NO. 14-24-00509-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

SAMUEL BELL
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 2440892
From the County Criminal Court at Law No. 4 of Harris County, Texas

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BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

On January 15, 2023, Mr. Bell was charged by information with one count of the misdemeanor offense of driving while intoxicated. The information alleged that "in Harris County, Texas, SAMUEL BELL, hereafter styled the Defendant, heretofore on or about January 15, 2023, did then and there unlawfully, operate a motor vehicle in a public place while intoxicated." (C.R. at 9).

On June 17, 2024, Mr. Bell proceeded to trial by jury and on June 18, 2024, the jury found him guilty as charged. (3 R.R. at 163; C.R. at 282). The trial court sentenced him to one hundred eighty days in the Harris County Jail, but probated the sentence for one year. (C.R. at 282; 3 R.R. at 165). Trial counsel withdrew from representation and filed timely notice of appeal on July 5, 2024. (C.R. at 290). The Harris County Public Defender's Office was appointed to represent him on July 16, 2024. (C.R. at 292). Undersigned counsel was assigned to this case on August 15, 2024.

ISSUES PRESENTED

ISSUE ONE

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE DEFENSE OF NECESSITY

ISSUE TWO

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY UNDER CODE OF CRIMINAL PROCEDURE ART. 38.23 ON THE VOLUNTARINESS OF HIS CONSENT TO A BLOOD DRAW

ISSUE THREE

WHETHER APPELLANT'S CONSENT TO A BLOOD DRAW WAS INVOLUNTARY DUE TO THE POLICE OFFICER'S MISREPRESENTATION OF THE LAW

ISSUE FOUR

WHETHER APPELLANT'S CONSENT TO A BLOOD DRAW WAS INVOLUNTARY DUE TO THE POLICE OFFICER'S OVER-REACHING CONDUCT

STATEMENT OF FACTS

At the time of his arrest, Appellant was working for a flooring company, but he was homeless and living out of a rental car. One of his clients called him and invited him over to eat. The client had a travel trailer that Appellant was hoping to be able to spend the night. The client lived in a very rural area outside of Houston. Upon arriving at the client's home, Appellant immediately sensed the man was carrying himself in a threatening manner. He told Appellant, who is black, about an incident when he was nearly beaten to death by a black police officer. He thought Appellant resembled the

black police officer. Appellant sensed that he was becoming more aggressive as time passed. The man started to get physical and invasive. (3 R.R. at 99-105).

Soon after telling the story in an aggressive manner, the client wanted to show Appellant his collection of weapons. He had "several pistols, he had some knives, and he had like an AR or like a rifle type." Appellant thought he was invited over to eat and stay in the travel trailer, but he began to question why the man had invited him over in the first place. The man had already given him a plate of food and a very strong alcoholic drink. Appellant was concerned he might have put something in the drink. Feeling as though he was in danger, Appellant decided he needed to leave immediately. (3 R.R. at 105-106).

Appellant was already feeling tired when he arrived at the client's house. Because he had been sleeping in the back of the rental car, he had not slept well and his back was hurting. He needed to leave for his own safety, but he wanted to get off the road to sleep as quickly as possible. He drove around looking for a parking lot where he could park and sleep before going to work the next morning. Not knowing his way around the area, Appellant got lost. His phone battery was dead so he was unable to access directions. He thought he was getting off the exit and into a parking lot where it would be safe to sleep. He was suddenly awakened by knocking on the driver's side window. (3 R.R. 107-108).

Deputy Gregory Turnier, a deputy constable for Harris County Constable Precinct 4, was on duty during the early morning hours of January 15, 2023, when he

was called to the scene of a man alleged to be asleep at the wheel at a traffic light in southeast Houston. When he arrived he found Appellant asleep at a traffic light. There was another Harris County deputy constable already at the scene. Deputy Turnier was wearing a body camera and he recorded the arrest. (2 R.R. at 112-122; State's Exhibit 2). Appellant informed them that he was coming from a friend's house in Pearland. Deputy Turnier smelled the odor of alcohol and thought he noticed Appellant swaying and "stumbling a little bit." (2 R.R. 125-127).

