Affirmed and Plurality, Concurring, and Dissenting Opinions filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-99-01150-CR

JAMES OLIVER NERVIS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 810,875

P L U R A L I T Y O P I N I O N

James Oliver Nervis, Jr. appeals his conviction for felony possession of less than one gram of cocaine[1] on the grounds that the trial court erred in: (1) denying a mistrial as a result of the prosecutor's improper jury argument; (2) denying appellant's motion to suppress; and (3) refusing appellant's request for a jury instruction regarding whether evidence was legally obtained. We affirm.

---

[1] A jury convicted appellant and assessed punishment at one year and six months confinement.

Background

While traveling eastbound on 33rd Street, Harris County Sheriff's Deputy Doug Thomas passed a vehicle traveling westbound in which he noticed the driver was not wearing a safety belt. Thomas stopped the car and, while talking with appellant, the driver, observed a copper tube protruding from appellant's front shirt pocket. Thomas asked appellant if he could examine the tube, appellant gave it to him, and Thomas suspected that it was a crack pipe. Thomas then tested the residue in the tube for cocaine, and, based on a positive result, arrested appellant for possession of a controlled substance.

Prosecutorial Comments

Appellant's first point of error claims that the trial court erred in not granting a mistrial as a result of three improper comments by the prosecutor. The first occurred on cross-examination when the prosecutor asked appellant, "Why are you being such a jerk?" The second was made during jury argument in the guilt phase: "He [appellant] couldn't answer one question straight on cross-examination. Giving the defendant the right to testify does not give him the right to be an arrogant jerk." The third came during jury argument in the punishment phase:

> Ask yourself this: Using the same common sense that you used in finding him guilty, using the same common sense that you used in seeing through all of the unadulterated trash that they brought you yesterday.

In each instance, appellant objected to the argument, the trial court sustained the objection and instructed the jury not to consider it for any purpose, and appellant requested a mistrial, which the trial court denied.

An instruction to disregard improper argument is presumed to be followed by the jury and thus to cure the error except where the comment is so offensive or flagrant that an instruction would be ineffective. *Wesbrook v. State*, 29 S.W.3d 103, 115-16 (Tex. Crim. App. 2000), *cert. denied*, 121 S. Ct. 1407 (2001). Because the complained of comments in

this case were not so offensive or flagrant that instructions to disregard would have been ineffective, appellant's first point of error is overruled.

Motion to Suppress

Appellant's second point of error contends that the trial court erred in denying his motion to suppress because Deputy Thomas's affidavit was not sworn or verified. Appellant filed a motion to suppress, accompanied by affidavits, in which he contended that Deputy Thomas did not have probable cause to search or arrest him. The State filed an opposing affidavit by Deputy Thomas that was signed, but not sworn or verified. Prior to trial, the trial judge held a hearing on appellant's motion to suppress in which he limited the evidence to the affidavits. Appellant made no objection to Thomas's affidavit at that hearing. The trial judge denied appellant's motion, but allowed him to re-urge the motion at trial.

At the very beginning of trial, appellant re-urged his motion to suppress based on Thomas's affidavit being unsworn. The trial court noted that it had already ruled on the motion, but again stated that appellant would be allowed to re-urge it at any time during trial. Appellant re-urged the motion when Thomas was first called to testify at which time the trial court stated that it would hold its ruling on that. When the crack pipe was later introduced into evidence during the testimony of the chemist who tested it, appellant again objected to its admission on the basis of his motion to suppress, and the trial court overruled his objection. Appellant now contends the trial judge erred in denying the motion because Thomas's unsworn affidavit could not be considered as evidence.

In order for a complaint to be preserved for appellate review, the record must show that it was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling sought and that the trial court ruled on the complaint. TEX. R. APP. P. 33.1(a). Thus, a failure to object to unsworn testimony waives the irregularity. *Beck v. State,* 719 S.W.2d 205, 212 (Tex. Crim. App. 1986).

To the extent that appellant is complaining of the trial court's pretrial denial of his motion to suppress,[2] appellant's failure to object to the affidavit at the pretrial hearing waived that complaint.[3] To the extent appellant is complaining of the trial court's further denial of the motion to suppress when the crack pipe was introduced at trial, Deputy Thomas had then testified regarding the events leading to appellant's arrest, and the admissibility of his earlier affidavit was no longer relevant. Therefore, the trial court did not err in denying the motion to suppress due to the unsworn nature of Thomas's affidavit, and appellant's second point of error is overruled.

