NO. 01-24-00881-CR

IN THE COURT OF APPEALS FOR THE 1ST DISTRICT OF TEXAS AT HOUSTON, TEXAS

JUSTIN WAYNE ORTEGO,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

ON APPEAL FROM

TRIAL CAUSE NO. 22DCR0033

IN THE 253RD JUDICIAL DISTRICT COURT OF CHAMBERS COUNTY, TEXAS

APPELLANT'S BRIEF

Respectfully submitted,

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STATEMENT OF THE CASE

Justin Wayne Ortego, (hereafter "Appellant") was indicted, by the Chambers County District Attorney's Office (hereafter "Appellee" or "State") on one charge of Continuous Sexual Abuse of a Child, three charges of Indecency with a Child by Touching and three charges of Indecency with a Child by Sexual Contact. The Appellant was tried in the 253rd Judicial District Court before the Honorable Chap B. Cain, III, and ultimately convicted by a jury and sentenced to a term of Life in prison and three terms of twenty years in prison.

Prior to trial, the Appellant filed motions to suppress certain items of evidence, specifically text messages taken from the Appellant's phone by his ex-wife which the trial Judge denied.

During trial, two defense witnesses were not allowed to testify via ZOOM, and the Appellant was denied certain jury instructions he believed he was entitled to under the law and evidence in the case.

Following the jury's verdict(s), the Appellant filed a motion for new trial with the trial Court which was denied.

The Appellant is appealing the trial Court's ruling on the Appellant's motion(s) to suppress evidence, the trial Court's refusal to allow the defense witnesses to testify at trial, the

trial Court's failure to include the requested jury instructions in accordance with Article 38.23 of the Texas Code of Criminal Procedure and the trial Court's denial of his motion for new trial.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant believes that oral argument would be of benefit to the Court. While opinions addressing the warrantless searches of cell phones are abundant, and while at least one recent opinion addressed the searching of a husband's cell phone by his wife without consent, this case presents unique fact scenario that would allow for and perhaps provide clarity to the law regarding the searches of cell phones by those involved in personal relationships.

ISSUES PRESENTED

I. WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO SUPPRESS THE TEXT MESSAGES CONTAINED WITHIN THE DELETED FILES OF HIS CELL PHONE AND DISCOVERED BY THE APPELLANT'S WIFE WHILE HE WAS IN THE SHOWER AND UNABLE TO EITHER GIVE EFFECTIVE CONSENT TO SEARCH THE PHONE OR REVOKE ANY CONSENT PREVIOUSLY GIVEN?

II. WHETHER THE APPELLANT SHOULD HAVE BEEN ALLOWED TO CALL TWO WITNESSES TO TESTIFY AT TRIAL BY WAY OF ZOOM, WHERE THE ONLY OBJECTION MADE OR REASON GIVEN AT TRIAL, AND ON THE RECORD, WAS THAT THE STATE DID NOT AGREE TO ZOOM TESTIMONY?.

III. WHETHER THE APPELLANT WAS ENTITLED TO A JURY INSTRUCTION UNDER ARTICLE 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE IN CONNECTION WITH THE TEXT MESSAGES OBTAINED FROM THE APPELLANT'S CELL PHONE BY THE APPELLANT'S EX-WIFE WHILE THE APPELLANT WAS IN THE SHOWER?

IV. WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO GRANT THE APPELLANT A NEW TRIAL?

STATEMENT OF FACTS

On January 10, 2022, deputies of the Chambers County Sheriff's Department responded 229 Fairview Cemetery Drive in Winnie, Texas related to a call alleging the crime of sexual assault of

a child has been committed.

Upon arrival, Deputy J. Walker and Sergeant L. Clement met with Jessica Ortego who began to inform them of an incident involving her ex-husband, the Appellant, Justin Wayne Ortego, that was alleged to have occurred approximately one or two months prior, on November 20, 2021.

Jessica relayed to the deputies that the Appellant had arrived to the residence in Winnie after traveling back from his job in Laplace, Louisiana.

Jessica and the Appellant had been in an "on again/off again" relationship for over twenty years that had produced four daughters, with ages ranging from 23 - 13 years of age. The couple had been formally divorced in 2013, but had continued to see one another through multiple break ups, with Jessica Ortego at one point becoming engaged to another man, prior to the couple eventually getting back together and then on-again/off-again relationship.

The relationship was tumultuous, with accusations of infidelity on the part of both parties being prevalent throughout the entirety of the couples time together, and with the majority of the accusations being directed towards the Appellant.

Jessica informed the deputies that she had a "mother's intuition" that something was going on and accessed the Appellant's phone while he was taking a shower. She used the pass code that he had given to her previously and had never changed, and then proceeded to search his cell phone, ultimately ending up in the deleted messages/trash folder.

In the deleted files of the phone, Jessica found text messages to the 13 year old daughter, Jane Doe, requesting her to "get naked" and trying to arrange a meeting in the house so that they could "get it done."

Jessica took screen shots of the text messages she found on the Appellant's phone and then

confronted the Appellant while he was still in the shower. An argument ensued, the neighbor Brian Stanford was called, and the Appellant eventually agreed to leave the residence in exchange for Jessica giving him back his cell phone.

