Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

NO. 14-95-01133-CR

SHIRLEY CLARK LABLANCHE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 677,425

O P I N I O N

A jury found appellant guilty of assault. TEX. PENAL CODE ANN. § 22.01 (Vernon Supp. 1999). The trial court entered judgment on the jury's verdict and assessed an $800 fine as punishment. In thirty-five points of error, appellant contends the trial court erred by: (1) admitting hearsay evidence; (2) overruling an objection to the illegal seizure of an audiocassette tape; (3) declining to admit the audiotape for a limited purpose; (4) failing to include requested instructions in the jury charge; and (5) improperly instructing the jury in the charge. We affirm.

I. BACKGROUND

Appellant and her son, George LaBlanche, filed several cases in a justice court. The cases were transferred to the justice court where Judge Paul Till presided. To check the status of these cases, appellant and George requested the case files from Evelyn Keenum, the head clerk of the justice court. While talking with appellant and George, Keenum noticed that George was taping their conversation and asked him to turn off the recorder. George refused. In spite of his refusal, Keenum provided the LaBlanches with the files of their cases and copies of requested documents. After receiving a copy of a document with a small yellow sticky note attached, the LaBlanches asked Keenum to certify the copy. Keenum disappeared. When she returned, Keenum informed the LaBlanches that she could not certify the document and suggested they talk to Judge Till about it.

The LaBlanches were suspicious of the document and of Judge Till. After Keenum refused to certify the document, the LaBlanches went out into the hallway to discuss this development. Through a window to the courtroom, appellant saw a small group of people assembled before the bench and concluded that she and George should leave because "something was being plotted in the court."

Meanwhile, Deputy Sidney Bartlett, the bailiff assigned to the justice court, watched as Keenum interrupted a contested hearing and whispered something to the judge. In response to the judge's instructions, Bartlett approached the LaBlanches and told them the judge would see them. Bartlett led the LaBlanches into the courtroom and told them to have a seat until the judge called them to the bench.

When Judge Till called the LaBlanches to the bench, he asked appellant her name. Appellant became agitated, insisted she did not have to give her name, and indicated that she wanted to leave the courtroom. Judge Till asked George if he had a tape recorder.

When George responded that he did, Judge Till told him to turn it off and give it to the bailiff.

Bartlett approached George with outstretched hands, but instead of handing over the recorder, George struck the deputy. Appellant also hit him. Then George turned and ran toward the back door of the courtroom. Judge Till told the LaBlanches they were not free to leave. Bartlett caught up with George at the back door and tried to handcuff him. Bartlett was unsuccessful because George tucked his hands over the recorder. At this time, appellant jumped on Bartlett's back, scratched his face with her fingernails, pulled his glasses off his face, and bit the deputy in the side. Appellant, George, and Bartlett fell through the door to the courtroom and out into the hall.

II. HEARSAY

In her first twelve points of error, appellant contends the trial court erred in admitting hearsay testimony over timely objection. Appellant complains of the testimony of several witnesses who testified to statements that Judge Till: (1) asked appellant her name; (2) asked George if he had a tape recorder; (2) instructed George to give the recorder to the bailiff; (3) instructed the bailiff to get the recorder; (4) told appellant and George they were not free to leave; (5) told appellant and George that (a) they would be held in contempt if they did not cooperate, (b) he only wanted to help them, and (c) he did not understand why they were being disrespectful.

Hearsay is a statement, including a written statement, other than one made by the declarant while testifying at trial, which is offered to prove the truth of the matter asserted. *See* TEX. R. CRIM. EVID. 801(d). An extrajudicial statement, which is offered for the purpose of showing what was said rather than for the truth of the matter stated therein does not constitute hearsay. *See Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995). With the exception of the statement instructing the bailiff to get the tape recorder, the testimony regarding Judge Till's statements was offered to show what Judge Till said and

not to prove that: (1) Shirley LaBlanche was appellant's name; (2) George possessed a tape recorder and was recording the courtroom proceedings; and (3) both appellant and her son were not free to leave the courtroom and in contempt of court. Therefore, the trial court did not err in admitting these statements because they do not constitute hearsay.