Article 38.23 Instruction

Appellant's third point of error argues that the trial court erred by refusing appellant's request for a jury instruction on probable cause. In order to preserve a jury charge complaint for appellate review, a defendant must, at a minimum, present an objection to the trial court, "distinctly specifying each ground of objection." TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 2001). The purpose of this requirement is to enable the trial court to know in what respect a defendant regards the charge as defective and to afford the court an opportunity to correct it before reading the charge to the jury. *Pennington v. State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985). It thus serves a statutory purpose in preventing trial judges from being "sand-bagged" and unnecessarily reversed. *Id.* It is a statute which the courts can neither ignore nor emasculate. *Id.*

Article 38.23 provides, in part: "*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

---

2 Appellant's brief does not state whether it is complaining of the trial court's denial before trial, during trial, or both. The only portion of the record appellant cites is that at which the trial court noted at the beginning of trial that it had already ruled on the motion and that appellant would be allowed to raise it again during trial, *i.e.*, a place at which the trial court did not rule at all.

3 Even if the objection had been raised at the pretrial motion to suppress hearing, it would have been within the trial court's discretion to defer a ruling until trial when Thomas testified, rather than grant the motion at the hearing due to the affidavit defect. *See, e.g., Bell v. State*, 442 S.W.2d 716, 719 (Tex. Crim. App. 1969).

evidence was [illegally] obtained . . . , the jury shall disregard any such evidence so obtained." TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2001) (emphasis added). A trial court is required to submit an article 38.23 instruction only if there is a factual dispute as to how the evidence was obtained. *Wesbrook*, 29 S.W.3d at 121. Therefore, where there is no such factual dispute, but only a legal determination to be made, an article 38.23 instruction is not warranted. *Id*.

When an article 38.23 instruction is given, the jurors must be told exactly what evidence is in question; otherwise they cannot pass upon its admissibility. *Atkinson v. State*, 923 S.W.2d 21, 25 (Tex. Crim. App. 1996). In addition, a jury instruction which consists of only an abstract statement of the law from article 38.23, but does not instruct the jury on the applicable law governing reasonable suspicion, probable cause, or other such issue, apply that law to the evidence in the case, and ask the jury to resolve the disputed fact issue(s) that justify or invalidate the officer's conduct, is defective.[4] *Davis v. State*, 905 S.W.2d 655, 663 (Tex. App.—Texarkana 1995, pet. ref'd).

In the present case, appellant made only the following request for an article 38.23 instruction:

---

[4] To illustrate the specificity required, the following was held to be a correct article 38.23 instruction on whether DPS rules for administering a breath alcohol test had been followed:

> You are instructed that under our law in order to be considered valid, a chemical test must be performed according to the rules and regulations governing such test by the Department of Public Safety concerning proper techniques and methodology.
>
> Included in those regulations are:
>
> (1) continuous observation of the person tested for a minimum of fifteen (15) minutes prior to the actual test;
>
> . . . . .
>
> If you have found beyond a reasonable doubt that each of these regulations were complied with you may consider such test and give it whatever weight you choose.
>
> If you do not so find or if you have a reasonable doubt as to whether these regulations were complied with you may not consider said test for any purpose and shall not refer to it further in your deliberations.

Atkinson, 923 S.W.2d at 23, 25.

> [Appellant] respectfully requests that there be a paragraph regarding probable cause, as we have asserted throughout this trial there is a lack of probable cause for arrest and illegal seizure and search of the defendant and, therefore, ask that this issue also be submitted to the jury.

This request left the trial court to guess: (1) on what legal requirement of probable cause a fact issue had been raised; (2) what was the fact issue that had been raised on that requirement; and (3) what conflicting evidence had raised that fact issue. Without being apprised of these matters, the trial court lacked an adequate basis to decide whether an article 38.23 instruction was warranted, let alone what the instruction should state.

