NO. 12-19-00245-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

RUBEN HERNANDEZ-CONTRERAS, APPELLANT	***§***	***APPEAL FROM THE 114TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Ruben Hernandez-Contreras appeals his conviction for online solicitation of a minor. In two issues, Appellant argues that the trial court abused its discretion in refusing to submit an instruction in its charge pursuant to Texas Code of Criminal Procedure, Article 38.23(a) and that such a refusal amounted to reversible error. We affirm.

BACKGROUND

On October 17, 2018, Texas Department of Public Safety (DPS) Special Agent Josh Roraback was investigating cases of online solicitation of minors with a team of members of local law enforcement in Tyler, Texas. Among his other roles, Roraback acted as the "online chatter," wherein he communicated with others online through the "Whisper" application's messaging feature, which commonly is used to facilitate casual sexual encounters.

On Whisper, Roraback assumed the fictitious persona of a fifteen-year-old female named "Kylie." Early that afternoon, someone using the Whisper profile name of "Little_Wiz" contacted Kylie and propositioned her for sex and smoke.[1] Kylie informed Little_Wiz that she was fifteen-years-old, and after first stating that he was seventeen-years-old, Little_Wiz later told her that he was twenty-one-years old. Undeterred after learning her age, Little_Wiz asked Kylie if she liked Mexicans and persisted in requesting

[1] Roraback testified that a "smoke," in this context amounted to an invitation for Kylie to smoke marijuana with him.

that Kylie engage in vaginal, oral, and anal sex with him. He further sought to arrange to meet her in person for this purpose later that afternoon. Little_Wiz eventually agreed to pick up Kylie in his truck in the parking lot of a closed Steak 'n Shake restaurant in Tyler, Texas, whereupon he would take her back to her mother's house where the two would engage in oral and vaginal sex.[2]

The surveillance and arrest faction of Roraback's team of officers was staged near this Steak 'n Shake restaurant, and they maintained constant radio communication with each other and Roraback during the sting operation. After Little_Wiz communicated to Kylie that he had arrived, Roraback relayed this information to the team, and Texas Ranger Joshua Jenkins and other nearby officers began watching several trucks that entered the parking lot beginning at that time. Little_Wiz initially told Kylie that he was driving a brown Ford truck, but he later told her it was a "Chevy." The messaging between Kylie and Little_Wiz continued, and Little_Wiz's response included details about other businesses in the complex that indicated that he was somewhere in the close vicinity of the Steak 'n Shake restaurant. Jenkins observed the man later arrested and identified as Appellant go inside shops, sit and wait in his blue Ford pickup truck, and move his truck to different parking spaces around the lot without an obvious purpose. Jenkins testified that this was unusual when considering how someone ordinarily would behave when visiting such a location to patronize the adjacent retail establishments.

When Little_Wiz could not persuade Kylie to stand outside the entrance to the Steak 'n Shake restaurant or otherwise reveal herself to him, he became suspicious and stopped responding to her Whisper messages. Around that same time, the blue Ford truck that officers had been watching since its arrival, which corresponded to the time Little_Wiz announced his arrival to Kylie, exited the parking lot. This truck was the only one remaining in the lot that had arrived during the relevant time period. DPS Trooper David Anthony was contacted to initiate a traffic stop, and thereafter, Appellant was arrested for online solicitation of a minor. At that time, Appellant told Anthony that he knew why he was being arrested and stated, "Let me explain it." Officers seized Appellant's phone, and although the Whisper application had been deleted from it, law enforcement later located a remnant file folder from the application that contained Appellant's photograph and several separate messages to another female canceling his plans for that afternoon.

[2] Kylie told Little_Wiz that her mother left the house at noon. Kylie repeatedly declined Appellant's requests that she engage in anal sex with him.

Appellant was charged by indictment with online solicitation of a minor and pleaded "not guilty." The matter proceeded to a jury trial. At trial, during the charge conference, Appellant requested an instruction pursuant to Texas Code of Criminal Procedure, Article 38.23(a), which the trial court denied. Ultimately, the jury found Appellant "guilty" as charged and, following a trial on punishment, assessed his punishment at imprisonment for eleven years. The trial court sentenced Appellant accordingly, and this appeal followed.