Even if the statements were hearsay, appellant waived error to her hearsay objections. With the exception of testimony regarding contempt of court and the judge's instructions to the bailiff, appellant's trial attorney elicited the same testimony regarding Judge Till's statements on cross-examination of the State's witnesses and on direct examination of appellant and her son. Appellant introduced Judge Till's statements into evidence when she offered the tape recording of the courtroom proceedings during her case-in-chief.[1]

Generally, error regarding improperly admitted evidence is waived if that same evidence is brought in later by the defendant or by the State without objection. *See Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993). "However, error is not waived when the evidence is brought in later in an effort to meet, rebut, destroy, deny or explain the improperly admitted evidence." *Id.* Even if improperly admitted evidence is offered for such purposes, a defendant waives error if, in testifying, she confirms the truth of such facts or evidence, unless the evidence or testimony is not tied to the elements of the case. *See Maynard v. State*, 685 S.W.2d 60, 66 (Tex. Crim. App. 1985) (citing *Thomas v. State*, 572 S.W.2d 507 (Tex. Crim. App. 1976)); *but cf. Leday v. State*, 983 S.W.2d 713, 718-19 (Tex. Crim. App. 1998) (no exception to waiver of error where defendant testifies to meet, destroy, explain illegally obtained evidence wrongfully admitted at trial).

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[1] The tape recording reveals that appellant began to protest about being in court when she was called to the bench. Judge Till interrupted appellant three times to ask her to identify herself. After giving her name, appellant protested that she should not have to appear before a judge to get a certified copy of a letter and that they were leaving the courtroom. Judge Till told her that they were not free to go. The judge asked George about the tape recorder and instructed him to give it to the bailiff. Although the tape reflects other statements made by Judge Till, the quality of the recording makes it difficult to determine if Judge Till ordered Bartlett to take the recorder.

Appellant contends she preserved error because she offered the tape recording for a limited purpose and advised the trial court when examining witnesses that she was proceeding under "Accused's Trial Notice No. One." Trial Notice No. One was a pretrial notification that "evidence is about to be brought, by way of either cross-examination of a witness presented by the State or direct examination of a witness presented by Accused, in an effort **to meet, rebut, destroy, deny, explain, contradict or impeach the harmful effect of otherwise improperly admitted evidence**, i.e., either testimony of exhibit(s)." (emphasis in the original) However, the evidence appellant presented during her case-in-chief – her testimony, George's testimony, and the tape recording of the proceeding – confirmed the truth of testimony given by the State's witnesses regarding Judge Till's statements. Appellant's testimony on direct examination confirmed that Judge Till asked George if he had a tape recorder, that he asked her to identify herself, and that he said she and George were not free to leave the courtroom.[2] George likewise testified on direct that Judge Till asked their names, told his mother she was not free to leave, asked him if he had a tape recorder, to turn it off, and give the recorder to the bailiff.

Although Judge Till's statement instructing the bailiff to get the tape recorder was hearsay, the trial court's error in admitting the statement did not affect a substantial right of appellant. *See* TEX. R. APP. P. 44.2(b); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).[3] A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See King*, 953 S.W.2d at 271 (citing

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[2] Appellant testified as follows: Judge Till called her and George to the bench and asked her name. She tried to explain to him that she did not understand why she was in front of him when the "Judge sort of got a little irate. Then he asked me my name again, I told him what my name was, then he asked my son what his name was, and he hold him what his name was." Appellant tried to explain to the judge that she did not think they should discuss the case with him and then George told the judge they were leaving. As they started to turn around, the judge asked George, who had a pouch over his arm, "did he have a tape in there." "And my son told him yes, and he told him to take it out, was he playing it. My son said yes. And he told him, take it out, give it to him [the judge]." George turned the recorder off and told the judge he didn't have to give it to him and they proceeded out of the courtroom. At that time, "[t]he judge told us we were not free to leave—"

[3] Even under former appellate rule 81(b)(2), the error in admitting the hearsay statement is harmless.

Kotteakos v. United States, 328 U.S. 750, 776 (1946). Any potential harm was defused by George's testimony, which confirmed that Judge Till told him to give the recorder to the bailiff. One may reasonably infer from George's testimony that the bailiff understood that he was to get the recorder from George.

Accordingly, we overrule appellant's first twelve points of error.

III. ADMISSIBILITY OF THE AUDIOTAPE

In her thirteenth point of error, appellant contends the trial court erred in admitting the audiotape of the courtroom proceedings because the State unlawfully seized it in violation of Article I, Section 9 of the Texas Constitution and article 38.23(a) of the Texas Code of Criminal Procedure. Article I, Section 9 of the Texas Constitution provides that "[t]he people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation." TEX. CONST. Art. I, § 9. Article 38.23 provides 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. TEX. CODE CRIM. PROC. ANN. Art. 38.23 (Vernon Supp. 1999).