Deputy Turnier performed a series of field sobriety tests including the horizontal gaze nystagmus test, the walk-and-turn test and the one leg stand test. He observed six out of six clues on the horizontal gaze nystagmus test; eight out of eight clues on the walk-and-turn test; and three out of four clues on the one leg stand test. At that point, believing he was intoxicated by alcohol, Appellant was under arrest. (2 R.R. at 128-136). Deputy Turnier read the statutory warnings known as the DIC-24 to Appellant and gave him a copy. Although disputed by Appellant, according to Deputy Turnier, Appellant refused a breath test, but consented to a blood test. Appellant was then transported to the Joint Processing Center (JPC). (2 R.R. at 137-138).

Upon arrival at the JPC, Appellant informed Officer Turnier that he needed to use the restroom and he requested a drink of water. Before responding to these requests, Officer Turnier brought Appellant for the blood draw. He collected the blood obtained by a lab technician and submitted the vials to the Harris County Institute of Forensic Sciences. (2 R.R. at 147-150).

Angela Branch, a DWI lab technician for the Houston Police Department, was working on January 15, 2023, when Appellant was brought in for a blood draw. (3 R.R. at 8-15; State's Exhibit 4-6).

Michelle Sims, a forensic toxicologist with the Harris County Institute of Forensic Sciences, would testify that the blood samples in this case were brought in afterhours so it was stored in a refrigerated lockbox until it could be retrieved the next day. Once processed through the system, the vials were transferred to toxicology for testing. Once received in toxicology, blood from one of the vials is tested using standard operating procedures known as "headspace gas chromatography with flame-ionization detection (GC-FID). The sample was analyzed twice using this method. Once tested, a toxicology laboratory report of the testing was produced. The report indicated "an ethanol concentration of 0.133 plus or minus 0.014 grams per 100 milliliters of ethanol." (3 R.R. at 39, 44-49; State's Exhibit 7).

SUMMARY OF THE ARGUMENT

Because Appellant satisfied the confession and avoidance doctrine and provided some evidence to support a necessity defense, it was error to not include the defensive instruction in the court's charge, causing some harm to Appellant by forcing him to argue inconsistently with his presentation of the evidence and by preventing the jury from interpreting the evidence in such a way that supported a finding of necessity if they believed his justification defense.

The trial court erred when it denied Appellant's request for a 38.23 instruction on the voluntariness of Appellant's consent to a blood draw in the court's charge at the guilt/innocence phase of the trial. Because the officer's explanation of Appellant's statutory rights were misleading, Appellant's car was being towed before he was "under arrest," and the physical and mental compulsion used by law enforcement were fact issues raised by the evidence to obtain consent. Because the disputed facts were material, the results of the blood test were inadmissible.

At trial, defense counsel moved to suppress the blood draw consent and results. The consent was involuntary due to the officer's misstatements of the law and use of over-reaching tactics in obtaining consent. The trial erred and abused its discretion in denying the requested suppression of evidence.

ARGUMENT

ISSUE ONE

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE DEFENSE OF NECESSITY

A. STANDARD OF REVIEW

"The trial court must provide the jury with 'a written charge distinctly setting forth the law applicable to the case."[1] "The trial court must instruct the jury on statutory defenses, affirmative defenses, and justifications whenever they are raised by the evidence in the case."[2] Under Texas Penal Code §2.03(c), "a defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that the element is true."[3]

"In determining whether a defense is supported, a court must rely on its own judgment, formed in the light of its own common sense and experience, as to the limits of rational inference from the facts proven."[4] "A defendant is entitled to an instruction on every defensive issue raised by the evidence, regardless of whether the evidence is strong, feeble, unimpeached, or contradicted, and even when the trial court thinks the testimony is not worthy of belief."[5] "A defendant's testimony alone is sufficient to raise

[1] *Maciel v. State*, 631 S.W.3d 720, 722 (Tex. Crim. App. 2021)(quoting Tex. Code Crim. Proc. art. 36.14).
[2] *Id.* (*citing Walters v. State*, 247 S.W.3d 204, 208-09 (Tex. Crim. App. 2007)).
[3] *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007); *see* Tex. Penal Code §2,03(c).
[4] *Shaw*, 243 S.W.3d at 658.
[5] *Walters*, 247 S.W.3d at 209.