On appeal, appellant asserts that defense testimony at trial controverted whether the officer was ever in a position to observe whether appellant was wearing a seat belt and thus whether the officer had *reasonable suspicion* for stopping appellant in the first place. However, as set forth above, appellant's request for an article 38.23 instruction not only gave no hint of any such issue, it affirmatively indicated that the instruction was requested to address probable cause (*i.e.*, to search or arrest) rather than reasonable suspicion (*i.e.*, to stop or detain).[5] This denied the trial court any opportunity to rule on the contention appellant now asserts on appeal. Under such circumstances, in order to have properly granted appellant's request for an article 38.23 instruction, the trial court would first have had to either: (1) question appellant's attorney to draw out a specific basis for the request; or (2) analyze *for appellant* the various grounds on which an officer's actions could have potentially been challenged under the circumstances and then relate the trial testimony to those grounds to determine that a material conflict existed. Because the trial court was under no such obligation, appellant failed to preserve the complaint he presents on appeal.

---

[5] Nor was the fact issue upon which appellant now relies on appeal apparent from any other context in the trial court. Appellant's written motion to suppress and his counsel's arguments to the court were directed to the lack of probable cause for appellant's search and arrest and the unsworn nature of the State's probable cause affidavit. Appellant did not challenge the justification for the initial traffic stop except to point out that, in observing that appellant was not wearing a *shoulder* belt, the officer admitted he didn't know whether appellant might have nevertheless been wearing a *lap* belt, *i.e.*, without the shoulder strap.

Accordingly, his third point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 10, 2002.

Panel consists of Justices Edelman, Frost, and Murphy.[6] (Frost, J. concurring and Murphy, J. dissenting.)

Do Not Publish — TEX. R. APP. P. 47.3(b).

[6] Senior Chief Justice Paul C. Murphy sitting by assignment.

Affirmed and Plurality, Concurring, and Dissenting Opinions filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-99-01150-CR

JAMES OLIVER NERVIS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 810,875

C O N C U R R I N G O P I N I O N

An article 38.23 instruction is required only when the evidence at trial raises a factual issue concerning whether the evidence was obtained in violation of the federal or state constitutions. *Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996); *Moreno v. State*, 987 S.W.2d 195, 202 (Tex. App.–Corpus Christi 1999, pet. ref'd); *Angelo v. State*, 977 S.W.2d 169, 178 (Tex. App.–Austin 1998, pet. ref'd). In this case, there are no factual disputes as to the manner in which the complained-of evidence was obtained.

The police officer testified appellant was not wearing a seat belt. Neither appellant, who testified, nor any other witness offered testimony refuting this fact. The officer further

testified that the reason he stopped appellant was because appellant was not wearing a seatbelt. Although appellant offered evidence suggesting the officer's vehicle never crossed paths with his vehicle, there is no evidence in the record that would create a genuine factual dispute as to the officer's stated reason for the traffic stop. Even assuming the jury did not believe the officer's vehicle crossed paths with the appellant's vehicle, and instead believed the officer merely drove up behind appellant's vehicle, there is nothing in the record to indicate that the officer did not observe appellant driving without a seatbelt.

In *Thomas v. State*, 723 S.W.2d 696, 707 (Tex. Crim. App. 1986), the Court of Criminal Appeals stated: "[a] trial court is required to include a properly worded Article 38.23 instruction in the jury charge only if there is a factual dispute as to how the evidence was obtained." In *Thomas*, the appellant testified but never controverted facts surrounding his refusal to provide a breath sample. *Id.* Accordingly, the court found that because there was no factual dispute as to how the evidence was obtained, an article 38.23 instruction was not necessary. *Id.* Whether the officer passed or came from behind appellant's vehicle before making the traffic stop does not amount to a factual dispute concerning the existence of probable cause to stop appellant. Thus, no article 38.23 instruction was required. *See id.*

No defense witness contradicted the State's assertions that appellant had violated a traffic law (failure to wear his seatbelt while driving), but only offered evidence suggesting the officer's account leading up to the stop may have differed, in incidental ways, with the account given by other witnesses. In spite of an apparent factual dispute as to who was driving in which direction before the traffic stop, there is no fact issue concerning the objective circumstances upon which the officer formulated the probable cause to believe that appellant had committed a traffic offense. The stated reason for the stop (appellant was driving without his seatbelt fastened) existed under either factual scenario. Therefore, the trial court did not abuse its discretion in denying appellant's requested article 38.23 instruction.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 10, 2002.

Panel consists of Justices Edelman, Frost, and Murphy.[1]

Do Not Publish — TEX. R. APP. P. 47.3.

