin moved his car closer to the trailer once Schultz came out. Two other people then came out of the trailer—Jessie Gutierrez and Raschel Arbuckle. Boykin could see from the open doorway to the trailer a Coleman stove with a couple of pans on it sitting on top of another stove. Shortly after Gutierrez and Arbuckle exited the trailer, the wind blew the door closed. After searching Schultz, Gutierrez, and Arbuckle for weapons, the officers had them sit on an old tractor tire some distance away from the entrance to the trailer.

Boykin noticed some rusty barrels close to the trailer, one of which contained a "funny orange looking paste." Boykin brought the substance to Labertew's attention, and Labertew described the paste as a reddish, mashed substance that appeared to be wet. Labertew told Boykin that he suspected the substance was red phosphorous, a byproduct of methamphetamine manufacturing. Labertew later realized the substance was not red phosphorous, but knew from his experience and education that the substance

was another byproduct of methamphetamine manufacturing. The substance was later identified as the remains of sinus pills after the pseudoephedrine is extracted.

At some point, Ensminger left and Lednicky arrived. Labertew pointed out the reddish substance in the barrel to Lednicky. Lednicky also believed that the substance was a byproduct of methamphetamine manufacturing. The officers also noticed Coleman fuel containers strewn around the outside of the trailer, as well as several gasoline containers. Labertew, Boykin, and Lednicky thought that the people from the trailer could have been manufacturing methamphetamine, and Labertew then called Hermes to request his presence at the scene. Labertew and Lednicky advised Hermes of what they had observed, and Hermes agreed to come to the scene. Hermes also notified his supervisor and the district attorney of the situation because of the eventuality that a search warrant might be required.

Hermes arrived at the Schultz property approximately fifty minutes after Labertew had first arrived. Hermes testified that when he arrived, he discovered that the officers had not completed a sweep of the trailer. Hermes testified that he was concerned about Burch because he believed that Schultz and Burch were still romantically involved. Hermes had also responded to the assault call by Burch in February. Hermes directed the officers to clear the trailer while Hermes watched the suspects.

Labertew went inside the trailer, followed by Lednicky and Boykin. They did a quick search for weapons and additional people but found nothing. While inside the

trailer, Labertew testified that he saw in plain view a Coleman propane stove, several soda bottles with liquid in them, a Bunsen burner, an electric hot plate, large salt containers, and muriatic acid. Boykin testified that the two pans on top of the Coleman stove had a rusty, oily residue in them and that he observed two more Coleman fuel containers. Lednicky noted that the Coleman stove still had heat radiating off of it but that he saw no food around that looked like it had been cooked or heated or was being prepared to be cooked or heated.

Labertew, Boykin, and Lednicky testified that they knew from their training and experience that the items they observed in the trailer could be used to manufacture methamphetamine. The officers did not remove any of the items they saw inside the trailer, but told Hermes what they had observed. Hermes had also observed the items outside of the trailer that the other officers had identified as possible methamphetamine lab components, as well as cold packs (thermal bags) and a gas mask. Hermes testified that he decided to make an application for a search warrant after considering all of the material seen both inside and outside of the trailer. After conferring with his supervisor and the district attorney, Hermes directed the other officers to take Schultz, Gutierrez, and Arbuckle to the sheriff's office rather than detaining them at the property.

Once the search warrant was obtained, Hermes returned to the property along with the MIG, a specialized task force trained to search and handle the hazardous materials associated with a methamphetamine lab. Dimambro and Sanders testified that

the team recovered numerous substances from the trailer that are characteristically bought on the retail level and used to manufacture methamphetamine, including: Coleman fuel, antihistamine tablets that contain pseudoephedrine, coffee filters, hot plates, cases of lithium batteries, drain cleaner containing sulfuric acid, drain cleaner containing sodium hydroxide, and muriatic acid. Dimambro reported that they also found powdered methamphetamine, a variety of liquids that tested positive for methamphetamine, and homemade acid gas or hydrogen chloride gas generators. Dimambro and Sherman testified that mixing drain cleaner or sulfuric acid with salt makes hydrogen chloride gas, which is used to convert the liquid methamphetamine into a powdered form.

