Affirmed and Majority and Concurring and Dissenting Opinions filed March 22, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01416-CR

LARRY TORRES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 338th District Court
Harris County, Texas
Trial Court Cause No. 819,182

MAJORITY OPINION

Larry Torres appeals a conviction for possession of a controlled substance with intent to deliver on the grounds that the trial court erred by: (1) denying his motion to suppress; (2) denying his request for a jury charge instruction to disregard illegally obtained evidence; (3) excluding the testimony of a defense witness; (4) denying defense counsel's motion to withdraw; and (5) admitting extraneous offense evidence. We affirm.

Background

According to the record, Angela Hood, who claimed to be appellant's common law wife, informed the police that appellant was selling large quantities of cocaine at Hood's

apartment. Shortly thereafter, officers arrived at the apartment and obtained Hood's consent to search it. After awakening appellant there, the officers told him they were conducting a narcotics investigation and asked if he had any narcotics in the house or on himself. Appellant responded by withdrawing an ounce of cocaine from the pocket of his pants. Although the officers found no other cocaine, they recovered a scale covered with a cocaine residue. Appellant was charged by indictment with possession of a controlled substance with intent to deliver, found guilty by a jury, sentenced to seventy years' confinement, and fined $10,000.

Motion to Suppress

Appellant's first point of error contends that the trial court erred by denying his motion to suppress the evidence found in Hood's apartment and the incriminating oral statements he made there that the drugs belonged to him. He claims that this evidence was illegally obtained by the police in violation of the Fourth and Fourteenth Amendments to the United States Constitution, article I, section 9 of the Texas Constitution, and article 38.23 of the Texas Code of Criminal Procedure. However, appellant's failure to obtain a hearing or ruling on his pretrial motion to suppress and his failure to timely object at trial to the admission of the complained of evidence on this basis waived any complaint regarding its admissibility. *See* TEX. R. EVID. 103(a)(1); TEX. R. APP. P. 33.1(a). Accordingly, appellant's first point of error is overruled.

Article 38.23 Instruction

Appellant's second point of error complains that the trial court erred by denying his request for an article 38.23 instruction in the guilt/innocence charge to the jury.[1] We note that conflicting authority has developed regarding whether a defendant who fails to challenge

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[1] *See* TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979) (requiring the trial court, where the issue is raised by the evidence, to instruct the jury to disregard incriminating evidence against the defendant if the jury believes or has a reasonable doubt that the evidence was obtained in violation of the defendant's constitutional rights).

the admissibility of allegedly illegally obtained evidence thereby waives his right to an article 38.23 jury instruction.[2] However, because we conclude that appellant was not entitled to the instruction for other reasons, we do not address the waiver issue.

A defendant is entitled to an article 38.23 instruction only if, among other things, there is a factual dispute as to how the evidence was obtained. *Wesbrook v. State*, 29 S.W.3d 103, 121 (Tex. Crim. App. 2000). Thus, there is no issue for the jury when the question is one of law only. *Pierce v. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000). In the instant case, there was no dispute as to the facts surrounding the manner in which the officers approached and spoke to appellant or appellant's retrieving cocaine from his pocket when questioned by the police. Appellant contends that he hesitated before doing so, but that the presence of three officers in the bedroom made it clear to him that he was required to comply. According to appellant, that hesitation raises a factual question as to whether he disclosed the contraband spontaneously, *i.e.*, consensually, or in response to the officers' assertion of authority.

However, whether the undisputed facts constituted a consensual encounter or a detention (or demonstrated that any detention was reasonable) was a question of law that would be determined objectively based on how a reasonable person would have perceived the officers' conduct and not upon how appellant subjectively reacted to it.[3] Because the only determination to be made on this issue was therefore of a legal, rather than factual, nature, appellant was not entitled to the requested jury instruction, and his second point of

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[2] *Compare Jackson v. State*, 888 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1994, no pet.) (finding waiver); *and Ramos v. State*, 831 S.W.2d 10, 15-16 (Tex. App.—El Paso 1992, pet. ref'd) (finding waiver); *with Bell v. State*, 881 S.W.2d 794, 802 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (finding no waiver); *and Johnson v. State*, 743 S.W.2d 307, 309-10 (Tex. App.—San Antonio 1987, pet. ref'd.) (finding no waiver).

[3] The test is whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. *See United States v. Mendenhall*, 446 U.S. 544, 554-555 (1980) (holding that the issue of whether a seizure has occurred in any given factual setting is a question of law); *State v. Velasquez*, 994 S.W.2d 676, 679 (Tex. Crim. App. 1999) (holding that the test is one of reasonableness).

error is overruled.

Exclusion of a Defense Witness

Appellant's third point of error asserts that the trial court erred by excluding the testimony of Elizabeth Wortman to support his defense theory that Hood planted the cocaine in his pants pocket because of her jealousy of Wortman. Although the State objected to particular answers by Wortman that pertained to Hood, Wortman's testimony was not excluded from the jury's consideration because the State's objections were lodged after the answers were given, and the trial court merely sustained the subsequent objections without instructing the jury to disregard the evidence.[4] Nor was there any attempt by appellant to introduce any additional testimony from Wortman by way of a bill of exception or offer of proof. Although the trial court's sustaining of the State's objections after Wortman's answers were given could have left uncertainty in the jurors' minds regarding the status of the evidence, the jury heard the evidence and would not have violated any of the court's instructions by considering it in determining guilt. Under these circumstances, we are not persuaded that the evidence was excluded. Accordingly, appellant's third point of error is overruled.

Motion to Withdraw

Appellant's fourth point of error contends that the trial court erred by denying trial counsel's motion to withdraw from the case. However, appellant's failure to request or obtain a ruling from the trial court on his motion to withdraw waived any complaint. *See* TEX. R. APP. P. 33.1(a). Therefore, point of error four is overruled.

Extraneous Offense Evidence

Appellant's fifth point of error claims that during the punishment phase of trial the trial court erred by allowing the State to present exhibits constituting unauthenticated and

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[4] *Cf. Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994) (noting that once evidence is received without a proper limiting instruction, it becomes part of the general evidence in the case and may be used to the full extent of its rational persuasive power).

insufficient evidence of prior offenses. Because appellant is not contesting the overall sufficiency of the evidence to prove the convictions, which were admitted by appellant on the stand, but only the admissibility and sufficiency of the particular exhibits, any error in admitting the exhibits was not preserved or harmful.[5] Accordingly, appellant's fifth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 22, 2001.

Panel consists of Justices Edelman, Wittig, and Frost.

Do not publish — TEX. R. APP. P. 47.3(b).

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[5] *See, e.g., Moore v. State*, 999 S.W.2d 385, 402 (noting that admission of same evidence from another source, without objection, *waives* previously stated objections, then holding that any error in admission of a diagram was *not harmful* where content of diagram was established by other testimony without objection), *cert. denied*, 120 S.Ct. 2220 (2000).