[1] Senior Chief Justice Paul C. Murphy sitting by assignment.

Affirmed and Plurality, Concurring, and Dissenting Opinions filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-99-01150-CR

JAMES OLIVER NERVIS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 810,875

D I S S E N T I N G O P I N I O N

Because I believe appellant was entitled to an article 38.23 instruction, I respectfully dissent.

In his third point of error, appellant complains that the trial court erred in refusing an article 38.23 jury instruction regarding probable cause for the stop. Specifically, appellant contends that because his vehicle never crossed paths with Deputy Thomas's vehicle, Deputy Thomas could not have seen if he was or was not wearing a seatbelt before appellant was stopped.

Following the stop, as Deputy Thomas was talking with appellant, Thomas testified that he observed a copper tube sticking out of appellant's front shirt pocket. According to Deputy Thomas, when asked about the tube, appellant said that he used it to adjust carburetors. Unconvinced by appellant's explanation, Deputy Thomas requested and received permission to examine the copper tube. Deputy Thomas testified that upon examining the tube he determined it to be a crack pipe, which tested positive for cocaine. Appellant denies ever seeing this crack pipe before, much less having it on his person. In support of this assertion, appellant testified that, contrary to Deputy Thomas's testimony that he observed the crack pipe in appellant's front pocket, the shirt that he was wearing at the time of the arrest did not have any front pockets. Additionally, appellant's wife and a witness to the stop, testified that the shirt appellant was wearing when he was stopped did not have front pockets.

The plurality opinion states that appellant failed to preserve error by failing to make a specific objection to the court's jury charge. At the close of the evidence, the trial court asked the parties if they had any objections to the charge. Appellant responded:

> The Defendant, Your Honor, respectfully requests that there be a paragraph regarding probable cause, as we have asserted throughout this trial there is a lack of probable cause for arrest and illegal seizure and search of the defendant and, therefore, ask that this issue also be submitted to the jury.

As regards specificity, to avoid the forfeiture of a complaint on appeal, a party must let the trial judge know what he wants, why he thinks himself entitled to it, and do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it. *Lankston v. State,* 827 S.W.2d 907, 909 (Tex. Crim. App. 1992). Where the correct ground for exclusion was obvious to the judge and opposing counsel, no waiver results from a general or imprecise objection. *Roeder v. State*, 688 S.W.2d 856, 859 (Tex. Crim. App. 1985). Here, prior to trial, appellant filed a motion to suppress, which alleged, among other things, that the offense of driving without seat belts did not authorize his detention and subsequent arrest. Appellant's affidavit in support of his motion stated

that the sheriff's or constable's vehicle was traveling in the same direction as appellant. The affidavit also stated that the car's windows were tinted and it is impossible to see from a distance whether the seat belts are in use. The State's controverting affidavit stated that the officer stopped appellant for driving without a seat belt. At trial, each side presented evidence as to whether the officer could have determined whether appellant was wearing his seat belt. At the time appellant objected to the charge, it was clear to the trial court and opposing counsel that appellant was seeking an article 38.23 instruction on the officer's probable cause to stop appellant. Therefore, error was preserved.

An article 38.23 instruction is required when there are factual disputes as to how the evidence was obtained. *Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996); *Estrada v. State*, 30 S.W.3d 599, 605 (Tex. App.—Austin 2000, no pet.); *see generally Hutch v. State*, 922 S.W.2d 166, 169 (Tex. Crim. App. 1996) (holding that an article 38.23 instruction was properly given where the officer found cocaine in a stop for no seatbelt, but defendant claimed he wore a seatbelt); *Reynolds v. State*, 848 S.W.2d 148, 149 (Tex. Crim. App. 1993) (holding that an article 38.23 instruction was merited when the officer stopped defendant for speeding, but defendant claimed he was not speeding). The issue of whether evidence was obtained unlawfully may be raised from any source, and may be strong, weak, contradicted, unimpeached, or unbelievable. *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993).

During trial, Deputy Thomas testified that he stopped appellant for failing to wear a seatbelt. When asked how he determined that appellant was not wearing a seatbelt, he testified that he passed appellant going in the opposite direction, looked into the driver's side window, and observed that appellant was not wearing a seatbelt.