Hermes testified that after the MIG team was finished, he went into the trailer and took photographs and collected items that were not sent to the state laboratory, including: two digital scales, two glass methamphetamine pipes, the lithium batteries, and several empty pseudoephedrine pill boxes. Photographed inside the trailer in the kitchen area was an ice chest with Schultz's name on it. Officers also recovered a rifle with a scope and carrying case in the woods in an area that was near to where Schultz, Gutierrez, and Arbuckle had been sitting. None of the items recovered were tested for fingerprints or DNA.

Nguyen testified that the items seized from the trailer and submitted for testing contained methamphetamine and had a total weight over four hundred grams. He also

testified that adulterants and dilutants were included in the total weight and that the lab did not calculate the purity of the samples.

As noted, Schultz argues that the evidence presented at trial was insufficient to prove that he was anything more than an "innocent bystander" at the methamphetamine lab uncovered in the trailer. The evidence supporting Schultz's position is based upon the testimony of Jennifer Gutierrez and Crystal Prise. Jennifer was married to Jessie Gutierrez, and she testified that she made the 9-1-1 call that brought law enforcement to Schultz's property on April 3. She admitted that she had fabricated the disturbance that she reported, hoping to get her husband in trouble. Jennifer further testified that Schultz did not arrive at the property until shortly before law enforcement arrived. Prise testified that she was Schultz's girlfriend and that he had spent the days preceding April 3 with her. She also testified that Schultz did not arrive at the property until shortly before law enforcement arrived.

The jury is the exclusive judge of the facts, the credibility of the witnesses, and the weight to be given the witnesses' testimony. *Jaggers v. State*, 125 S.W.3d 661, 672 (Tex. App.—Houston [1st Dist.] 2003, pet ref'd). A jury may believe all, some, or none of any witness's testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The jury is also entitled to disbelieve some or all of a witness's testimony even when that testimony is not contradicted. *See Evans v. State*, 202 S.W.3d 158, 162-63 (Tex. Crim. App. 2006). By finding Schultz guilty, the jury obviously did not believe the testimony of Jennifer or Prise

and did not believe that Schultz was a mere "innocent bystander." As the reviewing court, we "should not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony." *Vasquez v. State*, 67 S.W.3d 229, 236 (Tex. Crim. App. 2002).

Schultz argues that Labertew was not a credible witness. Schultz subjected Labertew to strenuous cross-examination, questioning him about a previous incident when Labertew was found to have falsified a search warrant affidavit. Even if the jury did not find Labertew credible, in whole or in part, Labertew's testimony was corroborated by the testimony of the other officers.

Evidence tying Schultz to the trailer and to the manufacturing process, besides his mere presence, includes the testimony from the officers on the scene and the exhibits introduced at trial establishing the following: (1) Schultz and Burch were residing in the trailer in February; (2) Schultz took several minutes to exit the trailer after being repeatedly ordered to do so by Labertew; (3) an ice chest bearing Schultz's name was found in the kitchen area of the trailer; (4) the MIG team recovered finished methamphetamine and methamphetamine in various stages of completion from a variety of places in the trailer; (5) components commonly used in the manufacture of methamphetamine were in plain view both outside and inside the trailer; (6) the red substance recovered from the trash barrel was wet when the officers first noticed it,

indicating that it had only recently been discarded; and (6) the search team also recovered scales and methamphetamine paraphernalia from the trailer.

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Schultz knowingly manufactured more than four hundred grams of methamphetamine. We therefore hold that the evidence was sufficient to support Schultz's conviction. Schultz's second issue is overruled.

Motion to Suppress

In his fourth issue, Schultz argues that the trial court erred in denying his motion to suppress the evidence recovered from inside the trailer because the warrantless entry into the trailer was without probable cause and was not based on any type of exigent circumstance. The testimony at the suppression hearing established that the officers did not seize any evidence during their initial entry into the trailer, but their report of what they had seen in the trailer was used to obtain a search warrant.

A trial court's ruling on a motion to suppress is evaluated under a "bifurcated standard of review." *Cole v. State*, 490 S.W.3d 918, 922 (Tex. Crim. App. 2016).

> First, we afford almost total deference to a trial judge's determination of historical facts. The judge is the sole trier of fact and judge of witnesses' credibility and the weight to be given their testimony. . . . Second, we review a judge's application of the law to the facts *de novo.* We will sustain the judge's ruling if the record reasonably supports that ruling and is correct on any theory of law applicable to the case.