a defensive issue requiring an instruction in the charge."[6] "But the evidence must be such that it will support a rational jury finding as to each element of the defense."[7] This requirement "serves to preserve the integrity of the jury as the factfinder by ensuring that it is instructed as to a defense only when, given the evidence, that the defense is a rational alternative to the defendant's criminal liability."[8]

"When reviewing a trial court's ruling denying a requested defensive instruction, [this Court must] view the evidence in the light most favorable to the defendant's requested instruction."[9]

B. THE REQUIREMENTS OF THE NECESSITY DEFENSE

"Texas Penal Code section 9.02 provides that '[i]t is a defense to prosecution that the conduct in question is justified under this chapter.'"[10] One such justification is the statutory defense of necessity, which "provides in relevant part that conduct that is otherwise criminal 'is justified if: (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm [and] (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct.'"[11]

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[6] *Beltran v. State*, 472 S.W.3d 283, 290 (Tex. Crim. App. 2015)(*citing Shaw*, 243 S.W.3d at 662); *see Hayes v. State*, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987).
[7] *Shaw*, 243 S.W.3d at 658.
[8] *Id.*
[9] *Maciel*, 631 S.W.3d at 722 (*citing Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006).
[10] *Id.* (quoting Tex. Penal Code §9.02).
[11] *Id.* (quoting Tex. Penal Code §9.22).

The first prong requires evidence that the defendant possessed a "reasonable belief" that his conduct was immediately necessary to avoid "imminent" harm. "Reasonable belief" means a belief that would be held by an ordinary and prudent person in the same circumstances as the actor.[12] "In most cases, whether a defendant was prompted to act by a reasonable belief is a question for the trier of fact."[13] "A defendant's belief that conduct was immediately necessary to avoid imminent harm may be deemed unreasonable as a matter of law, however, if undisputed facts demonstrate a complete absence of evidence of immediate necessity or imminent harm."[14] "Imminent" has been defined as 'ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near.'"[15] "Thus, imminent harm is harm that is ready to take place – harm that is coming in the very near future."[16] "Logically, then, if conduct is 'immediately necessary' to avoid harm that is imminent, that conduct is needed right now."[17] "Harm is imminent when there is an emergency situation and it is 'immediately necessary' to avoid that harm."[18] "In other words, a split-second

[12] Tex. Penal Code §1.07(a)(42).
[13] *Brazelton v. State*, 947 S.W.2d 644, 648 (Tex. App. –Fort Worth 1997, no pet.).
[14] *Id.*
[15] *Henley v. State*, 493 S.W.3d 77, 89 (Tex. Crim. App. 2016)(*quoting Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989).
[16] *Id.*
[17] *Id.*
[18] *Pennington v. State*, 54 S.W.3d 852, 857 (Tex. App. –Fort Worth 2001, pet. ref'd).

decision is required without time to consider the law."[19] "Evidence of a generalized fear of harm is not sufficient to raise the issue of imminent harm."[20]

The second prong of the necessity defense requires evidence that the harm the defendant sought to avoid clearly outweighed the harm the statute seeks to avoid, according to "ordinary standards of reasonableness."[21] The phrase "'ordinary standards of reasonableness' may be defined as the standards that an ordinary and prudent person would apply to the circumstances and the actor faced."[22] This requirement serves "to facilitate the desired balancing of harms on a case-by-case basis."[23] The reasonableness inquiry is a fact question for the jury to decide and should be viewed from an accused's standpoint at the time he acted.[24] Appellant raised the defense of necessity

Viewed in the light most favorable to the requested instruction on necessity, the evidence shows that before Appellant drove while intoxicated, he went to the home of a client hoping for a warm meal and bed to sleep in. Upon arrival at his house in a rural area outside of Houston, the client gave him an unrequested, strong alcoholic drink. (3 R.R. at 103). Appellant began to feel threatened by the client when he became

