IN THE
TENTH COURT OF APPEALS

No. 10-16-00388-CR
No. 10-16-00389-CR
No. 10-16-00390-CR
No. 10-16-00391-CR
No. 10-16-00392-CR

KELLY HOOPER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 52nd District Court
Coryell County, Texas
Trial Court Nos. 15-22910, 15-22911, 15-22912, 15-22913, & 15-22914

MEMORANDUM OPINION

Kelly Shane Hooper was indicted on five counts of possession of child pornography. Hooper entered a plea of guilty to all five counts. The jury assessed punishment at 10 years confinement and a $10,000 fine on each count, and the trial court ordered that the sentences run consecutively. We affirm.

Motion to Suppress

In the first issue, Hooper argues that the trial court erred in denying his motion to suppress the external hard drive containing the child pornography. When reviewing a trial court's ruling on a motion to suppress, we view the evidence in the light most favorable to the trial court's ruling. *State v. Robinson*, 334 S.W.3d 776, 778 (Tex.Crim.App.2011); *State v. Kelly*, 204 S.W.3d 808, 818 (Tex.Crim.App.2006). The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony. *Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex.Crim.App.2007). Therefore, we give almost total deference to the trial court's rulings on (1) questions of historical fact, even if the trial court's determination of those facts was not based on an evaluation of credibility and demeanor; and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Amador v. State*, 221 S.W.3d 666, 673 (Tex.Crim.App.2007). But when application-of-law-to-fact questions do not turn on the credibility and demeanor of the witnesses, we review the trial court's ruling on those questions de novo. *Hereford v. State*, 339 S.W.3d 111, 118 (Tex.Crim.App.2011); *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex.Crim.App.2000).

Kristina Eikenberg testified at the hearing on the motion to suppress that she and Appellant were friends and shared movies and DVDs with each other. She stated that they used an external hard drive to share the movies. Eikenberg testified that she had permission to access a shared folder on Appellant's hard drive to download whatever

she wanted from the shared folder. On one occasion, Eikenberg went to Appellant's house and took Appellant's external hard drive to her house to download movies. When she got to her house, Eikenberg accessed the hard drive and opened the shared folder. A video started playing that depicted child pornography. Eikenberg screamed and attempted to close her tablet.

Eikenberg made a report with the National Center for Missing and Exploited Children. She then went to report the incident to the Copperas Cove Police Department. At the police department, she met with Officer Dexter Ferdinand and told him that she borrowed a hard drive from a friend and that the hard drive contained child pornography. Officer Ferdinand asked Eikenberg if he could look at the hard drive, and she agreed. Officer Ferdinand testified that it was his understanding Eikenberg had authority to use the hard drive. Officer Ferdinand viewed a video in the shared folder and confirmed that it contained child pornography. Officer Ferdinand took the hard drive into evidence.

Patricia Griffith, with the Texas Attorney General's Office Child Exploitation Unit, testified that she received a report that Eikenberg had contacted the National Center for Missing and Exploited Children and that Eikenberg had turned over an external hard drive to the Copperas Cove Police Department. Griffith went to the Copperas Cove Police Department and took custody of the hard drive. She obtained a search warrant for

the hard drive from a Travis County Magistrate. A forensic analyst searched the hard drive and found that it contained numerous images and videos of child pornography.

Appellant argues that the trial court erred in denying his motion to suppress because Eikenberg did not have authority to consent to the search of the hard drive. A third party can consent to a search to the detriment of another's privacy interest if the third party has actual authority over the place or thing to be searched. *United States v. Matlock*, 415 U.S. 164, 170, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *State v. Rodriguez*, 521 S.W.3d 1, 19 (Tex.Crim.App. 2017); *Hubert v. State*, 312 S.W.3d 554, 560 (Tex. Crim. App. 2010). The third party may, in his own right, give valid consent when he and the absent, non-consenting person share "common authority" over the premises or property, or if the third party has some "other sufficient relationship" to the premises or property. *United States v. Matlock*, 415 U.S. at 170-71, 94 S.Ct. 988; *State v. Rodriguez*, 521 S.W.3d at 19; *Hubert v. State*, 312 S.W.3d at 561. Common authority is shown by mutual use of the property by persons generally having joint access or control for most purposes. *State v. Rodriguez*, 521 S.W.3d at 19. In *Frazier v. Cupp*, 394 U.S. 731, 740, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), the Court held that a duffle bag co-user's consent is good against the absent, co-user of the bag.