Jessica Ortego then waited a month to contact law enforcement.

During the time that Deputy Walker and Sergeant Clement were being informed of the events of November 20, 2021, Jessica Ortego provided them with photo copies of the text messages she had found on the Appellant's phone while he was taking a shower. Detective's were assigned to the case, a warrant

On January 23, 2022, the Appellant was arrested on active warrants related to accusations of sexual assault committed against Jane Doe, and the Appellant was ultimately indicted in Cause Nos. 22DCR0030-22DCR0036; one charge of Continuous Sexual Abuse of a Child and six charges of Indecency with a Child.

The Appellant filed a motion to suppress the text messages discovered by Jessica Ortego and then turned over to law enforcement, claiming that Jessica Ortego's search of the Appellant's phone violated the provisions of 4th and 14th amendments to the United States Constitution, Article 1, Sections 9 and 19 of the Texas Constitution and Articles 1.04, 1.06 and 38.23 of the Texas Code of Criminal Procedure.

The Appellant also argued that Jessica Ortego committed the offense of Theft under Texas law and therefore the evidence should be suppressed in accordance with Article 38.23.[1]

The trial court conducted hearings on the Appellant's motion to suppress on September 28, 2023 and October 30, 2023.

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[1]C.R.R. Vol.3., Page 65, Lines 8-25.

The trial judge stated "it's uncontroverted that the wife had consent to look at his phone. . . . . It's further uncontroverted that they were married. . . . .And considering the totality of the circumstances, the Court finds that defendant provided his wife, Ms. Ortego, with the phone password. He gave her written permission to look at his phone. For whatever reason she wanted to look at it. . . . the Court also is finding that law enforcement in the State of Texas had nothing to do with Ms. Ortego looking into the contents of the defendant's phone."

The motion to suppress was denied.

On July 31, 2024, the Appellant filed a supplemental motion to suppress the text messages found by Jessica Ortego in light of a recent opinion out of the 3rd District Appellate Court in Austin, Texas.

The Appellant took the position that the search and seizure of the text messages by Jessica Ortego violated Article 38.23 of the Texas Code of Criminal Procedure by way of Section 33.02 of the Texas Penal Code (Breach of Computer Security) and Section 31.03 (Theft).[2]

The trial court denied the motion to suppress.

Trial commenced in these cases on August 26, 2024, with a jury being selected and testimony began the following day, on August 27th.

During trial, and over objection[3], the text messages subject to the Appellant's motion(s) to suppress were introduced into evidence, along with testimony regarding those text messages and additional evidence obtained by way of warrants obtained based upon those text messages.

No downloads or phone "dumps" contained the text messages subject to the Appellant's

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[2]C.R.R. Vol 4, Page 28, Lines 1-3.

[3]C.R.R. Vol. 6, Page 103-104, and 106 and Vol 7, Page21-22.

motions to suppress, thus the only evidence regarding these text messages were the photo copies of the text messages taken from the Appellant's phone while he was in the shower.

The trial Judge refused to allow two defense witnesses to testify via ZOOM, based upon the State of Texas refusing to agree. Additionally, the trial Judge did not include defense requests for 38.23 instructions in the charge regarding violations of both constitutional and state law.

The Appellant was found Guilty in Cause No's 22DCR0030, 22DCR0031, 22DCR0032, and 22DCR0033.

The Defendant was sentenced to imprisonment for a term of life in Cause No. 22DCR0030, and three 20 year sentences in Cause Nos. 22DCR0031, 22DCR0032 and 22DCR0033.

It is these convictions and resulting sentences to which the Appellant complains.

SUMMARY OF ARGUMENT

I. JESSICA ORTEGO DID NOT HAVE EFFECTIVE CONSENT TO SEARCH THE APPELLANT'S CELL PHONE WHILE HE WAS TAKING A SHOWER, AND THEREFORE HER ACTIONS CONSTITUTE VIOLATIONS OF THE LAW THAT INVOKE THE PROVISIONS OF ARTICLE 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE AND DICTATE THAT THE EVIDENCE OBTAINED BY JESSICA ORTEGO, AND THE FRUITS OBTAINED THEREFROM, BE SUPPRESSED AND SHOULD NOT HAVE BEEN ALLOWED AT THE TRIAL OF THE APPELLANT.

II. WHERE THE ONLY BASIS ON THE RECORD, AS IT RELATES SPECIFICALLY TO THE TWO WITNESSES DESIRED TO BE CALLED BY THE DEFENSE VIA ZOOM TESTIMONY, IS THAT THE STATE DID NOT "AGREE", THE TWO WITNESS'S TESTIMONY SHOULD HAVE BEEN ALLOWED BY THE TRIAL JUDGE.

III. THE EVIDENCE RAISED AT TRIAL, AND THROUGH THE STATE'S DIRECT EXAMINATION OF THEIR OWN WITNESSES, RAISED THE NECESSARY AMOUNT OF EVIDENCE CONCERNING ISSUES OF FACT THAT ENTITLED THE APPELLANT TO THE INSTRUCTIONS HE REQUESTED IN ACCORDANCE WITH ARTICLE 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE.