The State, however, did not offer the tape into evidence. Appellant offered the tape into evidence during the direct examination of George LaBlanche for the limited purpose of establishing the illegality of her arrest, even though she expressly objected to the admission of the tape before trial. When a defendant offers evidence to which she earlier objected, she is not in a position to object to the admission of such evidence on appeal. *See Crawford v. State*, 617 S.W.2d 925, 932 (Tex. Crim. App. 1980); *Amunson v. State*, 928 S.W.2d 601, 608 (Tex. App.–San Antonio 1996, pet. ref'd). Consequently, appellant waived complaint of the admission of the tape. We overrule appellant's thirteenth point of error.

In points of error fourteen and fifteen appellant contends the trial court erred in admitting the audiotape, Defense Exhibit No. 2, for a limited purpose and in declining to instruct the jury the tape was admitted for a limited purpose. Appellant, however, failed to preserve this issue for review. To preserve a complaint for appellate review, the record must show that (1) the complaining party made a timely request, objection or motion, which stated the specific grounds for the ruling sought and which complied with the rules of evidence, to the trial court; and (2) the trial court expressly or implicitly ruled on the request, objection, or motion or refused to rule on the request, objection, or motion and the complaining party objected to the refusal. *See* TEX. R. APP. P. 33.1.

Here, appellant offered the tape for a limited purpose, and the State objected to its admission unless the trial court admitted it for all purposes. The trial court did not rule on appellant's request to limit the admissibility of the tape or the State's objection, and appellant did not press the trial court for a ruling or object to the court's refusal to rule. After appellant played the tape to the jury and requested a limiting instruction, the trial court noted that it had admitted the tape for all purposes. The trial court later rejected appellant's request for an article 38.22 instruction in the jury charge on the lawfulness of appellant's detention and the retrieval of the tape.

Appellant, nevertheless, asks this court "to decide whether a trial court may admit evidence for any purpose other than the specified purpose(s), if any, a party offered such evidence." The rules of evidence require the trial court to admit evidence for limited purposes only "[w]hen evidence is admissible as to one party or for one purpose, but not admissible as to another party or for another purpose is admitted." *See* TEX. R. EVID. 105(a). There is no evidence, in this case, that the tape was inadmissible as to one party or for any purpose; thus, the trial court was not required to limit the admissibility of the tape upon appellant's request or to instruct the jury accordingly. Points of error fourteen and fifteen are overruled.

V. JURY CHARGE

In the remaining points of error, appellant complains the trial court committed reversible error in denying her requests for certain instructions in the jury charge or in overruling her objections to the jury charge. Nevertheless, by post-submission motion, appellant, abandoned points twenty-two, twenty-five, twenty-eight, and thirty-one. Therefore, we do not address these points of error on appeal.

A. DENIAL OF REQUESTED INSTRUCTIONS

In points of error sixteen, seventeen, eighteen, nineteen, thirty-four and thirty-five, appellant argues the trial court reversibly erred by denying her requested instructions in the jury charge.

1. INSTRUCTION LIMITING JURY'S CONSIDERATION OF APPELLANT'S AUDIOTAPE

In point of error sixteen, appellant contends the trial court should have included a limiting instruction in the charge, restricting the jury's consideration of the audiotape to its proper scope. Because the tape had been admitted for all purposes, the trial court did not err in refusing to instruct the jury otherwise. Where evidence is admissible for all purposes, no limiting charge is necessary. *See Richardson v. State*, 786 S.W.2d 335, 338 (Tex. Crim. App. 1990). Accordingly, we overrule appellant's sixteenth point of error.

2. INSTRUCTION ON APPELLANT'S PRE-BITE SEIZURE

In her seventeenth and thirty-fifth points of error, appellant complains the trial court erred in denying her request to instruct the jury not to consider evidence of her actions subsequent to Justice Till's statement that she was not free to leave, up to, but not excluding, her assault on Deputy Bartlett, if the jury had reasonable doubt of the lawfulness of her arrest or detention. Appellant contends the instruction was mandatory under article 38.23(a) of the code of criminal procedure because the evidence raised a fact issue regarding the legality of her arrest or detention.

Article 38.23 requires the trial judge to instruct the jury to disregard incriminating evidence used against the defendant at trial if the jury believes or has reasonable doubt that the evidence was unlawfully seized. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.23(a)

(Vernon Supp. 1999); *Wilkerson v. State*, 933 S.W.2d 276, 280 (Tex. App.--Houston [1st Dist.] 1996, pet. ref'd). No instruction is required when the evidence fails to raise a fact question as to the legality of the State's methods in obtaining the evidence. *See State v. Mayorga*, 901 S.W.2d 943, 945 (Tex. Crim. App. 1995).

