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REPORTER'S RECORD  
VOLUME 1 OF 1 VOLUMES  
TRIAL COURT CAUSE NO. 03-0055-3

STATE OF TEXAS \* COUNTY COURT AT LAW  
VS. \* NUMBER 3  
SHERYL JEAN HAYES-PUPKO \* WILLIAMSON COUNTY, TEXAS

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PRE-TRIAL HEARING  
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ORIGINAL

On the 8th day of March, 2004, the following  
proceedings came on to be heard in the above-entitled and  
numbered cause before the Honorable Don Higginbotham, Judge  
presiding, held in Georgetown, Williamson County, Texas:

Proceedings reported by shorthand machine.

## A P P E A R A N C E S

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MR. DEE HOBBS  
Assistant County Attorney  
405 M.L.K.  
Georgetown, Texas 78626  
ATTORNEY FOR STATE

- AND -

MR. MARK MORALES  
Attorney at Law  
401 West 6th Street  
Georgetown, Texas 78626  
ATTORNEY FOR DEFENDANT

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MR. MORALES: I call Deputy Derrick Dutton  
to the stand.

(Whereupon witness was duly sworn.)

DERRICK DUTTON,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MORALES:

Q. Deputy, how are you doing?

A. Fine.

Q. My name is Mark Morales. I represent Ms. Pupko.  
I'm going to be asking you a series of questions that are  
going to require a yes or no answer. If you have any  
questions concerning any of my questions or if my questions  
are unclear, then just let me know and I will rephrase or  
repeat the question.

1 A. Yes, sir.

2 Q. How were you first alerted to an alleged  
3 disturbance at Ms. Pupko's residence?

4 A. I was dispatched by Williamson County  
5 Communications.

6 Q. Okay. And when you arrived, who is the first  
7 person you came into contact with?

8 A. The Gerban's—Mr. and Ms. Gerban.

9 Q. And were they pretty agitated at the time?

10 A. Not that I recall. They seemed pretty calm. I  
11 guess it had been a while between the incident and the time  
12 that I arrived.

13 Q. How long would you say it had been?

14 A. I couldn't tell you.

15 Q. And so you said they appeared pretty calm?

16 A. It was probably about 30 minutes after I was  
17 dispatched.

18 Q. 30 minutes. In your opinion, the Gerban's were  
19 calm?

20 A. At that time, yes, sir.

21 Q. At that time. And did they yell at you in any  
22 way or use any kind of obscenities?

23 A. No, sir.

24 Q. Did they yell, in any way, concerning about what  
25 had happened -- the incident that had happened?

1 A. They explained what had happened to me.

2 Q. Were they agitated about that?

3 A. To the point that they were communicating what  
4 happened. They weren't yelling or anything.

5 Q. But were they mad at what happened?

6 A. Sure. They were agitated by it.

7 Q. A little while ago, you said they were calm?

8 A. Yes. They were calm in their speaking.

9 Q. How long did you talk with them?

10 A. Probably 15, maybe 20 minutes. It was long  
11 enough to get their side of the story and get a statement  
12 from both of them.

13 Q. Okay. What did you do next?

14 A. I went to make contact with the next door  
15 neighbor, Ms. Pupko.

16 Q. And what did you ask her?

17 A. I asked her about the incident, and to explain  
18 what happened during the incident between her and her  
19 neighbor.

20 Q. What did she tell you?

21 A. She advised me that she was watering her plants  
22 and that -- basically, she started into a civil dispute  
23 that she had with the neighbors in reference to a covered  
24 patio that they had built at the back of their residence.

25 Q. Was she irate at this point, or angry?

1 A. No, not at that point.

2 Q. Was she calm?

3 A. Yes. She was explaining -- she began to rant and  
4 rave about the civil matter that they had between her and  
5 the neighbors. She began talking about that, talking about  
6 how they didn't have the proper permits to build the  
7 structure. I explained to her that that's not why I was  
8 here and that that was a civil issue. According to them,  
9 they had all the permits that they needed through the  
10 County to build what they had.

11 Q. And at this point, did you ask Ms. Pupko for her  
12 name?

13 A. Yes, sir, I did.

14 Q. And this is while you were at her residence,  
15 correct?

16 A. We were standing in front of her garage in her  
17 driveway.

18 Q. Did she give you her name?

19 A. Yes, she did.

20 Q. And then what did you ask her for?

21 A. I asked her for her date of birth.

22 Q. Did she give it to you?

23 A. No.

24 Q. In fact, you asked her -- you told her that she  
25 was required to give you that information. Is that

1 correct?