ARTICLE 38.23(a) CHARGE INSTRUCTION

In his first issue, Appellant argues that the trial court abused its discretion in refusing to submit an instruction in its charge pursuant to Texas Code of Criminal Procedure, Article 38.23(a). In his second issue, Appellant contends that the trial court's refusal to submit this instruction caused him "some harm," which warrants reversal of the trial court's judgment.

Standard of Review and Governing Law

We review a trial court's refusal to give an instruction in its charge for an abuse of discretion. *See* ***Steele v. State***, 490 S.W.3d 117, 130 (Tex. App.–Houston [1st Dist.] 2016, no pet.). A trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." ***Taylor v. State***, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008).

We review alleged jury charge error in two steps—we first determine whether error exists, and, if so, we then evaluate whether sufficient harm resulted from the error to require reversal. ***Price v. State***, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015); ***Ngo v. State***, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005); ***Joshua v. State***, 507 S.W.3d 861, 863–64 (Tex. App.–Houston [1st Dist.] 2016, no pet). The degree of harm required for reversal depends on whether the jury charge error was preserved in the trial court. ***Almanza v. State***, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g) (setting forth analysis for determining whether jury charge error requires reversal). If the jury charge error properly has been preserved by an objection or request for instruction, reversal is required if the appellant has suffered "some harm" from the error. ***Vega v. State***, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *see* ***Barrios v. State***, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). When the defendant fails to object or states that she has no objection to the charge, we will not reverse for jury charge error unless the record shows the defendant has suffered

egregious harm. *See* ***Ngo***, 175 S.W.3d at 743–44. Thus, in considering Appellant's issues, we first must determine if there was error in the charge. *See* ***Joshua***, 507 S.W.3d at 864. Only if we find error do we address whether Appellant was harmed sufficiently to require reversal. ***Id.***

Discussion

Texas Code of Criminal Procedure, Article 38.23(a) provides as follows:

> 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(a) (West 2018). An Article 38.23(a) instruction must be included in the jury charge only if there is a factual dispute about how the evidence was obtained. ***Garza v. State***, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004). A fact issue about whether evidence was legally obtained may be raised "from any source, and the evidence may be strong, weak, contradicted, unimpeached, or unbelievable." ***Id.***

Before a defendant is entitled to the submission of a jury instruction under Article 38.23(a), he must meet the following three requirements: (1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) that contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence. ***Madden v. State***, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007). There must be a genuine dispute about a material fact, which is essential in deciding the lawfulness of the challenged conduct. ***Id.*** at 510–11. If there is no disputed factual issue, the legality of the conduct is determined by the trial judge as a question of law. ***Id.*** at 510. And if other facts, not in dispute, 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. ***Id.***

A peace officer may, without a warrant, arrest an offender when the offense is committed in his presence or within his view. TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (West 2005). An officer does not have to "personally view every element of the offense"

before a proper Article 14.01 arrest can be made. ***Astran v. State***, 799 S.W.2d 761, 764 (Tex. Crim. App. 1990). Probable cause for a warrantless arrest under Article 14.01(b) may be based on an officer's prior knowledge and personal observations. ***State v. Woodard***, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011). An officer may rely on reasonably trustworthy information provided by another person in making the overall probable cause determination. ***Id.*** Thus, all information to support probable cause does not have to be within an officer's personal knowledge. ***Id.*** The ultimate question under Article 14.01(b) is whether, at that moment, the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person to believe that the arrested person had committed or was committing an offense. *See* ***id.***[3]

In the instant case, Appellant argues that the trial court abused its discretion in refusing his requested Article 38.23(a) instruction because a factual issue existed as to whether the offense of online solicitation of a minor occurred within the presence of officers, thereby giving them probable cause to arrest him without a warrant. Specifically, he notes that the evidence supports that (1) officers who were waiting for "Little_Wiz" to arrive did not know the suspect's real name or physical characteristics other than believing that he might be Hispanic, (2) they were aware that their suspect probably was driving a truck but were not sure of its make, model, or color, and (3) after officers began to observe Appellant, they did not witness him commit any crime. Thus, Appellant argues that even if the evidence could lead to the conclusion that officers had probable cause to believe that Little_Wiz committed the offense of online solicitation, they lacked a basis to believe that Appellant was the same person as Little_Wiz apart from the fact that he is Hispanic and was driving a pickup truck that day. We disagree.