Id. (footnoted citations omitted); s*ee also Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016). When the trial court makes explicit fact findings, the reviewing court determines whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports those fact findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). The trial court's legal ruling is then reviewed *de novo* unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id*. at 818. We also give due deference to the trial court's ruling on mixed questions of law and fact "if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor." *Williams v. State*, 257 S.W.3d 426, 432 (Tex. App.—Austin 2008, pet. ref'd). As noted, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Id*.; *see also Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). The trial court "may choose to believe or disbelieve any or all of a witness's testimony." *Garza v. State*, 34 S.W.3d 591, 594 (Tex. App.—San Antonio 2000, pet. ref'd); *see also Allridge v. State*, 850 S.W.2d 471, 492 (Tex. Crim. App. 1991).

Boykin, Hermes, and Labertew testified at the suppression hearing, as well as Lorrene Schultz, Schultz's mother. After the evidentiary hearing, the trial court made written findings of fact and conclusions of law. The trial court concluded that the officers were justified in entering the trailer without a warrant because they had probable cause plus exigent circumstances. The trial court also concluded that the officers were justified in entering the trailer without a warrant in order to perform a "protective sweep" of the

trailer for officer safety. Schultz does not dispute the trial court's findings of fact, which were largely based on the same evidence presented at trial, but Schultz does challenge the trial court's conclusion that the officers were justified in their warrantless entry into the trailer. He asserts that the amount of time between the officers' entry onto his property and their entry into the trailer establishes that the officers did not truly believe that any type of exigent circumstances existed. The testimony of the witnesses reflected that the officers did not make entry into the trailer until approximately forty-five minutes after they first arrived at Schultz's property and not until directed to do so by Hermes. The officers' sweep of the trailer lasted approximately ninety seconds.

After Schultz, Gutierrez, and Arbuckle exited the trailer, the officers questioned them about Burch's location. However, none would provide any information on Burch. Labertew testified that he was still concerned that there might be other people or weapons inside the trailer. Labertew stated that they had not cleared the trailer before Hermes arrived because they were "more concerned about keeping the scene secure and also keeping secured the individuals that we did have outside based on - - there was three of them and three of us." Labertew's concerns were mirrored by Lednicky, who testified:

> [T]here's three subjects there and three officers. I don't think any officer that was in his right mind would go into a residence by himself to clear it. And if there would have been two of us go out of the three officers that was there, then you leave one officer to watch three people.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures by government officials. U.S. CONST. amend. IV; *see*

Wiede v. State, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). A defendant seeking to suppress evidence because of an alleged Fourth Amendment violation bears the initial burden of producing evidence that rebuts a presumption of proper police conduct. *Amador v. State*, 221 S.W.3d 666, 672 (Tex. Crim. App. 2007); *see also Young v. State*, 283 S.W.3d 854, 872 (Tex. Crim. App. 2009). A defendant satisfies this burden by establishing that a search or seizure occurred without a warrant. *Amador*, 221 S.W.3d at 672. Once the defendant has made this showing, the burden then shifts to the State to prove that the search or seizure was nonetheless reasonable under the totality of the circumstances. *Id*. at 672-73; *see also Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005). It is undisputed that the initial entry into the trailer was without a warrant.

Under the Fourth Amendment, a warrantless search is unreasonable *per se* unless it fits into one of a "few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S.Ct. 2130, 2135, 124 L.Ed.2d 334 (1993) (quoting *Thompson v. Louisiana*, 469 U.S. 17, 19-20, 105 S.Ct. 409, 410, 83 L.Ed.2d 246 (1984)); *see also Torres*, 182 S.W.3d at 901. Established exceptions include: "the consent exception, the exigency exception, the automobile exception, the search-incident-to-arrest exception, and the special-needs exception." *State v. Rodriguez*, 521 S.W.3d 1, 10 (Tex. Crim. App. 2017) (internal citations omitted). As noted, the trial court determined that the entry into Schultz's trailer was justified by exigent circumstances.

