NUMBER 13-15-00440-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JEFFREY EUGENE DORNAK, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the County Court of Wharton County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez

A jury convicted, appellant, Jeffrey Eugene Dornak, of driving while intoxicated ("DWI"), a class B misdemeanor, and he was sentenced to eighteen months' community supervision with a $1,000 fine. *See* TEX. PENAL CODE ANN. § 49.04 (West, Westlaw through 2015 R.S.). By one issue, Dornak contends that the trial court erred by not

including a jury instruction pursuant to article 38.23(a). *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West, Westlaw through 2015 R.S.). We affirm.

I. BACKGROUND

Nathan Kubes, a police officer with the City of El Campo, responded to a dispatch call to investigate an alleged reckless driver in a white truck. Officer Kubes located the white truck driven by Dornak and observed that Dornak failed to stop at a flashing red light, which is a traffic violation. Officer Kubes stopped Dornak, and he smelled alcohol coming from Dornak's breath. Officer Kubes noticed that Dornak's eyes were "[r]ed and glassy" and that Dornak's breath had a "[s]trong smell of alcohol." Officer Kubes saw that Dornak had not released the brake or turned off his turn signal. When asked, "Are little mistakes like that common with drunk drivers," Officer Dornak replied, "Yes."

Officer Kubes did not ask Dornak to perform a field sobriety test because Dornak wore a brace on his leg. Officer Kubes performed the Horizontal Gaze Nystagmus Test ("HGN") on Dornak. Officer Kubes testified that Dornak failed all three parts of the HGN test and that Dornak had "involuntary jerking of the eyes," which indicated that Dornak had alcohol in his system. Based on Dornak's performance on the HGN test, Officer Kubes arrested Dornak for DWI.

Dornak refused Officer Kubes's request to take a breath-test or to give a blood specimen. Officer Kubes executed an affidavit for a search warrant to obtain a blood specimen. A search warrant issued, and Dornak's blood specimen showed that Dornak's blood alcohol level was over twice the legal limit.

Dornak's trial counsel requested a jury charge instruction pursuant to article 38.23(a). *See id.* Specifically, Dornak's trial counsel argued the following:

> Your Honor, I would request an issue be submitted to the jury on the provisions of the Code of Criminal Procedure 38.23, wherein the law

> provides, that if evidence is illegally obtained in violation of a state law, i.e., in this situation being 18.01([j]) of the Code of Criminal Procedure, meaning that the officer has admitted it was an investigation for a DWI stop, that the person refused the test and that the officer did not seek or obtain a licensed attorney, which would be Judge Clapp in this county, to sign the search warrant affidavit, but instead used an unlicensed Justice of the Peace. And for that reason, we would ask the jury be allowed to have an issue on that to decide whether or not they thought that was proper in regards to obtaining the search warrant, and subsequently, the blood results.

See id. art. 18.01(j) (West, Westlaw through 2015 R.S.) (providing that "[a]ny magistrate who is an attorney licensed by this state may issue a search warrant . . . to collect a blood specimen from a person who" is (1) arrested for, among other things, DWI and (2) "refuses to submit to an alcohol test").[1] The prosecutor responded:

> Recently, the Court has ruled—not this Court but one of the appellate courts in another state, 18.01([i]) and ([j]), we're good on. We're doing those correctly.[[2]] It's an argument that's been brought up a good number of times, specifically by Richard and Colleen Manske in this court. But what we're doing is lawful. So to call it a legal violation is a total fiction. And to put an instruction in front of the jury would go against the law as it stands, and it would also [confuse] the issues.

The trial court denied the request, the jury convicted Dornak, and this appeal followed.

II. APPLICABLE LAW AND STANDARD OF REVIEW

Article 38.23(a) provides that "evidence obtained by an officer . . . 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, [is inadmissible] against the accused" at trial. *See*

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[1] We have already concluded in *Zalman v. State* that in Wharton County, where the search warrant issued, the above-made argument is without merit. *See* No. 13-13-00471-CR, 2015 WL 512914, at *6 (Tex. App.–Corpus Christi Feb. 5, 2015, pet. ref'd) (mem. op., not designated for publication). In *Zalman*, we held that while the general rule under 18.02(j) states that a blood draw warrant must be signed by a magistrate who is a licensed attorney, in Wharton County, a non-attorney justice of the peace may sign a warrant for a blood specimen pursuant to article 18.02(i), which is an exception to 18.02(j) applying in certain rural communities. *See id.* It does not appear that Dornak has re-urged this issue in his appellate brief. However, to the extent he may have intended to make such argument on appeal, we find it is without merit as explained in *Zalman*. *See id.*

[2] Although the prosecutor said that an appellate court in another state approved their blood draw warrant procedures, this Court has made such a ruling in *Zalman* as explained above. *See id.*

id. art. 38.23(a). A 38.23(a) jury instruction is required when there is evidence raising a question of fact regarding whether the fruits of a police-initiated search or arrest were illegally obtained. *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012); *see* TEX. CODE CRIM. PROC. ANN. art. 38.23(a). To obtain an instruction under 38.23(a), "the defendant must show that (1) an issue of historical fact was raised in front of the jury, (2) the fact was contested by affirmative evidence at trial, and (3) the fact is material to the constitutional or statutory violation that the defendant has identified as rendering the particular evidence inadmissible." *Robinson*, 377 S.W.3d at 719. The jury must be instructed it must disregard that evidence if it believes, or has a reasonable doubt, that the evidence was obtained in violation of article 38.23. *Id.* "In short, there must be a genuine dispute about a material fact." *Madden v. State*, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007). The evidence must "raise a 'factual dispute about how the evidence was obtained.' Where the issue raised by the evidence at trial does not involve controverted historical facts, but only the proper application of the law to undisputed facts, that issue is properly left to the determination of the trial court." *Robinson*, 377 S.W.3d at 719. In addition, if the undisputed facts "are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence." *Madden*, 242 S.W.3d at 510.