Actual authority is not necessarily a prerequisite for a valid consensual search. *State v. Rodriguez*, 521 S.W.3d at 19. If an officer reasonably, though mistakenly, believes that a third party purporting to provide consent has actual authority over the place or

thing to be searched, apparent authority exists. *Id*. The purported consent from the third party can serve to make the search reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *State v. Rodriguez*, 521 S.W.3d at 19; *Hubert v. State*, 312 S.W.3d at 561. Apparent authority is judged under an objective standard: "Would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" *State v. Rodriguez*, 521 S.W.3d at 19.

Eikenberg testified that she and Appellant frequently shared movies by using an external hard drive. Eikenberg stated that she had permission to access Appellant's hard drive and to take the hard drive to her house. Eikenberg and Appellant had joint access to the external hard drive. There was no password protection or any prohibition on Eikenberg accessing the files. The record shows that Eikenberg had common authority over the hard drive and was able to give consent for the limited search conducted by Officer Ferdinand. Moreover, Eikenberg had apparent authority to consent to the search. She was in possession of the hard drive and stated that she was a mutual user of the hard drive with authority to access the files. The facts available to Officer Ferdinand would warrant a reasonable person to conclude that Eikenberg had authority over the hard drive.

In addition, the Texas Attorney General's Office obtained a search warrant to search the hard drive. A forensic analyst searched the hard drive pursuant to the search

warrant and found numerous images and videos of child pornography. When a search warrant is issued on the basis of an affidavit containing unlawfully obtained information, the evidence seized under the warrant is admissible only if the warrant clearly could have been issued on the basis of the untainted information in the affidavit. *Brackens v. State*, 312 S.W.3d 831, 838 (Tex.App. – Houston [1 Dist.] 2009, pet. ref'd)(citing *Pitonyak v. State*, 253 S.W.3d 834, 848 (Tex.App.-Austin 2008, pet. ref'd). If the tainted information was clearly unnecessary to establish probable cause for the search warrant, then the defendant could not have been harmed by the inclusion of the tainted information in the affidavit. *Brackens v. State*, 312 S.W.3d 831, 838. The information provided by Eikenberg would have been sufficient to obtain the search warrant without the information provided by Officer Ferdinand. We overrule the first issue.

Sentencing

In the second issue, Appellant argues that the trial court abused its discretion in ordering his sentences to run consecutively. We review a trial court's decision to cumulate sentences for an abuse of discretion. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (West Supp. 2017). The trial judge has absolute discretion to cumulate sentences if the law authorizes the imposition of cumulative sentences. *Byrd v. State*, 499 S.W.3d 443, 446 (Tex.Crim.App. 2016). A trial court abuses its discretion if it imposes consecutive sentences where the law requires concurrent sentences. *Byrd v. State*, 499 S.W.3d at 447.

Pursuant to Section 3.03 of the Texas Penal Code:

> (b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:
>
> …
>
> (3) an offense:
>
> (A) under Section 21.15 or 43.26, regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of both sections;

TEX. PENAL CODE ANN. § 3.03 (b) (3) (A) (West Supp. 2017). Appellant was convicted of five offenses under Section 43.26 of the Texas Penal Code. The trial court was authorized to order that the sentences run consecutively.

In assessing the sentence, the trial court stated, "A message from the jury was clear in this case. Court will stack all cases." Appellant argues that the trial court based its decision to cumulate the sentences on a faulty interpretation of the facts. The jury assessed the maximum punishment for each offense. The trial court appears to reference that; however, the trial court's statement does not show that the decision to cumulate sentences was based upon a faulty factual interpretation. The trial court did not abuse its discretion in ordering the sentences to run consecutively. We overrule the second issue.

Conclusion

We affirm the trial court's judgments.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed February 14, 2018
Do not publish
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