Under the exigent circumstances exception, a warrantless search is reasonable when (1) an officer has probable cause and (2) an exigency exists that requires an immediate entry. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). Probable cause exists when reasonably trustworthy facts and circumstances within the knowledge of the police officer on the scene would lead him to reasonably believe that evidence of a crime will be found. *Turrubiate v. State*, 399 S.W.3d 147, 151 (Tex. Crim. App. 2013).

> We have identified three categories of exigent circumstances that justify a warrantless intrusion by police officers: 1) providing aid or assistance to persons whom law enforcement reasonably believes are in need of assistance; 2) protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; and 3) preventing the destruction of evidence or contraband. If the State does not adequately establish both probable cause and exigent circumstances, then a warrantless entry will not withstand judicial scrutiny.

Gutierrez, 221 S.W.3d at 685-86 (footnoted citations omitted).

As noted, the trial court also concluded that the officers were justified in entering the trailer without a warrant in order to perform a "protective sweep." Even where probable cause and exigent circumstances do not exist, in some cases police may conduct a protective sweep of private property. *Reasor v. State*, 12 S.W.3d 813, 816 (Tex. Crim. App. 2000).

> Under the protective-sweep exception, when an officer arrives at a residence in response to a reported emergency and has an objectively reasonable belief, based on specific and articulable facts, that there may be a person inside the residence who poses a danger to the officer or to others in the area, the officer may perform a "protective sweep" of the residence without a warrant or consent.

Lipscomb v. State, 526 S.W.3d 646, 655 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). A protective sweep is not a full search of the premises, but merely a cursory inspection of those spaces where a person might be hiding. *Id*. "It may last only long enough to dispel the reasonable suspicion of danger and no longer than officers are justified in remaining in the home." *Id*. While, generally, a protective sweep is conducted pursuant to an in-home arrest, "arrest is not always, or *per se*, an indispensable element of an in-home protective sweep. . . ." *Cooksey v. State*, 350 S.W.3d 177, 185 (Tex. App.—San Antonio 2011, no pet.) (quoting *United States v. Gould*, 364 F.3d 578, 584 (5th Cir. 2004)); *see also Ricks v. State*, No. AP-77,040, 2017 WL 4401589, at *8 n.31 (Tex. Crim. App. Oct. 4, 2017) (not designated for publication) ("[A]n arrest is not a necessary precondition to a lawful protective sweep.").

When assessing a warrantless entry, whether justified as a protective sweep or by exigent circumstances, an objective standard is utilized based on the facts reasonably available to the officer at the time of the search. *Cole*, 490 S.W.3d at 923. The reviewing court must evaluate the circumstances on a case-by-case basis, looking at the totality of the circumstances. *Weems*, 493 S.W.3d at 578. "A reasonable, articulable suspicion of danger may justify a limited, cursory inspection to dispel the suspicion." *Pace v. State*, 318 S.W.3d 526, 534 (Tex. App.—Beaumont 2010, no pet.).

The evidence presented at the suppression hearing, when viewed in the light most favorable to the trial court's ruling, supports the trial courts conclusion that exigent

circumstances justified the warrantless entry into the trailer. *See Kelly*, 204 S.W.3d at 818 (when reviewing a trial court's ruling on a motion to suppress, the appellate court views the evidence in the light most favorable to the trial court's ruling). The trial court determined that the officers on the scene had probable cause to believe that there might be someone in the trailer who required assistance. This was based upon the particulars of the 9-1-1 call that reported gun shots, loud shouting, and screaming and the knowledge of the officers that Schultz had been arrested in February after another domestic violence call involving Burch. *See Gipson v. State*, 82 S.W.3d 715, 721 (Tex. App.—Waco 2002, no pet.) (exigent circumstances based in part on past experience of responding officers to domestic violence at same location). The failure of Schultz, Gutierrez, or Arbuckle to provide the officers with any information regarding Burch's whereabouts provided further justification for the officers' belief that she might have been injured and inside the trailer. *See Gonzalez v. State*, 148 S.W.3d 702, 708 (Tex. App.—Austin 2004, pet. ref'd) (exigent circumstances based in part on evasiveness of witnesses).