In this case, the record reflects no evidence raising a fact issue as to whether appellant was unlawfully detained or arrested when Judge Till told her that she was not free to leave the courtroom.[4] Instead, the record reflects that appellant and her son were lawfully detained by the justice court under its inherent power to impose respect, decorum, and submission to its mandates. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997) (noting all courts possess inherent power to impose silence, respect, decorum, and submission to their lawful mandates); *Ex parte Krupps*, 712 S.W.2d 144, 149 (Tex. Crim. App. 1986) (holding refusal to stand when judge entered court constituted contempt); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-400 (Tex. 1979) (noting inherent powers exist to enable courts to effectively perform their judicial functions and to protect their dignity, independence and integrity). Because appellant's detention was lawful, the trial court did not err in refusing appellant's request for an article 38.23(a) instruction. Accordingly, we overrule appellant's seventeenth point of error.

3. DEFENSE OF TAPE

In her eighteenth and nineteenth points of error, appellant complains the trial court erred in refusing to submit instructions on defense of property and defense of a third person's property. When properly requested, a defendant is entitled to a charge on every defensive theory raised by the evidence, regardless of the strength of the evidence or

[4] Furthermore, it is not within the province of the jury to determine the legality of a detention or arrest. *See Gurrola v. State*, 852 S.W.2d 651, 653 (Tex. App.–Houston [14th Dist.] 1993) (noting whether a detention or search is lawful is a question of law), *rev'd on other grounds*, 877 S.W.2d 300 (Tex. Crim. App. 1994); *State v. Hopper*, 842 S.W.2d 817, 819 (Tex. App.–El Paso 1992, no pet.) (holding if facts undisputed, sufficiency of evidence to justify warrantless detention or arrest is question of law).

whether it is controverted. *See Taylor v. State*, 856 S.W.2d 459, 470-71 (Tex. App.—Houston [1st Dist.] 1993), *aff'd*, 885 S.W.2d 154 (Tex. Crim. App. 1994).

Section 9.41(a) of the penal code provides, as follows, in pertinent part:

> A person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

TEX. PEN. CODE ANN. § 9.41(a) (Vernon 1994). Likewise, section 9.43 of the penal code justifies the use of force to protect tangible, moveable property of a third person, if, under the circumstances as he reasonably believes them to be, the actor would be justified under section 9.42 in using force to protect his own property and the third person is the actor's child. *See id.* § 9.43(2)(C). Sections 9.42 and 9.43 of the penal code, however, were "obviously designed to aid a law-abiding citizen in protecting his property from a thief or other wrongful taker." *Jones v. State*, 715 S.W.2d 778, 779 (Tex. App.–Houston [14th Dist.] 1986, no pet.) (citing Model Penal Code § 3.06 comment at 44 (Tentative Draft No. 8, 1958)). To protect suspects whose property has been seized in violation of his statutory or constitutional rights, the Legislature provided the exclusionary statute, i.e., article 38.23 of the code of criminal procedure, as a legal remedy. *See Johnson v. State*, 864 S.W.2d 708, 723 (Tex. App.–Dallas 1993), *aff'd*, 912 S.W.2d 229 (Tex. Crim. App.1995) (noting analysis of state policy of encouraging suspects to yield to police show of authority to be persuasive). Consequently, the self-help remedies of sections 9.42 and 9.43 of the penal code are not available to suspects to justify the use of force against law enforcement officers, acting within the scope of their employment, even if the officers seize the property in violation of the suspect's statutory and constitutional rights.

Moreover, there is no evidence that appellant assaulted Bartlett to defend against his unlawful interference with her property, even though she testified the audiotape in her son's possession actually belonged to her. While there is some evidence that appellant bit Bartlett in defense of her son's life and property, there is no evidence that she or George

reasonably believed they had to defend the audiotape from wrongful takers. Although George was not a suspect to any crime outside the court, he, nevertheless, attempted to flee the courtroom after the justice of the peace informed him that he was not free to leave and instructed him to give his tape to the court. In fact, appellant testified that she knew several of the men in the floor fracas were police officers and that she bit Bartlett because he was closest to her.

The trial court did not err in denying appellant's request for instructions on defense of the audiotape. Appellant's eighteenth and nineteenth points of error are overruled.

4. VOLUNTARY ACT

In her thirty-fourth point of error, appellant maintains the trial court erred in denying her request for an instruction on the voluntariness of her conduct under section 6.01 of the penal code. Section 6.01(a) provides that "[a] person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." TEX. PEN. CODE ANN. § 6.01(a) (Vernon 1994). "Voluntariness, within the meaning of section 6.01(a), refers only to one's physical bodily movements." *Alford v. State*, 866 S.W.2d 619, 624 (Tex. Crim. App. 1993). Only if the evidence raises an issue regarding the voluntariness of the conduct charged must the trial court instruct the jury to acquit if there is reasonable doubt as to whether the accused voluntarily engaged in the conduct of which she is charged. *See Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997).