IV. GIVEN THE REASON STATED ON THE RECORD AND DURING THE TRIAL FOR DENIAL OF ALLOWING THE TWO DEFENSE WITNESSES TO TESTIFY VIA ZOOM, THE TRIAL JUDGE SHOULD HAVE GRANTED THE APPELLANT'S MOTION FOR NEW

TRIAL.

ARGUMENT

I. JESSICA ORTEGO DID NOT HAVE EFFECTIVE CONSENT TO SEARCH THE APPELLANT'S CELL PHONE WHILE HE WAS TAKING A SHOWER, AND THEREFORE HER ACTIONS CONSTITUTE VIOLATIONS OF THE LAW THAT INVOKE THE PROVISIONS OF ARTICLE 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE AND DICTATE THAT THE EVIDENCE OBTAINED BY JESSICA ORTEGO, AND THE FRUITS OBTAINED THEREFROM, BE SUPPRESSED AND SHOULD NOT HAVE BEEN ALLOWED AT THE TRIAL OF THE APPELLANT.

At the initial hearing on the Appellant's motion to suppress, a witness for the State, lead detective on the case Kayln Perry, made the following statement when asked about her understanding of what occurred on the evening of November 20, 2022:

"So he was home, I believe, for the holidays and – and he was taking a shower and Jessica went through his phone and located deleted text messages that he had between him and [Jane Doe] amd – and, I mean, that's – that's pretty much it."[4]

A. Standard of Review:

In reviewing the suppression of evidence under the Texas Code of Criminal Procedure Article 38.23 (a), the Appellate Courts afford almost total deference to the trial court's fact finding and reviews it application of the law de novo. *See Tucker v. State*, 369 S.W.3d 179, 184 (Tex. Crim. App. 2012).

The voluntariness of a person's consent is a question of fact to be determined by analyzing all of the circumstances of a particular situation. *Meekins v. State*, 340 S.W.3d 454 (Tex. Crim. App. 2011) *citing Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

When the State relies on consent to justify a search, it must prove that the consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S.543, 548 (1968).

B. The Totality of the Circumstances as They Relate to Voluntariness of Consent:

[4]C.R.R., Vol. 2, Page 42, Lines 20-23.

(1) The letter means nothing in this case as it relates to the search of the Appellant's phone on November 20, 2021, yet the trial Judge placed great weight on the content of the letter.

The trial Judge stated the following "it's uncontroverted that the wife had consent to look at his phone. She testified to that fact. She backed it up with State's Exhibit No. 1[5]: No. 8, where he wrote, 'To let you, if you have any concerns, to look at my phone for any reason.'"[6]

Exhibit 1, a handwritten letter entitled "A Commitment to You" also included " 5. To not let anyone come between us I a relationship whether it be inside or outside our home" and "11. To be with you through thick and thin for the rest of our days."[7]

Days prior to the scheduled hearing on the Appellant's motion to suppress, Jessica Ortego sent an email, with the "A Commitment to You" letter attached. The email read as follows: Good morning, So I was going through some old things that I've had put away and I found this hand written letter from Justin from one of the many times we had split and got back together...I know his writing is hard to read buuuut #8 is proof he clearly gave me permission to look at his phone. . . .I will be brining this tomorrow along with a birthday card and a few other letters he wrote to show it is in fact his handwriting."[8]

Jessica Ortego could never, even after being given chance after chance, give any assurances as to when State's Exhibit 1 was written. During direct examinationat the initial suppression hearing

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[5]C.R.R., Vol. 2. Exhibit 1; handwritten letter entitled "A Commitment to You"

[6]C.R.R., Vol 3, Page 80, Lines 3-7.

[7]C.R.R., Vol 2, Exhibit 1.

[8]C.R.R., Vol 2, Exhibit 2.

the following exchange occurred between the prosecutor and Jessica Ortego:

(Q): Do you know when he wrote that letter?

(A): I do not. It was one of the times we got back together

See C.R.R. Vol. 2, Page 66, Lines 18-20

The Court (Q): Do you have any idea when it was written?

Jessica Ortego (A): No Sir.

See C.R.R., Vol 2, Page 67, Lines 14-16.

When asked about the multiple break ups and one break up where she was engaged to another man, Jake Simon,[9] Jessica Ortego still could not give any real idea of when the letter "A Commitment to You" was writen: "I do not know what time frame because I had several different letters."[10]

Without a date as to when the letter was written, it is of little value to the State's position that she had consent to search his phone, considering the totality of the circumstances surrounding the searching of the contents of the Appellant's phone while he was taking a shower. The fact that the letter was written at some unknown point in time in the past does not lend itself to assuming the two were in the same place, relationship- wise, as they were whenever the letter was penned.

An individual's giving consent for an officer to search his car on Monday does not carry over to Wednesday. , , , A new, present sense consent must be obtained.

The voluntary statements of individuals in police custody, when taken days apart, are attenuated to the point that new Miranda warnings are required before the questioning begins in

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[9]C.R.R. Vol 2, Pages 85-91.

[10]C.R.R., Vol 2, Page 87, Lines 19-20.

order for them to be admissible under article 38.22 of the Texas Code of Criminal Procedure.

Sex between individuals that have been married for years must be consensual on every occasion, or it is a crime.