Although there was a delay in the initial entry into the trailer, the circumstances the officers faced when they first arrived had not dissipated at the time Hermes arrived on the scene. The previous assault investigation, along with the recent 9-1-1 call and the evasiveness of the suspects, provided objective reasons for the officers to believe that Burch, or someone else, may have been the victim of an assault and was in the trailer either injured or otherwise incapacitated. Boykin testified that they did a protective

sweep of the trailer "just to basically make sure nobody was either hurt or needed help or had been shot or killed without us checking and then leaving just to make sure that there was nobody in there of that nature."

Boykin further testified that their entry into the trailer was also in concern for officer safety because someone could have been hiding in the trailer waiting to ambush them. The 9-1-1 call along with the evasiveness of Schultz, Gutierrez, and Arbuckle regarding whether anyone else was in the trailer understandably raised suspicions that Burch may have been in the trailer as well as some other individual or individuals who had harmed her and who might also harm the responding officers. Hermes testified that he requested that the officers on the scene clear the trailer because,

> I wanted to make sure that there was no other - - anybody else in that house prior to recovering a firearm off the property. I wanted to make sure there was nobody else in the house with a firearm as a suspect, a person of interest, or a victim in the house because of that call.

When questioned about the delay in performing the protective sweep, Hermes replied, "It's never too late when it comes to officer safety."

The trial court's conclusion that exigent circumstances justified the officers' entry into the trailer was supported by the record. The record also supports the officers' entry into the trailer as a protective sweep. Because the officers had the right to enter the trailer on the grounds of safety to officers and others, there was no basis for suppressing any evidence that they saw in plain view. *See Ford v. State*, No. 03-11-00227-CR, 2014 WL 1207983, at *5 (Tex. App.—Austin Mar. 20, 2014, no pet.) (mem. op., not designated for

publication) (items seen in plain view during protective sweep could be used to obtain search warrant). We hold that the trial court did not err in denying Schultz's motion to suppress. Schultz's fourth issue is overruled.

Jury Charge

In his first issue, Schultz asserts that the trial court erred in failing to give a proper jury instruction under article 38.23 of the Code of Criminal Procedure regarding the Texas exclusionary rule.[1] The trial court gave the following instruction to the jury:

> The Fourth Amendment to the U.S. Constitution is as follows:
>
> > It is the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> Article 1, Section 9 of the Texas Constitution is as follows:
>
> > The people shall be secure in their persons, houses, papers and possessions, from all unreasonable searches or seizures, and no warrant to search any place, or to seize any person or thing, shall issue without

[1] Article 38.23(a) 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 (West 2005).

> describing them as near as may be, not [*sic*] without probable cause, supported by oath or affirmation.
>
> If you believe, or if you have a reasonable doubt, that the evidence was obtained in violation of the provisions of the U.S. Constitution and the Texas Constitution, or either of them, then and in such event, the jury shall disregard any such evidence so obtained.

Schultz specifically argues that the trial court's instruction is only an abstract statement of the law and does not include language that would apply the law to the evidence. He additionally asserts that the trial court did not instruct the jury on the law governing probable cause, did not apply that legal concept to the evidence, and did not ask the jury to resolve the disputed fact issues that either justify or invalidate the officers' conduct in entering Schultz's residence without a warrant.

At the charge conference before the trial court's preparation of the final charge, the parties debated whether an instruction under article 38.23 was appropriate. The trial court accommodated Schultz's request and included the previously quoted instruction. Schultz made no further objection to the charge.

A claim of jury-charge error is reviewed using the procedure set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985), *overruled on other grounds by Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988). *See Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). The first step is to determine whether there is error in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Only if we find error, do we then analyze that error for harm. *Almanza*, 686 S.W.2d at 171; *see also Middleton v. State*,

125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003). If an error was properly preserved by objection, reversal will be necessary if there is some harm to the accused from the error. *Almanza*, 686 S.W.2d at 171. Conversely, if error was not preserved at trial by a proper objection, as was the case here, a reversal will be granted only if the charge error causes egregious harm, meaning the appellant did not receive a fair and impartial trial. *Id*.

Assuming without deciding that the trial court's instruction was erroneous, we conclude that the error did not cause egregious harm to Schultz. "Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007); *see also Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006). To obtain a reversal for jury-charge error, Schultz must have suffered actual harm and not just merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986). In reviewing the record for egregious harm, the reviewing court should consider the following: "1) the entire jury charge, 2) the state of the evidence, including the contested issues and the weight of probative evidence, 3) the final arguments of the parties, and 4) any other relevant information revealed by the record of the trial as a whole." *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008).