In this case, appellant was charged with assaulting Deputy Bartlett. The record contains no evidence that appellant's bodily movements were involuntary when she bit Bartlett. Because the evidence does not raise the issue of the voluntariness of her assault on Bartlett, the trial court did not err in denying appellant's request for an instruction on voluntariness under section 6.01(a) of the penal code.

Appellant, nevertheless, contends the State raised the issue of the voluntariness of her conduct under section 6.01(c) when it offered evidence that Judge Till told her that she was not free to leave the courtroom and she failed to obey the order. Section 6.01(c)

provides that an omission, or the failure to act, is not an offense unless the defendant had a statutory duty to act. *See* TEX. PEN. CODE ANN. § 6.01(c)*; Sabine Consol., Inc. v. State*, 816 S.W.2d 784, 787 (Tex. App.—Austin 1991, pet. ref'd). Appellant argued at trial that she had no duty to obey the judge's order and violated no criminal statute by refusing to comply with the judge's order; therefore, the judge had no right to take her into custody. Appellant's contention is without merit because she was not charged with contempt of court.

Because the evidence did not raise a voluntariness issue, the trial court did not err in denying appellant's request for a voluntariness instruction. Appellant's thirty-fourth point of error is overruled.

B. OBJECTIONS TO FINAL CHARGE

In the remaining points of error appellant contends the trial court erred in overruling her objections to the final charge. In points of error twenty and twenty-one, appellant complains that the trial court included instructions in the charge that were without application to the facts of the case, were incorrect statements of law, and unfairly and prejudicially pertain only to Judge Till's actions. In points twenty-two, twenty-three, twenty-six, twenty-seven, twenty-nine, thirty, thirty-two, and thirty-three, appellant complains about various other instructions, without argument or citation to legal authority. In the heading of each of these points of error, appellant denotes her objection to the instruction as either "incorrect," or "no application." In the body of each point, appellant incorporates the statement of facts and arguments and authorities under point of error twenty, but she does not present any argument or authority related to the point of error. By footnote, appellant inserts an edited version of the trial objection to each instruction. The record, however, reflects that appellant did not make the same objection to all of the instructions. Therefore, in reviewing these points of error on appeal, we restrict our analysis to the specific objection that appellant lodged at trial.

In reviewing a jury charge for alleged error, an appellate court must examine the charge as a whole and not as a series of isolated and unrelated statements. *See Dinkins v. State*, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995). Here, the charge reflects that the trial court informed the jury that appellant had been charged with the offense of aggravated assault on a peace officer. The trial court stated the elements of the offense, defined each element and term, and instructed the jury on reasonable doubt and the legal presumption regarding an officer's badge. The trial court further applied these elements and instruction to the facts giving rise to appellant's assault on Deputy Bartlett. The trial court also instructed the jury on mistake of fact, defined terms related to the defense, and applied this law to the facts giving rise to the assault. On a separate page, the trial court gave the instructions, which appellant objected to at trial and now brings on appeal. The charge also stated the law of self-defense and defense of a third party and applied this law to the facts of the case.

1. INSTRUCTIONS FROM CODE OF JUDICIAL CONDUCT

In points twenty, twenty-one, twenty-three and twenty-four, appellant contends the trial court erred in submitting instructions from the Code of Judicial Conduct regarding ex parte communications and recording trial proceedings. At trial, appellant objected that the instructions were only a partial statement of the law. She complained that the language in each instruction was "stated in such a way as to deceive the jury into believing that the judge had a right to do something that he otherwise didn't have a right to do." She specifically objected that the charge did not speak to her First Amendment rights. She claimed the charge spoke only to the rights of the judge.

On appeal,[5] appellant contends these instructions are incorrect statements of law because they do not state the entire text of each canon from which they were drawn. Appellant also complains these two instructions are "without application to the facts of this cause and unfairly as well as prejudicially pertains only to Judge Till's actions."

[5] Appellant makes no reference to her First Amendment rights on appeal.

a. Ex parte Communication

In points twenty and twenty-one, appellant complains that the following instruction from the Canons of the Texas Code of Judicial Conduct regarding judicial communications is incorrect:

> Canon 8 of the Texas Code of Judicial Conduct says that a judge shall accord to every person who has a legal interest in a proceeding the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this section by court personnel subject to the judge's direction and control. A Justice of the Peace is not prohibited from having communications concerning;
>
> a. uncontested administrative matters,
> b. uncontested procedural matters,
> c. magistrate duties and functions,
> d. determining where jurisdiction of an impending claim or dispute may lie,
> e. determining whether a claim or dispute might more appropriately be resolved in some other judicial or nonjudicial forum,
> f. any other matters where ex parte communications are contemplated or authorized by law.