There is no such concept existing within the letter of the criminal law that provides for a claim of "continuing consent" based upon the "A Commitment to You" letter. It provides no more guidance to a Court in determining whether mutual assent or consent existed on November 20, 2022, at 229 Fairview Cemetery Dr., in Winnie, Texas than any other meeting of the minds between Jessica Ortego and the Appellant at some unknown point in time years ago and under some unknown and certainly distinctive circumstances..

(2) The trial Court gave paid tremendous attention to the fact that Jessica Ortego had the passcode to the cell phone at issue and the Appellant believes far too much weight was given to this factor.

Giving a friend or family member a key to one's house does not always mean that friend or family member can enter the residence at anytime they choose.

A passcode to a cell phone is but a single factor, that is to be afforded no more weight than any other in evaluating the totality of the circumstances.

The Court of Criminal Appeals in *Granville v. State*, 423 S.W.3d 399 (Tex. Crim. App. 2014) in acknowledging a subjective expectation of privacy in the contents of one's cell phone, in footnotes 16 and 17 cite numerous cases setting forth various instances where an individual demonstrated a reasonable and subjective expectation of privacy:

In *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007) an individual who did not even own the phone, but rather his employer did, had standing to challenge a search of the phone because

he had use of the phone and took normal precautions to protect the privacy, even though he had no passcode at all.

Simply because a friend or family member has a key to one's home is not ever-so-telling of whether one has consent, if the only time the friend or family member utilizes the key is when they know the person is not at home.

Surely, a court would not place much weight on the fact that a friend or family member had the key to one's home and then drove by the home, only to find the owner was there at the house, and the individual refused to knock on the door or use the key?

Surely it would make a difference to know that instead of using the key while they knew the owner was home, the friend or family member parked down the street, where they could see when the homeowner was leaving the residence, and then and only after the homeowner was down the road a mile or so, chose to utilize the key to enter the home?

Jessica Ortego chose to wait down the street until the homeowner left the residence and then entered.

On cross-examination during the continuation of the hearing on the Appellant's motion to suppress, Volume 3 of the Court Reporter's Record, Page 16, Lines 17-25, and Page 17, Lines 1-8 read as follows:

(Q): Why didn't, when he came home, you say, "You know what, Justin, I've been worried about some things, and we've had trust issues, I want to go theough you phone now." Why didn't you do that?

(A): I just didn't. We were busy. I was cooking dinner, I was making shirts, I was doing things because we had a trip planned..

(Q): But this thing was burning inside you. You said, "it was a mother's intuition. I thought something was wrong."

(A): Correct.

(Q): And four hours, they go by, and you don't say, "You know what, let me see that phone. That's our deal." You did do that, did you?"

(A): No.

(Q): You waited until he was in the shower, correct?

(A): Yes.

Jessica Ortego

(3) The text messages found by Jessica Ortego while the Appellant was in the shower were in the deleted/trash folder; a place where things are intentionally placed in order to be free from discovery by others.

When asked by the prosecutor why she looked in the "trash folder?", Jessica Ortego responded, "I don't know. I just – I was scrolling through all different things and that was the last thing I happened to look at because he has been known to delete things before."[11]

When asked at a pretrial hearing on the motion to suppress about the Appellant hiding things in the past, Jessica Ortego testified that the Appellant had hidden things from her on many occasions in the past, and she agreed that he did so in order that she would not find them.[12]

On direct examination of the lead detective in these cases, Kayln Perry, the following exchange took place between the prosecutor and the detective during the initial suppression hearing:

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[11]C.R.R., Vol. 2, Page 70, Lines 22-25

[12]C.R.R., Vol. 3, Page20, Lines 21-25, and Page 21, Lines 1-3.

(Q): Did it look like these messages had been deleted?

(A): Yes. . . . .

.....

(Q): Is deleting text messages one way that a person may try to get out of – of trouble or to prevent someone from finding something?

(A): Yes, ma'am.

See C.R.R., Vol. 2, Page 44, Lines 7-8, and Line 25, and Page 45, Lines 1-3.

Every criminal defense attorney in the State of Texas has had a client that was not very good at hiding things. However, just because something is poorly hidden, that does not mean they mean for someone to find it, nor does it mean they are desirous of someone to find it, or even indifferent if someone finds it. The act of hiding something, other than an Easter egg[13] for a small child, is an act that verbalizes one's perceived privacy interest in a certain thing and an expectation that it will not, or should not, be found.

The Appellant believes this aspect/circumstance related to the search of his phone by Jessica Ortego was not given the consideration it was due by the trial Judge.

(4) The shower is one place a person will eventually go after a long drive from Laplace, Louisiana to Winnie, Texas, and the shower is one place that a person will definitely go without taking their cell phone.

While the Supreme Court of the United States, in *Schneckloth v. Bustamonte*, 412 U.S.

[13]This attorney is not trying to be humorous, or in any form attempting to make light of this situation. This case involves very serious criminal accusations and very serious legal issues. However, this attorney has spent considerable time trying to think of things that we as human beings hide and that we ***want*** to be found by someone else and the only thing that has come to mind is hiding Easter eggs for children.