We first consider the entire jury charge. No other portions of the charge are challenged, and the trial court properly instructed the jury on the elements of the offense

for which Schultz was convicted. Additionally, the challenged portion is a correct statement of the law in regard to the prohibition against using evidence that was seized unlawfully. *See Woods v. State*, No. 07-13-00358-CR, 2014 WL 3536993, at *4 (Tex. App.—Amarillo Jul. 16, 2014, pet. ref'd) (mem. op., not designated for publication) (no egregious harm found when jury charge properly charged jury on law applicable to the charges against defendant, no other portions of charge were challenged, charge contained correct statement of law related to unlawfully seized evidence, and charge properly placed the burden on State to prove evidence was seized lawfully). The charge also contains general language regarding reasonable doubt, the presumption of innocence, the prosecution's burden of proof, and the jury's exclusive role as the fact finder, including assessing the credibility of the witnesses and the weight to be given their testimony. *See Pickens v. State*, No. 08-02-00163-CR, 2006 WL 802456, at *4 (Tex. App.—El Paso Mar. 30, 2006, pet. ref'd) (not designated for publication) (no egregious error found when charge contained instructions regarding presumption of innocence, reasonable doubt, burden of proof, and jury's proper role).

Additionally, as previously noted, the evidence supported the conclusion that the officers' warrantless entry into the trailer was lawful as it was based upon exigent circumstances or was a protective sweep. Also, the final arguments of both Schultz and the State addressed the propriety of the officers' entry into the trailer without a warrant. Schultz argued that the jury should acquit him because all of the evidence in the case was

obtained as a result of the officers' warrantless entry into the trailer. The closing arguments fully informed the jury of the import of their decision as it related to the warrantless entry. *See Woods*, 2014 WL 3536993, at *4.

We therefore conclude that even if the trial court erred in failing to give a proper instruction under article 38.23, Schultz did not suffer egregious harm from the error. Schultz's first issue is overruled.

Actual Innocence

In his third issue, Schultz asserts that he is actually innocent of the crime for which he was convicted. The substance of Schultz's argument, however, is that the trial court erred in allowing his motion for new trial to be overruled by operation of law because he is entitled to a new trial because of newly discovered evidence.[2] The newly discovered evidence is an unsworn declaration from Jessie Gutierrez that states that Schultz had no knowledge of the methamphetamine lab in the trailer and that Schultz had only arrived at the property shortly before law enforcement arrived.

The record reflects that Schultz's motion for new trial was not properly presented to the trial court. The trial court pronounced sentence and signed the judgment on April 6, 2015. Schultz filed a motion for new trial and motion in arrest of judgment on May 4, 2015. The trial court did not conduct a hearing on the motion, which was overruled by

[2] Two motions for new trial were filed—one by Schultz's trial counsel and one by his appellate counsel. The trial court made no ruling on either motion. The motion at issue on appeal is the one filed by appellate counsel.

operation of law. The motion included a "certificate of presentment" by which defense counsel certified that a true and correct copy of the motion was hand-delivered to the "Office for the 21st Judicial District Court of Burleson County" on May 4, 2015. Neither the certificate of presentment nor the trial court's docket sheet, however, shows that Schultz gave the trial court actual notice of his motion for new trial. *See Burrus v. State*, 266 S.W.3d 107, 115-16 (Tex. App.—Fort Worth 2008, no pet.) (certificate of presentment and docket sheet notation that motion was filed are insufficient to establish presentment); *Longoria v. State*, 154 S.W.3d 747, 762-63 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (same); *cf. Stokes v. State*, 277 S.W.3d 20, 24 (Tex. Crim. App. 2009) (entry on docket sheet stating "Motion New Trial presented to court no ruling per judge" sufficient to show presentment).