Appellant concedes the instruction essentially tracks portions of Canons 3(B)(8) and 6(C)(2). Nevertheless, she contends the instruction is incorrect because it contains portions of the two canons instead of the entire canon.

Article 36.14 of the Code of Criminal Procedure requires the trial judge to charge the jury with the law applicable to the case. *See* TEX. CODE CRIM. PROC. ANN. Art. 36.14 (Vernon Supp. 1999*)*. "A trial judge, therefore, must assay the case before it can ascertain what law is applicable to the case." *Cane v. State*, 698 S.W.2d 138, 140 (Tex. Crim. App. 1985). The trial judge must submit some law to the jury such as the essential elements of the offense and may, at his or her discretion, submit other law that is simply informational if helpful to the jury. *See id.* Proper instructions are those which help the jury in answering questions and which find support in the evidence and inferences to be drawn from the

evidence. *Macias v. State*, 959 S.W.2d 332, 336 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd).

The record here reflects evidence raising an inference about the propriety of Judge Till's communication with appellant. Therefore, instructions explaining the legal parameters under which a trial judge could communicate with parties outside of trial would be helpful to the jury in understanding this evidence.

Canon 3B(8), from which the trial court engrafted the first three lines of the instruction, provides the following:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to the law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, and alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control.

TEX. CODE JUD. CONDUCT, Canon 3B(8), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998). A list of exceptions to the prohibition of ex parte communication follows this rule. *Id.*

Canon 6, from which the rest of the instruction is engrafted, requires a justice of the peace to comply with all provisions of the code of judicial conduct except Canon 3B(8) pertaining to ex parte communications. *See* TEX. CODE JUD. CONDUCT, Canon 6C(1)(a). Because a justice of the peace is not required to comply with the additional provisions of Canon 3B(8), the trial court did not err in omitting the provisions from the instruction.

In lieu of compliance with Canon 3B(8), a justice of the peace must comply with Canon 6C(2). *See id.* Canon 6C(2) provides the following:

> A justice of the peace or a municipal court judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider ex parte or

other communications concerning the merits of a pending judicial proceeding. This subsection does not prohibit communications concerning:

(a) uncontested administrative matters,
(b) uncontested procedural matters,
(c) magistrate duties and functions,
(d) determining where jurisdiction of an impending claim or dispute may lie,
(e) determining whether a claim or dispute might more appropriately be resolved in some other judicial or non-judicial forum,
(f) mitigating circumstances following a plea of nolo contendere or guilty for a fine-only offense, or
(g) any other matters where ex parte communications are contemplated or authorized by law.

Id. Canon 6C(2). Because the instruction essentially tracks the language of this canon, the trial court did not err in submitting the instruction to the jury. *See Martinez v. State*, 924 S.W.2d 693, 699 (Tex. Crim. App. 1996) (following statutory law in jury charge not trial error).

Appellant also claims the instruction is without application to the facts of the cause and unfairly and prejudicially pertains only to Judge Till's actions. In support of this claim, appellant relies on *Kitt v. State*, 875 S.W.2d 19, 20 (Tex. App.—Texarkana 1994, pet. ref'd). The trial court in *Kitt* instructed the jury regarding the victim's justified use of deadly force to protect his property. *See id.* On appeal, Kitt complained that the instruction constituted a comment on the weight of the evidence because the instruction pertained to the victim's action and not the defendant's action. *See id.* The Texarkana Court of Appeals found the instruction unnecessary to the resolution of any issue in the case, but it did not find the instruction to be a comment on the weight of the evidence. *Id.*

A trial court comments on the weight of the evidence if it comments on the elements of the charged offense or assumes the truth of a controverted issue in its charge to the jury. *See Hathorn v. State*, 848 S.W.2d 101, 114 (Tex. Crim. App. 1992). The instruction, in this case, pertains to the standard of conduct applicable to Judge Till and not to appellant. The instruction makes no reference to an element of the alleged assault nor states an

assumption on a disputed fact regarding ex parte communications. Moreover, the instruction neither singles out testimony about any communication between Judge Till and appellant nor asserts that Judge Till was justified in communicating with appellant. Instead, the instruction provides abstract information about the basic standard governing the conduct of judges. Like the instruction in *Kitts*, the instruction, here, was unnecessary to the resolution of the case but it was not a comment on the weight of the evidence.