218,232 made clear that "proof of knowledge of the right to refuse consent" is not required, prerequisite", the Texas Court of Criminal Appeals made clear in *State v. Villarreal*, 475 S.W3d 784, 799 (Tex. Crim. App. 2014), that the ability to limit or revoke any consent which is given is a "**necessary** element of valid consent." (Emphasis added).

Jessica Ortego had hours to conduct a search of the Appellant's phone, in his presence, but chose not to.

"This was not the first time I looked at his phone or his tablet, and I would do it in front of him."[14]

These were the words of Jessica Ortego at the suppression hearing on one occasion when she was questioned as to why she waited until the Appellant was in the shower to search his phone if she had permission and she does it all the time:

"I wasn't, like, planning to look at it at first. But like I said, I was in the room and when he was in the shower. I was — something just told me to look at his phone. I didn't like, intentionally wait for him to get in the shower to look at it."[15]

In *State v. Ruiz*, No. PD-0176-18, opinion delivered September 11, 2019, the Court of Criminal Appeals held that the drawing of an unconscious individual's blood violated Texas implied consent law and considered as one of the factors that, as he was unconscious, Ruiz could "not limit or revoke his consent."

Likewise, in the shower, the Appellant could not limit or revoke consent of a search he had no idea was taking place.

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[14]C.R.R., Vol. 2, Page 66, Lines 7-8.

[15]C.R.R., Vol 2, Page 70, Lines 17-20.

(5) Whether on not the Appellant and Jessica Ortego were married, is not controlling as to whether she had an absolute right to search his phone; it is merely a circumstance for the trial Court to consider:

The trial Court placed a tremendous amount of weight on the issue of marriage in this case: "It is further uncontroverted that they were married. They held each other out as husband and wife. That's why he was allowed to come back in, into the relationship."[16]

While the concept of marriage should lend itself to trust, agreement, understanding and honesty, in today's world it cannot be assumed that a marriage means those things to all couples.

It certainly did not mean that with the Appellant and Jessica Ortego, as the relationship seemed to be riddled with breakups, infidelity, relationships with others, and general disagreements.

In *State v. Holloway*, No. 03-23-00423-CR, the Austin Court of Appeals found a wife committed the offense of Breach of Computer Security under Section 33.02 of the Texas Penal Code for going through her husband's cell phone while he was asleep and discovering child pornography. The couple was on the same phone plan and the Austin Court still found that the evidence was illegally obtained and ordered all evidence suppressed.

The Appellant and Jessica Ortego do not share the same phone plan, they are likely common law married, the trial Judge made a finding they were in fact married, and where Holloway was asleep in bed when his wife searched his phone, the Appellant was in the shower.

The fact that two people are married creates no "presumption" that they agree or have to agree with one another with respect to property rights.

Consent to search the home of a married couple may be granted by the husband and then

[16]C.R.R., Vol. 3, Page 80, Lines 14-16.

limited or revoked completely by the wife. *See Georgia v. Randolph*, 547 U.S. 103 (2006).

An agreed judgment in a divorce decree, unless consent exists at the time the judgment is rendered, is invalid. *See Kennedy v. Hyde*, 682 S.w.2d 525, 528-9 (Tex. 1984).

"For a valid consent judgment to exist, it is not sufficient that the parties may have at some time consented; the parties must explicitly and unmistakably five consent, and their consent must exist at the very momenbt the court undertakes to make the agreement the judgment of the court at rendition." *See Sohocki v. Sohocki*, 897 S.W.2d 422, 424 (Tex. App.–Corpus Christi-Edinburg 1995, no writ.)).

A judgment based upon an agreement cannot be redered if the consent of one of the parties has been withdrawn or is lacking at the time the agreement is rendered; "such judgment is void." *See Cooper v. Cooper*, 2021 WL 1747856 at *3 (Tex. App.–Dallas May 4, 2021, no pet.) (mem. Op.).

The fact that the relationship between the Appellant and Jessica Ortego was so volatile over the twenty-plus years they had known one another does not gain any stability with respect to them agreeing on anything, simply because the are married in the eyes of the trial Court.

C. Absent Valid Consent, Jesscia Ortego Violated the Laws:

(1) The Text of Article 38.23 of the Texas Code of Criminal Procedure:

Article 38.23 (a) makes clear 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."[17]

[17]Tex. Code. Crim. Proc. art. 38.23 (a).

The trial Judge made a point to state that "the Court also is finding that law enforcement in the State of Texas had nothing to do with Ms. Ortego looking into the contents of the defendant's phone. It was not at their request or urging or for any state reason or law enforcement reason."[18]

"No doubt, the plain language of art. 38.23 supports the conclusion that the unlawful or unconstitutional actions of *all* people, governmental and private alike, fall under the purview of the Texas exclusionary rule. One need only turn to a dictionary of the English language: "[O}ther means "being the ones distinct from those first mentioned.". The New Merriam-Webster Dictionary (1989). Since "officer[s]"are "those first mentioned," "other person[s]" are those distinct from officers." *State v. Johnson*, 939 S.W.2d 586,587 (Tex. Crim. App. 1996).

When Jessica Ortego violated the provisions of law set forth in subsctions (2), (3), and (4) below, and her violations of the law resulted in the evidence complained of being obtained, Article 38.23 dictates that the illegally obtained evidence be suppressed.