"'Presentment' must be apparent from the record, and it may be shown by such proof as the judge's signature or notation on the motion or proposed order, or an entry on the docket sheet showing presentment or setting a hearing date." *Gardner v. State*, 306 S.W.3d 274, 305 (Tex. Crim. App. 2009). There is nothing in the record before us to show that the trial judge ever saw Schultz's motion for new trial. The record contains no evidence that Schultz or his attorney took steps to obtain a setting for an evidentiary hearing on the motion or attempted to get a ruling on the motion. *See Perez v. State*, 429 S.W.3d 639, 644 (Tex. Crim. App. 2014). "Boiler plate language in the prayer is not sufficient to put the court on notice . . . . It certainly does not qualify as obtaining a

ruling." *Id*. Because the record does not show the motion was actually presented to the trial court, the issue of whether the court erred in denying Schultz a new trial is not preserved for our review. *See id*., *Longoria*, 154 S.W.3d at 762-63.

Additionally, in regard to Gutierrez's declaration, we note that a statement attached to a motion for new trial is merely "a pleading that authorizes the introduction of supporting evidence" and does not constitute evidence itself. *Briggs v. State*, No. 01-01-00248-CR, 2002 WL 287530, at *2 (Tex. App.—Houston [1st Dist.] Feb. 28, 2002, no pet.) (not designated for publication); *see also Stephenson v. State*, 494 S.W.2d 900, 909-10 (Tex. Crim. App. 1973). To constitute evidence, such a statement must be introduced as evidence at a hearing on a new-trial motion. *Stephenson*, 494 S.W.2d at 909-10; *Briggs*, 2002 WL 287530, at *2. Because there was no hearing held on Schultz's motion, Gutierrez's statement never became "evidence." *Stephenson*, 494 S.W.2d at 909-10; *see also Rouse v. State*, 300 S.W.3d 754, 762 (Tex. Crim. App. 2009) ("[P]ost-trial motions such as these are not self-proving and any allegations made in support of them by way of affidavit or otherwise must be offered into evidence at a hearing.").

Furthermore, even if Schultz has preserved his claim for our review, it is without merit. Motions for new trial on grounds of newly discovered evidence are not favored and are viewed with great caution. *West v. State*, No. 10-07-00100-CR, 2008 WL 5093376, at *4 (Tex. App.—Waco Dec. 3, 2008, pet. ref'd) (mem. op., not designated for publication). We review a trial judge's denial of a motion for new trial under an abuse-of-discretion

standard, reversing only if the trial court's decision was clearly erroneous and arbitrary. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012); *see also State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993). A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). This deferential review requires the appellate court to view the evidence in the light most favorable to the trial court's ruling. *Riley*, 378 S.W.3d at 457. The appellate court must not substitute its own judgment for that of the trial court and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Webb*, 232 S.W.3d at 112. The abuse-of-discretion standard applies whether the motion for new trial is denied by the trial court or overruled by operation of law. *See Mallet v. State*, 9 S.W.3d 856, 868 (Tex. App.—Fort Worth 2000, no pet.).

Even if Gutierrez's declaration had properly been before the trial court, it would not have entitled Schultz to a new trial. A defendant seeking a new trial on the basis of newly discovered or newly available evidence must show that: (1) the evidence was unknown or unavailable to him before trial; (2) his failure to discover the new evidence was not due to a lack of diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and will probably result in a different outcome following a new trial. *Carsner v. State*, 444 S.W.3d 1, 2-3 (Tex. Crim. App. 2014). The record in this case does not support the credibility of Gutierrez's statements.

The testimony of Hermes at the suppression hearing and the affidavit supporting the search warrant reflected that Arbuckle admitted that she, Schultz and Gutierrez had been manufacturing methamphetamine when the officers arrived at the Schultz property on April 3. The testimony of Burch at Schultz's sentencing hearing corroborated Arbuckle's information. Hermes also testified at the sentencing hearing that he listened to recordings of jail calls between Schultz and Prise, who discussed getting Gutierrez to concoct a statement accepting blame for the methamphetamine lab. In return, Schultz would provide a similar statement if Gutierrez were retried or tried on different charges. Nothing in the record supports Gutierrez's statements.

We conclude that Schultz has failed to establish that Gutierrez's affidavit is probably true or that it will probably result in a different outcome following a new trial. The trial court did not, therefore, abuse its discretion in allowing Schultz's motion for new trial to be overruled by operation of law. We overrule Schultz's third issue.

Having overruled all of Schultz's issues, we affirm the trial court's judgment.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed January 31, 2018
Do not publish
[CRPM]