Q. Tell the ladies and gentlemen of the jury where you saw the car.

A. It was traveling westbound on a street off of Airline. I was going eastbound, and I observed the driver driving the vehicle.

* * *

Q. Okay. What did you notice, Deputy Thomas, about the driver of this 83' Nissan?

A. I noticed he committed a traffic violation of not wearing a seat belt.

Q. And what — tell the ladies and gentlemen of the jury, put them out there at the scene, what kind of lighting do we have here?

A. It was a sunny day. It was plain lighting.

Q. Do you remember what time it was?

A. Around 5:00.

Q. Okay. How close were you, Deputy Thomas, to the defendant's car when you noticed that he wasn't wearing a seatbelt?

A. We passed in opposite directions, so it was easy just to see – we passed oncoming traffic, how you're just opposite lane from them. Couple feet, in between the lanes.

This testimony makes it clear to the jury that, while Deputy Thomas stopped appellant for not wearing a seatbelt, his ability to make that determination was dependent upon the fact that appellant's vehicle and Deputy Thomas's vehicle passed going in opposite directions.

There is no testimony in the record that Deputy Thomas would have been able to observe that appellant was not wearing a seatbelt if Deputy Thomas's vehicle had not passed appellant's vehicle, but rather had come up from behind appellant's vehicle.

Appellant disputes that his vehicle and Deputy Thomas's vehicle ever passed going in opposite directions.

> Q. Let me ask you this. Did you ever cross paths with the deputy sheriff's vehicle?
>
> A. At no time did I cross paths or face front of.
>
> Q. How was it you became aware that you had a police car behind you? Did he have his sirens on or his lights on, or how did you become aware of that?
>
> A. He pulled in and turned right behind me when I turned right on Delhi. My blinker was on to turn left. I had said before the police car was facing west on 33rd Street.

Additionally, appellant's sister, who witnessed the stop, when asked "which direction [the deputy's vehicle] came up from before it got behind your brother's vehicle," responded "it was traveling westbound on 33rd ."

Although appellant never testified that he was wearing a seatbelt, article 38.23 does not require appellant to directly refute Deputy Thomas's reason for the stop. Appellant raised a fact issue on how Deputy Thomas developed probable cause to stop appellant for not wearing a seatbelt. The record is clear that the only way Deputy Thomas was able to determine that appellant was not wearing a seatbelt was because the two vehicles passed going in the opposite direction. There is no indication in the record that Deputy Thomas could have made that same observation if he approached appellant's vehicle from behind, which appellant contends happened.

If the jurors believed that appellant's vehicle never passed Deputy Thomas's vehicle going in the opposite direction, then they would be forced to conclude that the deputy's testimony was either mistaken or not credible. *See Reynolds v. State*, 848 S.W.2d 148, 149 (Tex. Crim. App. 1993). Although a conclusion that the deputy was mistaken would not affect the legitimacy of the stop, a conclusion that he was lying would. *See id.* Had the jury believed that Deputy Thomas never passed appellant's vehicle going in the opposite direction, thus enabling him to observe that appellant was not wearing a seatbelt, and believed the officer was not credible, the officer would not have been justified in stopping the car. *See id*. Therefore, the trial court erred in failing to give an article 38.23 instruction.

I would further find sufficient harm was caused by the error to require reversal. *See Hutch v. State*, 922 S.W.2d 166, 170–71 (Tex. Crim. App. 1996). Error properly preserved by an objection to the charge will require reversal as long as the error is not harmless. *Id*. at 171. Meaning, any harm, regardless of degree, is sufficient to require reversal. *Id*.

The jury was allowed to consider evidence that was obtained as a result of the stop without first determining whether the stop was legitimate. If the court had given an instruction under article 38.23, the jury could have believed appellant and his witness and found that the stop was impermissible because Deputy Thomas could not have determined that appellant was not wearing his seatbelt. *See Reynolds*, 848 S.W.2d at 149. Accordingly, the jury would have been required to disregard such evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2001). I would find sufficient harm present to warrant reversal and would sustain appellant's third point of error. Because the plurality does not do so, I respectfully dissent.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed January 10, 2002.

Panel consists of Justices Edelman, Frost, and Murphy.[1]

Do Not Publish – TEX. R. APP. P. 47.3(b).

[1] Senior Chief Justice Paul C. Murphy sitting by assignment.