Appellant further contends the trial court should have applied the instruction to the facts of the case. Because the instruction was informational, discretionary, and not applicable to resolution of any fact question, the trial court did not err by not applying the instruction to the facts of the case. "General instructions and definitional instructions need not be applied to the facts of a case." *Clark v. State*, 929 S.W.2d 5, 10 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1116 (1997).

Appellant's twentieth and twenty-first points of error are overruled.

b. Judicial Authority to Deny Recording in Courtroom

In points of error twenty-three and twenty-four, appellant contends the following instruction is incorrect because it is an incomplete statement of law and the trial court failed to apply it to the facts of the case:

> Canon 3 of the Texas Code of Judicial Conduct says a judge should prohibit recording in the courtroom and areas immediately adjacent thereto during session of court or recesses between sessions. A judge may authorize recording of court proceedings if the means of recording will not distract participants or impair the dignity of the proceedings and the parties have consented, and the consent to being recorded has been obtained from each witness appearing in the recording.

Although the instruction tracked the language of former Canon 3A(10) of the Code of Judicial Conduct, it did not state the text of the subsection in its entirety. Nevertheless, the instruction was a correct statement of the law governing judicial conduct at the time Canon 3A(10) was in effect. However, at the time appellant appeared in Judge Till's court, the canon was no longer in effect. *See* STATE BAR OF TEX., RULES AND CANONS OF

ETHICS, Canon 3A (1974, superseded 1993). Because the instruction was a statement governing judicial conduct that was no longer in effect, the trial court erred in submitting it to the jury.

Having found error in the charge, we must now determine whether the error requires reversal. In *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985), the court of criminal appeals held that article 36.19 of the Texas Code of Criminal Procedure prescribes the manner in which jury charge error is reviewed on direct appeal. *See Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996); *see also Paulson v. State*, 991 S.W.2d 907, n. 25 (Tex. App.—Houston [14th Dist.] 1999, pet. filed). First, an appellate court must determine whether error exists in the jury charge. *Id.* Second, the appellate court must the error caused sufficient harm to require reversal. *See id.* at 170-71.

Whether harm is sufficient to require reversal depends upon whether the error was preserved. *See id.* at 171. Error properly preserved by objection to the charge requires reversal if the error caused any harm. *See id.* If the error was not properly preserved, reversal is not required unless the error caused egregious harm. *See id.* Appellant objected to the jury instruction but not on the ground that the canon was no longer in effect; consequently, appellant failed to preserve error. *See* TEX. R. APP. P. 33.1. Therefore, we apply the egregious harm standard.[6]

Errors that result in egregious harm "are those which affect 'the very basis of the case,' deprive the defendant of a 'valuable right,' or 'vitally affect a defensive theory.'" *Hutch*, 922 S.W.2d at 170 (quoting *Almanza*, 686 S.W.2d at 172). Direct evidence of harm is not required to establish egregious harm. *Id.* When conducting a harm analysis, an appellate court may consider (1) the charge itself; (2) the state of the evidence including contested issues and the weight of the probative evidence; (3) arguments of counsel; and, (4) any other relevant information revealed by the record of the trial as a whole. *See id.*

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[6] Even if appellant had preserved error, she suffered no harm from the inclusion of the instruction in the jury charge. The instruction was superfluous. It was unrelated to the facts of the underlying offense and unnecessary to the resolution of any fact issue in the case.

The instruction, here, was discretionary, intended to provide information to the jury to help jurors understand evidence concerning Judge Till's order to appellant's son to stop recording courtroom proceedings. Like the instruction on ex parte communications, the instruction addressed the judge's conduct and not appellant's actions, was unnecessary to the resolution of any fact issue, and was not a comment on the weight of the evidence.

Although incorrect, the instruction did not affect the very basis of the case, deprive appellant of a valuable right, or vitally affect a defensive theory. The jury charge properly addressed the elements of the offense, presumptions, and defenses. In closing argument, the prosecutor directed the jury's attention to the instruction noting that it addressed the judge's conduct. The prosecutor, however, did not dwell on the instruction or apply it to the facts of the case. The record also reflects strong probative evidence that appellant assaulted Bartlett without justification. Given the state of the charge and the strength of the evidence against her, we find the inclusion of the incorrect instruction was not egregious error. Appellant's twenty-third and twenty-fourth points of error are overruled.