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[19] *Id.*
[20] *Brazelton*, 947 S.W.2d at 648; *see also Stefanoff v. State*, 78 S.W.3d 496, 501 (Tex. App. –Austin 2002, pet. ref'd).
[21] *See* Tex. Penal Code §9.22(2); *Wood v. State*, 271 S.W.3d 329, 335 (Tex. App. –San Antonio 2008, pet. ref'd).
[22] *Williams v. State*, 630 S.W.2d 640, 643 (Tex. Crim. App. 1982).
[23] *Id.* at 643 n.2.
[24] *See Pennington*, 54 S.W.3d at 857.

aggressive and physical. Appellant was 'triggered" when the client showed him several weapons including "several pistols," "some knives," and "an AR or like a rifle type" weapon. (3 R.R. at 104-105). Appellant was feeling lightheaded from the drink and in danger when the client told him he reminded him of a police officer who had nearly beat him to death. Appellant was concerned because his family did not know where he was, he was worried something bad was going to happen to him, and he believed that he "needed to leave immediately." (3 R.R. at 106, 109).

Once he was out of the dangerous situation at the client's home, Appellant wanted "to get off the road as soon as possible; [he] wanted to find a parking lot, and [he] just want[ed] to go to sleep, and [he] wanted to go to work in the morning." (3 R.R. at 107). Unfamiliar with the area and unable to access the GPS on his phone, Appellant "drove until [he] thought [he] was getting off of the exit and into a parking lot." (3 R.R. at 108).

The above facts provide some evidence that Appellant had a reasonable belief that driving while intoxicated was immediately necessary to avoid imminent harm.

This was more than just a "generalized fear of harm." This was at least some evidence of an "emergency situation" that required a "split-second decision" by Appellant. He could either stay where he was at risk being assaulted if not killed, or he could escape his assailant by driving away. He chose to escape.

On this record, this Court cannot conclude that it was unreasonable as a matter of law for Appellant to believe that under the circumstances, driving while intoxicated

was immediately necessary to avoid imminent harm. Similarly, this Court cannot conclude that it was unreasonable as matter of law for Appellant to believe that the desirability and urgency of escaping assault or death clearly outweighed the harm from driving while intoxicated. Appellant had seen the cache of weapons that the client possessed and the client had indicated he reminded him of a person who nearly beat him to death. It was for the jury to decide, according to "ordinary standards of reasonableness," if an ordinary and prudent person under these circumstances would have left the client's residence in a car as Appellant did.[25]

In conclusion, the evidence at trial was sufficient to raise the defense of necessity. The reasonableness of that defense was a fact question for the jury to decide.[26]

C. THE LACK OF AN INSTRUCTION ON NECESSITY HARMED APPELLANT

When the defendant preserves a jury charge error at trial, as was the case here, the reviewing court must reverse if the error caused some harm.[27] "'Some harm'" means actual harm and not merely a theoretical complaint."[28] There is no burden of proof associated with the harm evaluation.[29] "Reversal is required if the error was calculated to injure the rights of the defendant."[30] The harm evaluation is case-specific and entails

[25] *See Wood,* 271 S.W.3d at 335-36.
[26] *See Maciel*, 631 S.W.3d at 725; *Wood*, 271 S.W.3d at 335-36; *Pennington*, 54 S.W.3d at 858; *Brazelton*, 947 S.W.2d at 649; *Spakes v. State*, 891 S.W.2d 7, 8, 11 (Tex. App. –Amarillo 1994), *aff'd*, 913 S.W.2d 597 (Tex. Crim. App. 1996).
[27] *See Jordan v. State*, 593 S.W.3d 340, 346-47 (Tex. Crim. App. 2020).
[28] *Id.* at 347.
[29] *See Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).
[30] *Jordan*, 593 S.W.3d at 347.

a review of the whole record, including the jury charge, contested issues, and weight of the probative evidence, arguments of counsel and other relevant information.[31] Failure to instruct on a confession-and-avoidance defense, such as necessity, is rarely harmless "because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense."[32]

Here, Appellant discussed the defense of necessity during voir dire (2 R.R. at 94-95) and Appellant admitted in his testimony that he drove while intoxicated. Thus, the court's charge, absent a necessity instruction, effectively left the jury with no choice but to convict Appellant of that offense, despite his extensive testimony providing a detailed explanation for why he committed the offense. The State directed the jury to the court's charge, and the charge left the jury without a means to acquit Appellant, even if the jury believed him. On this record, this Court must conclude that Appellant suffered some harm from the trial court's failure to charge the jury on necessity and a new trial is warranted.