(2) The 4th Amendment, Article 1, Section 9, and Article 1.06 TCCP:

Based upon the lack of consent, as set forth above, the Appellant contends the actions of Jessica Ortego were undertaken in violation of the 4th Amendment, Article 1, Section 9 of the Texas Constitution and Article 1.06 of the Texas Constitution.

(3) Jessica Ortego violated Section 33.02 of the Texas Penal Code when she gained access to the Appellant's phone while he was upstairs and in the shower.

In *State v. Holloway*, the Austin Court of Appeals held that a wife searching the cell phone of her husband by placing his thumb on the phone to unlock the device while he was asleep was a

[18]C.R.R., Vol 3, Page 80, Lines 22-25, Page 81, Line 1.

violation of the Breach of Computer Security statute and suppressed the evidence obtained as a result of the unauthorized search of the husband's phone.

In *Holloway*, the couple was legally married and they shared a family phone plan. The Court held that even though they were on a family plan where everyone got a phone, Holloway was the "owner" for purposes of 33.02 because he had the greater right to possession. Furthermore, under the definitions applicable to the Texas Penal Code, as they relate to computer crimes, a cell phone satisfies the definition of a computer.

In *Runyon v. State*, 674 S.W.3d 624, 633 (Tex. App.–Beaumont 2023, pet. Ref'd), the Court held that the use of a home computer by the girlfriend of the defendant, did not violate Section 33.02 of the Penal Code because for several reasons including the girlfriend has used the computer before, there was never any discussion about using the computer or not using the computer, and the computer was left turned on and unlocked when the defendant would leave for work.

Appellant would propose that a home computer on a desk left unattended while the owner goes to work is a far cry from a cell phone taken with the owner upstairs to the bedroom to take a shower.

(4) Jessica Ortego committed the offense of theft as defined under Section 31.03 of the Texas Penal Code when she took the Appellant's phone while he was in the shower and would not return it to him until she had seized the contents of the phone she wanted and until he agreed to leave the residence.

Jessica Ortego exercised dominion and control over the Appellant's cell phone for approximately one to two hours and only gave it back to him once she had taken and seized what she believed she needed from the phone.

(Q): How long of –how long– how much time lapsed from the time you– you took the phone to when you gave it back?

(A): Maybe an hour, two hours.

See C.R.R. Vol. 2, Page 72, Lines 2-4.

Jessica Ortego maintains that the Appellant never asked for the phone and that he only said he wanted it when he was leaving. That is not what the

After having his recollection refreshed by way of watching the body cam video of his arrival at the home of Jessica Ortego on January 10, 2022, Sergeant L. Clement recalled Jessica Ortego saying absent any prompting, "I took his phone and I wouldn't give it back."[19]

Jessica Ortego went on state that "He said something about, "I'm not leaving until I get my phone." I gave it back to him, but I told him I was taking pictures of it and sending myself the text message because I wanted proof of it."[20]

II. WHERE THE ONLY BASIS CONTAINED WITHIN THE RECORD, AS IT RELATES SPECIFICALLY TO THE TWO WITNESSES DESIRED TO BE CALLED BY THE DEFENSE TO PROVIDE TESTIMONY VIA ZOOM, IS THAT THE STATE DID NOT "AGREE", THE TWO WITNESS'S TESTIMONY SHOULD HAVE BEEN ALLOWED BY THE TRIAL JUDGE.

A, Testimony about the camper:

Jane Doe gave a forensic interview in this case and made several statements to the district attorney's office prior to the trial of this case. One place the alleged sexual acts were supposed to have taken place was the "camper" or travel trailer the Appellant kept in Laplace, Louisiana and lived in while he was working.

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[19]C.R.R., Vol 2, Page 30-32.

[20]C.R.R, Vol 2, Page 72, Lines 9-12.

The district attorney's office provided the defense with notice of a recent interview with Jane Doe where she said she was told to go to the "camper."

At trial, for the first time, Jane Doe claimed that it happened frequently in the camper and that he "always brought the camper back."[21] Jane Doe also mentioned several other things for the very first time at trial.

After stating that he always brought the camper home with him, the Appellant's attorney called Colonial RV Park and spoke with the manager, Patricia Livings. She was unable to drive to Anahuac,Texas to appear in Court, but did say she could testify via ZOOM.that the Appellant, like others that worked in the oil field and kept their campers at Colonial RV Park, rarely if ever took their campers home.

The Appellant's attorney intended to call Ms. Livings via ZOOM as she could directly rebut the testimony of Jane Doe as it related to the camper.

The trial Judge informed the Appellant's attorney that the case was moving on and that "We're not going to do a ZOOM. That ain't going to happen."[22]

The Court allowed the Appellant's attorney to make a bill of exception related to Ms. Livings, and another expert that required a driver as the expert had recently had eye surgery.[23]

The Court's ruling as to both witnesses testifying via ZOOM was the same; the witnesses were not allowed to testify via ZOOM.

The Court's reasoning as to both witnesses not being able to testify via ZOOM, was the

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[21]C.R.R., Vol. 8, Pages 26-28.

[22]C.R.R., Vol 8, Page 228, Page 230

[23]C.R.R., Vol 8, Pages 250-258.

same;

The Court: Does the State have any objections to the witness appearing by Zoom?