2. INSTRUCTIONS ON COURT'S AUTHORITY, CONTEMPT, ARREST, & USE OF FORCE

In the remaining points of error, appellant objects to instructions regarding the court's authority and contempt powers, and the authority of police to arrest without a warrant and to use force. At trial, appellant objected to these instructions on the grounds that the law given in these instructions was "inherently incomplete" because there was no application paragraph that applied this law to the facts of the case. Without an application paragraph, appellant argued, the instructions make "it seem to the jury, . . . that they can wantonly, freakishly apply these things to any set of facts in any manner that they want to in order to achieve an unjust result" without regard to her rights because the instructions do not enumerate her rights. On appeal, appellant argues the trial court erred in submitting all of these instructions on the ground that the trial court did not apply the law in each instruction to the facts of the case. She also argues that the instructions regarding the court's authority and contempt powers are incorrect statements of law. Based on her trial objections and the

argument stated in the heading of each point of error, we address on appeal whether the instructions are incorrect because they fail to deal with the constraints placed on the government to exercise these powers and whether the instructions are defective because the trial court failed to apply the law in each instruction to the facts of the case.

Specifically, appellant objects to the following instructions:

> A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue orders necessary or proper in aid of its jurisdiction.
>
> * * * * *
>
> A court may punish for contempt and has the power to confine a contemner to compel him to obey a court order. The power to punish a person for contempt is an inherent power of a court and is an essential element of judicial independence and authority. The power to punish for contempt whether express or regarded as an incident to jurisdiction conferred upon the court, exists for the purpose of enabling [sic] court to compel due decorum and respect in its presence, and due obedience to is judgment, orders, and process. The trial court may cause contemner to be detained by the sheriff or other officer for a short and reasonable time while the judgment of contempt and order of commitment are prepared for the judge's signature. The punishment for contempt of a justice court is a fine of not more than $100 or confinement in the county jail for not more than three days, or both such a fine and confinement in jail.
>
> A peace officer may arrest, without warrant, when a breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender.
>
> A peace officer is justified in using force against another when and to the degree the actor reasonable [sic] believes the force is immediately necessary to make or assist in making an arrest or search if he reasonably believes the arrest or search is lawful, and before using force, the officer manifests his purpose to arrest or search and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested or searched.

a. Correct Statement of Law

The instructions in the first, third, and fourth paragraphs in this excerpt from the jury charge concerning the court's authority, a warrantless arrest, and the justification of force

essentially track statutory language found in section 21.001(b) of the Texas Government Code, article 14.02 of the Code of Criminal Procedure, and section 9.51(a) of the Texas Penal Code, respectively. *See* TEX. GOV'T CODE ANN. § 21.001(b) (Vernon 1988); TEX. CODE CRIM. PROC. ANN. ART. 14.02 (Vernon 1977); TEX. PEN. CODE ANN. § 9.51(a) (Vernon 1994). Because the instructions track statutory language, they are not incorrect statements of law. *See Martinez*, 924 S.W.2d at 699.

Even though appellant complains that the contempt instruction is incorrect, she cites in several footnotes in her brief the legal authority upholding each sentence of the instruction. *See* TEX. GOV'T CODE ANN. § 21.002(b),(c) (Vernon 1988); *Ex parte Oebel*, 635 S.W.2d 454, 456 (Tex. App.—San Antonio 1982, no writ) (per curiam); *Ex parte Pryor*, 800 S.W.2d 511, 512 (Tex. 1990); *Ex parte Gonzalez*, 111 Tex. 399, 238 S.W. 635, 636 (1922); *Ex parte Barnett*, 600 S.W.2d 252, 257 (Tex. 1980). Because the instruction is based on sound legal authority, it, too, is a correct statement of the law.

Appellant's trial objection, however, concerns information omitted from each instruction that, if included, would have informed the jury of the legal constraints to the State's power and appellant's rights in respect to these provisions of the law. Appellant, however, failed to specify the information the trial court should have included in these instructions at trial. She fails to inform this court of the same on appeal. Without more, we cannot say the trial court abused its discretion in submitting correct statements of law to assist the jury in understanding the evidence before them.

b. Application to the Facts of the Case

Appellant's argument that the trial court erred in not applying these instructions to the facts of the case is also without merit. The instructions were not necessary to the resolution of any fact issue in the case, or any theory of culpability or defense. None of these instructions addressed appellant's conduct. All of these instructions were informational, responsive to evidence admitted at trial, and discretionary. Therefore, the

trial court did not err by not applying any of these instructions to the facts of the case. *See Clark v. State*, 929 S.W.2d at 10.

Accordingly, we overrule points of error twenty-six, twenty-seven, twenty-nine, thirty, thirty-two, and thirty-three.

The judgment of the court below is affirmed.

/s/ Norman R. Lee
Senior Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Justices Yates, Fowler, and Senior Justice Lee, sitting by assignment.

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