[31] *See id.*
[32] *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013).

ISSUE TWO

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY UNDER CODE OF CRIMINAL PROCEDURE ART. 38.23 ON THE VOLUNTARINESS OF HIS CONSENT TO A BLOOD DRAW

A. STANDARD OF REVIEW

"The trial court must provide the jury with 'a written charge distinctly setting forth the law applicable to the case."[33] "The trial court must instruct the jury on statutory defenses, affirmative defenses, and justifications whenever they are raised by the evidence in the case."[34] Under Texas Penal Code §2.03(c), "a defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that the element is true."[35]

"In determining whether a defense is supported, a court must rely on its own judgment, formed in the light of its own common sense and experience, as to the limits of rational inference from the facts proven."[36] "A defendant is entitled to an instruction on every defensive issue raised by the evidence, regardless of whether the evidence is strong, feeble, unimpeached, or contradicted, and even when the trial court thinks the testimony is not worthy of belief."[37] "A defendant's testimony alone is sufficient to

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[33] *Maciel v. State*, 631 S.W.3d 720, 722 (Tex. Crim. App. 2021)(quoting Tex. Code Crim. Proc. art. 36.14).
[34] *Id.* (*citing Walters v. State*, 247 S.W.3d 204, 208-09 (Tex. Crim. App. 2007)).
[35] *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007); *see* Tex. Penal Code §2,03(c).
[36] *Shaw*, 243 S.W.3d at 658.
[37] *Walters*, 247 S.W.3d at 209.

raise a defensive issue requiring an instruction in the charge."[38] "But the evidence must be such that it will support a rational jury finding as to each element of the defense."[39] This requirement "serves to preserve the integrity of the jury as the factfinder by ensuring that it is instructed as to a defense only when, given the evidence, that the defense is a rational alternative to the defendant's criminal liability."[40]

"When reviewing a trial court's ruling denying a requested defensive instruction, [this Court must] view the evidence in the light most favorable to the defendant's requested instruction."[41]

B. THE REQUIREMENTS OF TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 38.23

The Fourth Amendment to the United States Constitution and Article I, Section 9, of the Texas Constitution guarantee the right to be secure against unreasonable searches.[42] The requirements and proof under the federal and the Texas constitutions are the same.[43] In addition, Article 38.23 of the Texas Code of Criminal Procedure forbids any evidence obtained in violation thereof to be admitted against an accused.[44]

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[38] *Beltran v. State*, 472 S.W.3d 283, 290 (Tex. Crim. App. 2015)(*citing Shaw*, 243 S.W.3d at 662); *see Hayes v. State*, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987).
[39] *Shaw*, 243 S.W.3d at 658.
[40] *Id.*
[41] *Maciel*, 631 S.W.3d at 722 (*citing Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006).
[42] U.S. Const. amend. IV; Tex. Const. art. I, § 9.
[43] *Johnson v. State*, 912 S.W.2d 227, 235-36 (Tex. Crim. App. 1995).
[44] Tex. Code Crim. Proc. art. 38.23(a).

Searches conducted without a warrant are per se unreasonable under the Fourth Amendment unless they are subject to a recognized exception.[45] Voluntary consent is an exception to the warrant requirement.[46]

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

> No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the State of Texas, or the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.[47]

An instruction "under Article 38.23(a) is limited to disputed issues of fact that are material to [the defendant's] claim of a constitutional or statutory violation that would render evidence inadmissible."[48] A defendant must satisfy three requirements before being entitled to the submission of a jury instruction under article 38.23(a):

1. The evidence heard by the jury must raise an issue of fact;

2. The evidence on that fact must be affirmatively contested; and

3. That contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.[49]

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[45] *Gonzales v. State*, 389 S.W.3d 851, 854 (Tex. Crim. App. 2012).
[46] *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003).
[47] Tex. Code Crim. Proc. art. 38.23(a).
[48] *Madden v. State*, 242 S.W.3d 504, 509-10 (Tex. Crim. App. 2007).
[49] *Hamal v. State,* 390 S.W.3d 302, 206 (Tex. Crim. App. 2012); *Madden*, 242 S.W.3d at 501.