2 A. Yes, sir. I asked for her information several  
3 times. When I asked for the first time, she asked me why I  
4 needed that information.

5 Q. Hold on one second. Did you tell Ms. Pupko  
6 whether or not she was required to give that information to  
7 you?

8 A. After I requested it twice and explained to her  
9 that I was investigating a criminal offense, I did explain  
10 to her that she was required by law to give it to me.

11 Q. Did you tell her that she would be arrested if  
12 she didn't give it to you?

13 A. Yes, I did.

14 Q. Do you believe that she is required and was  
15 required to give that information to you?

16 A. At the time, I did.

17 Q. Do you believe that now?

18 A. After reading the statute, no.

19 Q. So you were wrong about her being required to  
20 give that information to you?

21 A. Yes, I was.

22 Q. So at this point, she hadn't committed any  
23 violation of the law. Is that correct?

24 A. An assault.

25 Q. At this point, you are asking her for her name

1 and her date of birth; and you told her that if she didn't  
2 give the information, you could arrest her because it was a  
3 violation of the law for not giving that information to  
4 you?

5 A. As far as fail to I.D., no.

6 Q. So she hadn't committed any offense at this  
7 point?

8 A. Other than the assault with the water.

9 Q. You didn't see that, did you?

10 A. No, sir.

11 Q. Well, after she asked you why you needed her date  
12 of birth, what did you do?

13 A. I explained to her that she would be arrested for  
14 fail to I.D. At that point, she began to back into the  
15 garage in an attempt to walk back into the house. At that  
16 time, I grabbed her arm to effect an arrest.

17 Q. Which arm did you grab?

18 A. I can't recall.

19 Q. So it could have been the right, or it could have  
20 been the left?

21 A. Yes.

22 Q. Did you grab her arm to place her under arrest,  
23 or did you grab her to detain her?

24 A. To arrest her for fail to identify. She was  
25 leaving.

1 MR. MORALES: Your Honor, may I approach?

2 THE COURT: Yes, you may.

3 Q. (By Mr. Morales) I'm showing you here an  
4 affidavit for a warrant for arrest and detention. Do you  
5 have a copy of that?

6 A. No, I don't.

7 Q. Can I bring your attention to this line right  
8 here (indicating)?

9 A. Yes, sir.

10 Q. Were you attempting to detain her or to arrest  
11 her at that point?

12 A. To arrest her.

13 Q. So even though you said in this affidavit, "I  
14 attempted to detain Sheryl by placing handcuffs on her  
15 after she refused to give me the information," you meant to  
16 arrest her?

17 A. Arrest.

18 Q. Okay. Was she lawfully detained at this point?

19 A. Not physically.

20 Q. So she was free to leave at that point?

21 A. No. I was conducting an investigation.

22 Q. So she was detained?

23 A. Yes.

24 Q. Now, after you grabbed one of her arms -- what  
25 did you do to her arm again?



1       A.    I just grabbed it to stop her to place her under  
2 arrest.  At that point, she began spinning around in  
3 circles pushing at my hand — pushing and slapping at my  
4 hands.

5       Q.    Okay.  As you grabbed her arm and twisted it  
6 behind her back, did she, at any point, start to cry?

7       A.    She was saying, no.  She may have been crying.

8       Q.    She was saying no?

9       A.    Yes.

10      Q.    She may have been crying?

11      A.    Yes.

12      Q.    And despite tearful pleas--as you just said she  
13 was crying--she may have told you no and was telling you to  
14 stop; and you didn't stop, did you?

15      A.    No.  I was going to effect the arrest.

16      Q.    In fact, you pushed her -- at this point, you  
17 pushed her against her car.  Is that correct?

18      A.    After spinning around several times, I felt like  
19 I was losing control of the situation.  So I used the  
20 vehicle to keep her from spinning around.  I pushed her up  
21 against the vehicle to control her.