The Prosecutor: Yes, Your Honor.

The Court: Okay. Your request to have the witness appear by Zoom is denied.

See C.R.R. Vol. 8, Page 253 as to Ms. Livings.

With respect to the Appellant's expert, Bruce Horn, a bill of exception was made[24], and as it related to his being allowed to testify via Zoom, the Court's questioning and ruling was the same:

The Court: Does the State have any objection to his testifying by Zoom?

The Prosecutor: Yes, Your Honor.

The Court: Okay. I'm not going to have people testify by Zoom without both parties agreeing to it. And even then, it could be problematic. Therefore, he's not here and he's not going to be able to testify. So if y'all would– so your request is denied.

See C.R.R., Vol. 8, Page 258, Lines 2-10.

The Court of Appeals in El Paso ruled in the case of *Harper v. State*, NO-08-23-00106-CR, 2024 Tex. App. LEXIS 5422, 31, that "the trial court abused its discretion by denying Appellant's request to call his expert witness to testify by Zoom."

The Court in *Harper* dealt with the same issue as the denial of the Zoom testimony: "The trial court denied Appellant's request for Dr. Anderson to appear by Zoom based on nothing more than the State's opposition. The trial court told Appellant's counsel, "And if they object to you putting on witnesses by Zoom, I'm not going to allow it. I'm just telling you you can't do it by Zoom unless the State agrees to it. And they haven't agreed to it, so there you go." *Harper* at 33.

[24]C.R.R., Vol 8, Page 255-257.

In this case before the Court, the trial Judge denied the witnesses to testify by Zoom, for no legal reasons which were articulated on the record, other than the State not agreeing to allow Zoom testimony.

See C.R.R. Vol. 14, D-Exhibit 1.

III. THE EVIDENCE RAISED AT TRIAL, AND THROUGH THE STATE'S DIRECT EXAMINATION OF THEIR OWN WITNESSES, RAISED THE NECESSARY AMOUNT OF EVIDENCE CONCERNING ISSUES OF FACT THAT ENTITLED THE APPELLANT TO THE INSTRUCTIONS HE REQUESTED IN ACCORDANCE WITH ARTICLE 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE.

On the morning of August 30, 2024, the trial Court held a charge conference. After some brief discussions both on and off the record, the Court went back on the record and the Judge asked defense counsel if there were any objections to the charge as proposed by the State.[25]

Defense counsel also requested charges in accordance with Article 38.23 of the Texas Code of Criminal Procedure, taking the position that the evidence raised at trial was sufficient to include 38.23 instructions related to Jessica Ortego violating Sections 31.03 (Theft), 33.02 (Breach of Computer Security), and 37.09 (Tampering with Physical Evidence) of the Texas Penal Code, the 4th amendment to the United States Constitution, Article 1, Section 9 of the Texas Constitution, and Article 1.06 of the Texas Code of Criminal Procedure.[26]

The requested instructions were denied.[27]

"The trial court must provide the jury with a written charge that sets forth the law applicable to the case." *Chambers v. State*, (No. PD-0424-19) (Tex. Crim. App. 2022) citing *Celis v. State*, 416

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[25]C.R.R., Vol 9, Page 5.

[26]Id. at Page 6.

[27]Id at Pages 6-7.

S.W.3d 419,423 (Tex. Crim. App. 2013) and Tex. Code. Crim. Proc. art. 36.14.

The Search; The 4th Amendment, Article 1, Section 9, and Article 1.06 of the Code of Criminal Procedure:

At trial, the following exchange occurred between the Prosecutor and Jessica Ortego:

(Q) So, did you have the right to get his phone in your opinion or not?

(A) Yes, I did. I had written consent and verbal. That was nothing out of the ordinary for me to look through his phone.

See C.R.R. Vol. 6, Pages 186-187.

By written consent, Jessica Ortego was referring to the "A Commitment to You" letter[28] that the State introduced into evidence as Exhibit #1 during the trial of the case and before the jury.

The State's next witness during trial was Sergeant, now Lieutenant Lucas Clement.

The following exchange occurred between the Prosecutor and the Lietenant:

(Q) Okay. When you were looking at the messages did you have any reason to think they were fabricated or fake?

(A) No, ma'am.

(Q) Okay. Did you have any reason to thik that Ms. Ortego acted inappropriately or illegally in obtaining those messages?

(A) No, ma'am.

See C.R.R., Vol. 7, Page 23, Lines 24-25 and Page 24, Lines 1-5.

While an objection was made and sustained, no instruction was given to the jury to disregard this question or the answer to the question.

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[28]C.R.R., Vol. 6, Page 47.

The Appellant contends that the State of Texas, by way of their direct questioning, interjected the issue of the legality of the conduct on the part of Jessica Ortego with respect to her actions connected to the Appellant's phone and therefore that issue was made a fact issue by the State of Texas based upon the evidence surrounding the acquisition of the text messages complained of by the Appellant.

The Appellant should have been given jury instructions of the search issues and their legality under 38.23.

The Appellant takes the same position regarding a charge of the 38.23-related offense of Breach of Computer Security under Section 33.02 of the Texas Penal Code.