When these elements are met, a trial court is required to include an article 38.23(a) instruction.[50]

"To raise a disputed fact issue warranting an article 38.23(a) jury instruction, there must be some affirmative evidence that puts the existence of that fact into question."[51] If there is no disputed factual issue, the legality of the conduct is determined by the trial judge alone, as a question of law.[52]

Appellant requested the instruction based on involuntary consent because "it would be part of the officer's testimony in the video firstly, Your Honor, whenever the DIC-24 form was read to my client afterwards and in summarization of the DIC-24, the police officer stated in a misleading fashion that if he were to give a sample of a .08, that he would be released." Appellant further pointed out that his "car was being towed" at the time the officer told him he would be released. (3 R.R. at 145).

Appellant went on to explain as justification for the 38.23(a) charge as follows:

> So under the law for compulsory self-incrimination, the police officer cannot exert physical or mental compulsion to obtain a statement. Physical compulsion could be physical torture and can also include a derivation of food or water, and mentalk compulsion can be more subtle, You Honor, as the Courts pointed out in *Thomas v. State*, which is 723 S.W.2d at 969, at 704.
>
> …
>
> In this case, we're arguing that the officer told him that if he was below a .08, that he would be released. But there's not an immediate result whenever you take blood results, so giving a blood result – a blood sample would not

[50] *Madden*, 242 S.W.3d at 510.
[51] *Madden*, 242 S.W.3d qt 513.
[52] *Madden*, 242 S.W.3d at 510, 518.

> – would not result in him being released. Further, if it was below .08, if it were a breath test, they wouldn't necessarily release him. So this statement was misleading and designed to get [Appellant] to provide a sample overbearing his will by, at the same time, taking away his livelihood and where he was staying.
>
> Additionally, Your Honor, when he's taken to the station and as part of the totality of the circumstances, once he's taken to his room for the blood draw, for a period of over four minutes [Appellant] refused to give a sample, and we submit to you that the refusal to give a sample and his refusal to give a sample essentially is him withdrawing his consent.
>
> After he told or indicated to the officers and lab technician that he was thirsty and wanted water and needed to use the restroom, he was prevented from using the restroom or getting water at that time until he gave a sample. We believe and we submit that this was physical compulsion, short of physical torture, however, it was physical compulsion to get [Appellant] to give the sample over his – after he had essentially withdrawn his consent.
>
> Further, Your Honor, at the time whenever the officer asked whether or not he consented to the blood draw, [Appellant] simply said "blood" in response to the officer, which is not a clear indication that he was consenting to blood. He just said the word "blood."
>
> Further, Your Honor, the officer failed to get a signature on the DIC-24 form, which really would have helped us in this situation because that would have been a clear sign of [Appellant's] intent to give consent. So for those reasons we're requesting an instruction under 38.23.

(3 R.R. at 145-48). The Court of Criminal Appeals has clarified that when there are disputed issues of fact affecting the legality of the search/seizure, the question of exclusion may be tried to the jury; in such event, the judge must include in the final charge an instruction that if the jury "believes or has a reasonable doubt, that the evidence was obtained in violation of …any provision of the Constitution or laws of

the State of Texas, or of the Constitution or laws of the U.S. …then and in such event, the jury shall disregard any such evidence so obtained."[53]

"The evidence which raises the issue [of whether the evidence was obtained illegally] may be either strong, weak, contradicted, unimpeached or unbelievable."[54]

The Texas Constitution requires the State to show my clear and convincing evidence that the consent was valid.[55] The United States Constitution, Fourth Amendment, test for valid consent to search is that the consent be voluntary and voluntariness is a question of fact to be determined from all the circumstances.[56]

The Court of Criminal Appeals has held that whether a driver's consent to take a breathalyzer test was voluntary is a question of fact for the fact-finder.[57]

Appellant was entitled to a 38.23 instruction because the issue of fact to be decided by the jury that was raised by the evidence in this case was whether Appellant freely and voluntarily consented to a blood test given the misleading and coercive nature