III. ANALYSIS

By his sole issue, Dornak contends that he was entitled to a 38.23(a) instruction because of Officer Kubes's "stated belief that physical deficits he observed were caused by [Dornak's] intoxication rather than [Dornak's] obvious leg injury and the cumbersome halo brace worn on one leg." As we understand it, Dornak argues that a question of fact existed regarding whether his leg brace caused his unsteadiness, swaying and

staggering, and if the jury had determined that the leg brace was the cause of his unsteadiness, swaying, and staggering then the warrant would have been deemed invalid and the blood draw would have been inadmissible. We will assume, without deciding, that a question of fact existed on that issue for purposes of our analysis.[3]

In his affidavit, Officer Kubes stated that Dornak (1) had a "strong" odor of alcohol, (2) had bloodshot and red/pink eyes, (3) had slow, mumbled, slurred speech, (4) exhibited six clues in the HGN test, which included in both eyes, the "lack of smooth pursuit," "distinct and sustained nystagmus at maximum deviation," and "onset of nystagmus prior to 45 degrees," and (5) had said, "I can't remember how much I was drinking." In addition, in his affidavit that was admitted into evidence, Officer Kubes noted that Dornak refused to provide either a breath or blood specimen to be tested. Regarding whether Dornak performed the "walk and turn test" and the "one leg stand test," Officer Kubes wrote in his affidavit "Due to medical condition unable to perform."

Examining the totality of the circumstances, from the four corners of the search warrant, we conclude that it was supported by probable cause based on Officer Kubes's statements that Dornak had slurred, mumbled speech, showed six clues on the HGN test, had bloodshot eyes, had the strong odor of alcohol, drove through a blinking red light without stopping, and admitted that he had been drinking and did not know how much alcohol he had consumed. *See Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006) (explaining that a search warrant is supported by probable cause when the facts set out within the "four comers" of the affidavit are "sufficient to justify a conclusion that

[3] To the extent that Dornak complains of Officer Kubes's credibility, we agree with the State that a dispute over an officer's credibility "is not enough to raise a fact issue as to the legality of the search." *See Madden v. State*, 242 S.W.3d 504, 509 (Tex. Crim. App. 2007). Therefore, we overrule any such issue brought by Dornak. *See id.*

the object of the search is probably on the premises to be searched at the time the warrant is issued"); *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997) ("Probable cause deals with probabilities; it requires more than mere suspicion but far less evidence than that needed to support a conviction or even that needed to support a finding by a preponderance of the evidence."); *Ramos v. State*, 31 S.W.3d 762, 764–65 (Tex. App.—Houston [1st Dist.] 2000, no pet.) ("Whether the facts alleged in a probable cause affidavit sufficiently support a search warrant is determined by examining the totality of the circumstances.") (citing *Illinois v. Gates*, 462 U.S. 213, 228–30 (1983); *Ramos v. State*, 934 S.W.2d 358, 362–63 (Tex. Crim. App. 1996)); *see also Emerson v. State*, 880 S.W.2d 759, 768 (Tex. Crim. App. 1994) (explaining that the HGN test is considered a highly reliable indicator of intoxication); *Bright v. State*, 865 S.W.2d 135, 137 (Tex. App.—Corpus Christi 1993, pet. ref'd) ("A jury may consider the refusal as evidence that the accused was intoxicated."). Therefore, because these facts supporting probable cause were not in dispute and sufficiently supported the lawfulness of the issuance of the warrant for the blood draw, the trial court was not required to submit to the jury a question regarding whether the brace caused Dornak to become unsteady, to sway, and to stagger because such a determination would not have been material to the ultimate admissibility of the evidence in this case. *See Madden*, 242 S.W.3d at 510.

Moreover, a jury may not be instructed under article 38.23(a) to determine a question of law. *See id.* at 510–11, 513 (involving a proposed article 38.23 instruction regarding "probable cause"). Here, Dornak's proposed jury instruction stated:

> You are instructed that 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.

> You are instructed that in any case where the legal evidence raises an issue hereunder, if you believe, or have a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, you shall disregard any such evidence obtained.

Dornak's requested instruction does not ask the jury to determine any specific historical fact and instead focused only on the law. *See id.* at 513; *Mbugua v. State*, 312 S.W.3d 657, 669–70 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("A jury may not be instructed under article 38.23(a) to determine whether a person is 'in custody' because such an instruction requires the jury to resolve an issue of law, not of fact."). Therefore, for the reasons stated above, we find no error in the trial court's refusal to provide the requested instruction. We overrule Dornak's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Do Not Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
22nd day of November, 2016.