Appellant does not identify, nor has our review of the record revealed, any specific historical fact based on affirmatively contested evidence that was material to the lawfulness of his arrest. Although Roraback testified that he did not personally observe Appellant in the parking lot that afternoon, he did witness the offense of online solicitation of a minor take place in the Whisper messages between Little_Wiz and Kylie, with the agreed rendezvous point's being the same place where other officers subsequently observed

[3] Such a scenario in which several officers are cooperating and, as a result, their cumulative information may be considered in assessing reasonable suspicion or probable cause is known as the "collective knowledge" doctrine. *See* ***State v. Martinez***, 569 S.W.3d 621, 626 (Tex. Crim. App. 2019).

Appellant. *See* TEX. PENAL CODE ANN. § 33.021(c) (West 2016) (person commits offense if he knowingly solicits minor over internet, by electronic mail or text message or other electronic message service or system, or through commercial online service with intent that minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with actor or another person); ***Ganung v. State***, 502 S.W.3d 825, 828 (Tex. App.–Beaumont 2016, no pet.) (crime of soliciting minor on internet under Section 33.021(c) is completed at time of internet solicitation, and not at some later time if and when actor actually meets the child). Furthermore, Jenkins, who conducted surveillance of the agreed meeting place, testified that while he observed Appellant sitting in his truck, he could not see if Appellant was using his phone or committing any criminal offense once he arrived. But neither of these facts nor facts such as the difference between the color of the truck mentioned by Little_Wiz in the Whisper messages and Appellant's blue Ford, were affirmatively contested by the evidence or material in and of themselves to the lawfulness of Appellant's arrest.[4] *See* ***Hamal v. State***, 390 S.W.3d 302, 307 (Tex. Crim. App. 2012) (defendant not entitled to Article 38.23 instruction where there was no dispute about what officer did, said, saw, or heard.).

Instead, the issue was whether the sum of the information known to the cooperating officers at the time of Appellant's arrest was sufficient to warrant a prudent person to believe that Appellant was the same person who committed the offense observed by Roraback on Whisper. *See* ***Martinez***, 569 S.W.3d at 628. Based on our review of the record, we conclude that Roraback's testimony about the communications between Little_Wiz and Kylie, when considered in conjunction with evidence regarding (1) the timing of Appellant's arrival, (2) his actions as observed by the officers on the scene, who, at that time, were communicating with Roraback about the his previous and continuing Whisper messages with Little_Wiz, (3) the fact that Appellant's actions in this parking lot were inconsistent with those of someone who ordinarily would come to the parking lot to patronize one of the adjacent businesses, and (4) the timing of Appellant's departure were sufficient to warrant the officers' belief that Appellant and Little_Wiz were one and the same. As a result, they were entitled to believe, as would a prudent person, that Appellant committed the crime of online solicitation of a minor. *See* ***id.***

[4] Roraback testified that, in his experience, it is common for people who engage in online solicitation of a minor to lie in online communications about things such as the clothes they are wearing or the vehicle they are driving.

Because there is no disputed factual issue, the legality of Appellant's conduct properly was determined by the trial court as a question of law, and Appellant was, therefore, not entitled to an Article 38.23(a) instruction. *See* ***Robinson v. State***, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012) ("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"). Therefore, we hold that the trial court did not abuse its discretion in refusing to submit an Article 38.23(a) instruction in its charge. Appellant's first issue is overruled.[5]

DISPOSITION

Having overruled Appellant's first issue, we ***affirm*** the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered May 29, 2020.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

[5] As a result of our resolution of Appellant's first issue, we need not consider his second issue. *See* TEX. R. APP. P. 47.1; *see also* ***Joshua***, 507 S.W.3d at 864.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 29, 2020

NO. 12-19-00245-CR

RUBEN HERNANDEZ-CONTRERAS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 114-1786-18)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was no error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the trial court's judgment be **affirmed**; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.