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[53] *Atkinson v. State*, 923 S.W.2d 21, 23 (Tex. Crim. App. 1996).
[54] *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993).
[55] *State v. Ibarra*, 953 S.W.2d 242 (Tex. Crim. App. 1997); *Montanez v. State*, 195 S.W.3d 101, 108 (Tex. Crim. App. 2006).
[56] *Schneckloth v. Bustamonte*, 412 U.S. 218 (!973); *Johnson v. State*, 226 S.W.3d 439 (Tex. Crim. App. 2007).
[57] *See* Article 38.23, supra; *see Hall v. State*, 649 S.W.2d 627 (Tex. Crim. App. 1983); *see Turpin v. State*, 606 S.W.2d 907 (Tex. Crim. App. 1980)("we find that the issue was sufficiently raised and the trial court should have instructed the jury on the issue of voluntary consent.").

of the officer's direction.[58] Questions of fact are to be decided by the jury and the jury should consider all circumstances of a particular situation.[59]

Officers did not obtain a search warrant for a specimen of Appellant's blood. Nor did they articulate grounds for any other exception to the warrant requirement. Rather, the only pathway to the blood test result was Appellant's consent to the blood draw. Because there was evidence to support a jury's finding that he was coerced into compliance and therefor did not freely and voluntarily consent to the blood draw was an essential fact in determining the lawfulness of the conduct. Appellant has demonstrated a genuine dispute about a material fact and was entitled to a 38.23 instruction.[60]

C. THE LACK OF AN INSTRUCTION PURSUANT TO ART. 38.23 HARMED APPELLANT

When the defendant preserves a jury charge error at trial, as was the case here, the reviewing court must reverse if the error caused some harm.[61] "'Some harm'" means actual harm and not merely a theoretical complaint."[62] There is no burden of proof associated with the harm evaluation.[63] "Reversal is required if the error was calculated to injure the rights of the

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[58] *See Schneckloth*, 412 U.S. at 233 (holding that the voluntariness of a person's consent is a question of fact).
[59] *Id.*; *Gutierrez v. State*, 221 S.W.3d 680 (Tex. Crim. App. 2007).
[60] *See Garza v. State,* 126 S.W.3d 79, 85 (Tex. Crim. App. 2004).
[61] *See Jordan v. State*, 593 S.W.3d 340, 346-47 (Tex. Crim. App. 2020).
[62] *Id.* at 347.
[63] *See Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

defendant."[64] The harm evaluation is case-specific and entails a review of the whole record, including the jury charge, contested issues, weight of the probative evidence, arguments of counsel and other relevant information.[65]

The jury charge error resulted in some harm to Appellant. The requested instruction would have commanded the jury to disregard the blood test result if they had a reasonable doubt about whether the consent was voluntary. But that instruction was denied. As a result, the jury was powerless to address the issue and by extension Appellant was powerless to argue to the jury that they should disregard the blood test results because there was evidence that Appellant was coerced in compliance.

As the trial court's instruction in this case was erroneous and the error was properly preserved, Appellant suffered some harm as a result of the error. This case must be reversed and remanded to the trial court for further proceedings.

[64] *Jordan*, 593 S.W.3d at 347.
[65] *See id.*

ISSUE THREE[66]

WHETHER APPELLANT'S CONSENT TO A BLOOD DRAW WAS INVOLUNTARY DUE TO THE POLICE OFFICER'S MISREPRESENTATION OF THE LAW

ISSUE FOUR

WHETHER APPELLANT'S CONSENT TO A BLOOD DRAW WAS INVOLUNTARY DUE TO THE POLICE OFFICER'S OVER-REACHING CONDUCT

The Fourth Amendment to the United States Constitution and Article I, Section 9, of the Texas Constitution guarantee the right to be secure against unreasonable searches.[67] The requirements and proof under the federal and the Texas constitutions are the same.[68] In addition, Article 38.23 of the Texas Code of Criminal Procedure forbids any evidence obtained in violation thereof to be admitted against an accused.[69]

Taking a blood specimen constitutes a search and seizure under the Fourth Amendment.[70] Courts deem searches conducted without a warrant per se unreasonable under the Fourth Amendment unless the searches fall within an exception.[71] The State shoulders the burden to prove that a warrantless search falls within an exception to the warrant requirement.[72]

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[66] Because Issues Three and Four both apply the same law and reference the same facts, Appellant has combined the arguments for the sake of efficiency.
[67] U.S. Const. amend. IV; Tex. Const. art. I, § 9.
[68] *Johnson v. State*, 912 S.W.2d 227, 235-36 (Tex. Crim. App. 1995).
[69] Tex. Code Crim. Proc. art. 38.23(a).
[70] *Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016).
[71] *Gonzales v. State*, 369 S.W.3d 851, 854 (Tex. Crim. App. 2012).
[72] *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003).