Theft:

At trial, the following exchange occurred between the Prosecutor and Jessica Ortego:

(Q) And we had a hearing where I asked, "Did you take his phone from him? And you said, "I never kept his phone from him." Do you remember that?

(A) Yes, I did not.

(Q) Do you remember watching the body cam where you said, "I wouldn't give his phone back to him until he" --

(A) I never watched it. I did say I wasn't going to give it back to him until I had what I needed off of it."

See C.R.R., Vol. 6, Page 186, Lines 17-24.

Tampering with Physical Evidence

At trial, numerous exhibits were introduced which were emails, and screen shots of text messages that were saved and collected by Jessica Ortego and then provided to the prosecution

shortly before trial. These emails, screen shots, etc. were thought to be relevant in the eyes of Jessica Ortego and they were in the eyes of the prosecution as well; they were admitted during trial.

State's 2, 2A, 2B, 2C and 2D were claimed to be text messages from "Savannah", one of the alleged victims that testified against the Appellant at guilt innocence under the provisions of article 38.37 of the Texas Code of Criminal Procedure.[29]

Jessica Ortego stated that she kept these text "just–if something needed to be done about –"; implying using them against the Appellant down the road, when they could be used in court.[30]

The Appellant's attorney asked Jessica about the manner in which she chose to "cherry pick" the portions of the conversations she saved.[31]

(Q): It's the part of the message that you thought that they would want for the purpose of this trial here?

(A): It's the part of the message that was irrelevant to the trial, to this part here.

(Q): That was irrelevant?

(A): I mean, relevant, yes, to what need to be. I mean, the rest of it was irrelevant, if was something– like I said, some of the messages–

(Q): And you made that determination that that was irrelevant, right, on your own? Not this Judge, not us.

(A): Correct.

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[29]C.R.R., Vol. 6., Pages 52-55.

[30]C.R.R., Vol. 6, Page 55, Lines 3-14.

[31]C.R.R., Vol. 6, Page 178, Lines 20-25, Page 179, Lines 1-3.

Section 37.09 (a) (1) provides that "A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he- alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.

The Appellant requested an instruction related to a 38.23 violation based upon the illegal act of Tampering with evidence, and the Court denied the Appellant's request.[32]

"We also believe that the text messages that were provided by Jessica Ortego, which are indicative of portions of messages, and only portions, not allowing the defendant to see the entire conversation, while they were in her control, satisfies tampering with evidence under the statute. And we would request a 38.23 instruction providing the language of 38.23 and then connecting that to the teft, tampering, breach of computer security, and violations of Article1.06, the Fourth Amendment, and Article 1, Section 9, Your Honor...[33]

The evidence presented and the testimony based on these portions of text messages involved extraneous acts allowed by way of article 38.37 and provided only the portions of conversations that Jessica Ortego thought would be bad for the Appellant. The defense was not afforded an opportunity to learn the entirety of these conversations, as Jessica Ortego saved only the portions she though relevant that, in her own words, "just in case something needed to be done about it."

Jessica Ortego's not securing the entirety of the conversation prohibited his attorneys from being able to properly cross examine the two witnesses that testified about extraneous acts in

[32]C.R.R., Vol. 9, Page 6, Lines 14-20.

[33]C.R.R, Vol. 9, Page 6, Lines 14-25.

accordance with 38.37, and violated his rights under the 5th amendment, the 6th amendment, the 13th amendment, and the Texas Constitutional equivalents.

IV. GIVEN THE REASON STATED ON THE RECORD AND DURING THE TRIAL FOR DENIAL OF ALLOWING THE TWO DEFENSE WITNESSES TO TESTIFY VIA ZOOM, THE TRIAL JUDGE SHOULD HAVE GRANTED THE APPELLANT'S MOTION FOR NEW TRIAL.

The Appellant timely filed a motion for new trial and a hearing was held in accordance with the statute.

Texas Rule of Appellate Procedure 21.3 provides for a new trial to be granted where the court has committed some other material error likely to injure the defendant's rights.

While the trial Court may have been upset with trial counsel, and while all Judges want to move trials along, at the trial of the Appellant, the only reason on the record for not allowing the two witnesses to testify via Zoom was that the State did not agree; as was the case exactly in *Harper*.

The trial Judge abused his discretion in not allowing the two witnesses to testify via Zoom and the defendant was denied his constitutional guarantees under the 5th, 6th and 14th amendments and the Texas equivalents to right to counsel, right to trial, and the right to due course of law.

See C.R.R. Vol. 14, D-Exhibit 1.

PRAYER FOR RELIEF

WHEREFORE, the Appellant respectfully requests that all grounds upon which relief is sought be granted and that the trial Court's rulings be reversed and this matter be remanded to the trial court for a new trial on the merits of the cases before this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, the undersigned, do hereby certify that the foregoing brief follow the requirements of Rule 9.4 of the Texas Rules of Appellate Procedure and that this brief is 8,334 words per Corel word count, excluding portions of the document that the Rule would exclude from the count.

/S/ J. Paxton Adams

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing Appellant's Brief has been served upon Mallory Vargas of the Chambers County District Attorney's Office, via efile service on this the15th day of May, 2025.

/S/ J. Paxton Adams

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