Courts recognize voluntary consent to a search as an exception to the warrant requirement. For purposes of a blood alcohol level blood draw, the consent must be clear and affirmative, and cannot be implied.[73] For consent to be voluntary, the consent must be given freely and not the result of physical or psychological pressures brought to bear by law enforcement.[74] Courts deem consent involuntary if the individual's "will has been overborne and his capacity for self-determination critically impaired."[75] Further, a "suspect's decision to submit to a breath test must be his own, made freely, and with a correct understanding of the statutory consequences of refusal."[76]

If consent was given at all by Appellant it was involuntary due to over-bearing conduct and misstatements of the law by Officer Turnier.

First and foremost, Officer Turnier tells Appellant that, despite his poor performance on the field sobriety tests, "technically" he is not under arrest and he won't be arrested if he blows under a 0.08 or the district attorney does not accept charges. If he refuses both the breath and blood, a warrant will be obtained for blood. Officer Turnier again tells Appellant that if he blows under a 0.08 he is free to go even though an inventory search was in progress and his vehicle was being towed. Officer Turnier

[73] *State v. Villarreal*, 475 S.W.3d 784, 793)(Tex. Crim. App. 2014)(rejecting argument that mandatory blood draw and implied consent provisions of the Texas Transportation Code "form a valid alternative to the Fourth Amendment warrant requirement").
[74] *Fienen v. State*, 390 S.W.3d 328, 333 (Tex. Crim. App. 2012).
[75] *See id.*
[76] *Gette v. State*, 209 S.W.3d 139, 145 (Tex. App. –Houston [1st Dist.] 2006, no pet.).

tells Appellant "the choice is yours; either breath or blood" and "which one do you consent either breath or blood" making it seem like refusal is not really an option. (State's Exhibit 2).

Consequently, Turnier's misstatement of the law caused Appellant to give involuntary consent to the blood draw if he consented at all.[77] Appellant did not sign the written statutory warnings indicating his alleged consent. (State's Exhibit 3). The State cannot reasonably argue that Turnier's jumbled reading of the DIC-24 form cancelled out his misstatements of the law to Appellant. Adopting such a view would judicially authorize police officers to misinform an accused of the law simply because the law has been stated at some point earlier in time. Not only did Turnier misinform and mislead Appellant as to the controlling law of consent, but he pressured Appellant to consent to providing either the breath or blood sample. If Appellant consented at all, it was after Officer Turnier misstated the law.

Taken as a whole, the circumstances appearing in the record show that Appellant's consent (if given at all) to the blood draw was not made freely or with a correct understanding of the statutory consequences of refusal. Officer Turnier's actions in this case were over-reaching, coercive, and contrary to law, resulting in involuntary consent given (if at all) by Appellant.

[77] *See Gette*, 209 S.W.3d at 145 (holding that a "suspect's decision to submit to a breath test must be his own, made freely, and with a correct understanding of the statutory consequences of refusal."

In absence of voluntary consent, and in absence of evidence of any exemption or justification for the warrantless blood draw, Appellant's blood draw was an unreasonable search and seizure. The trial court erred and abused its discretion in not suppressing the blood draw evidence and results, and a new trial is warranted.

PRAYER

Appellant prays that this Court reverse his conviction and remand to the trial court for a new trial or for any other relief he may be entitled.

Respectfully submitted,

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Pursuant to proposed Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of *Tex. R. App. Proc. 9.4(e)(i)*.

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/s/ Daucie Schindler
DAUCIE SCHINDLER

CERTIFICATE OF SERVICE

I certify that on the 14th day of October 2024, a copy of the foregoing instrument has been electronically served upon the Appellate Division of the Harris County District Attorney's Office.

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