22      Q.    In fact, in your own words, "you penned her  
23 against the vehicle."  Is that correct?

24      A.    Yes.

25      Q.    How tall do you think Ms. Pupko is?

1 A. 5'9", 5'10".

2 Q. And you couldn't control the situation even  
3 though you had one arm behind her back?

4 A. I didn't have one arm behind her back. As I  
5 attempted to put the arm behind her back, she spun around  
6 and we began spinning together.

7 Q. So she was pulling you along?

8 A. She was spinning around.

9 Q. But enough to make you spin with her?

10 A. Yes.

11 Q. And did she, at any point, tell you that her  
12 arm--when you were twisting her arm--didn't twist that way?

13 A. Not that I recall.

14 Q. But it is possible?

15 A. In the heat of it, it may have been possible,  
16 yes, sir.

17 Q. Now, at this point, after you penned her against  
18 your vehicle, did you secure control of her other hand?

19 A. Yes, I did.

20 Q. Then what did you do?

21 A. I handcuffed her.

22 Q. After you handcuffed her, what did you do next?

23 A. I walked her to my patrol vehicle.

24 Q. Could you tell if she had any limp in her gait or  
25 walking particularly slow, or did she attempt to walk in a

1 normal gait?

2 A. Not that I recall. To the best of my  
3 recollection, she walked normally.

4 Q. Did you ask her to get into your vehicle?

5 A. Yes, sir, I did.

6 Q. Before Ms. Pupko was in the car, she told you  
7 that she didn't have the range of motion in her knees to  
8 move her legs in the car. Is that correct?

9 A. Yes.

10 Q. So you knew that she didn't have the range of  
11 motion in her knees?

12 A. Yes, sir. I told her to slide in.

13 Q. So you told her to slide in, but she couldn't do  
14 it, correct? She just told you that she didn't have the  
15 range of motion, correct?

16 A. She could slide in.

17 Q. So she slid in, but she couldn't get her legs in  
18 the car from what you just said?

19 A. She could. She could slide in with her legs  
20 straight.

21 Q. But the fact of the matter is, you pushed her  
22 legs in the car?

23 A. When she refused several times to put her legs in  
24 the vehicle and resist transportation.

25 Q. In fact, you actually put your hands physically

1 on her knee, grabbed it and pushed them into the vehicle,  
2 correct?

3 A. Eventually, yes.

4 Q. Even after she told you that she didn't have the  
5 range of motion in her knees from an injury she had?

6 A. Yes, sir. She told me that she had knee  
7 problems.

8 Q. Okay. And that didn't concern you in any way?

9 A. Yes, it did. That's why I told her to slide in  
10 the vehicle.

11 Q. But after that, you still pushed her legs in the  
12 vehicle?

13 A. Yes, sir, I did.

14 Q. At this point, Ms. Pupko started hyperventilating  
15 and crying so hard that she couldn't even talk?

16 A. She was talking fine.

17 Q. And was she crying at this point?

18 A. Yes, she was.

19 Q. Did you ask her if she was okay or if she needed  
20 E.M.S.?

21 A. I can't recall.

22 Q. You didn't put that in your report, though, did  
23 you?

24 A. No.

25 Q. So you probably didn't ask her that. Is that

1 safe to say?

2 A. It's hard to say. I may have asked her.

3 Q. Actually, the only thing you did ask her was  
4 where her garage door opener was. Is that correct?

5 A. I don't recall.

6 Q. Do you recall if you went later on and closed her  
7 garage door?

8 A. I can't recall.

9 Q. Deputy, if you had a permanent disability in your  
10 arms that caused you to have limited range of motion and I  
11 twisted your arm beyond that range, what would you do?

12 A. I mean, that's a hypothetical question. I don't  
13 know what I would do.

14 Q. If I grabbed your arm and I twisted it around and  
15 you had a permanent disability in that arm and it couldn't  
16 extend, how do you think you would react?

17 A. I would probably be in pain. I can't say how I  
18 would react.

19 Q. Do you think you might spin away a little bit?

20 A. I would probably spin if it hurt, yes.

21 Q. Okay. Do you think you would maybe push back at  
22 me. Is that reasonable?

23 A. No, I wouldn't think so. I would never push at a  
24 police officer.

25 Q. No. I mean, me.

1 A. Oh, if it were you? Probably.

2 Q. So based on your training and experience, what is  
3 the first thing Ms. Pupko did to resist arrest in your  
4 opinion?

5 A. At the point where I grabbed a hold of her arm to  
6 effect the arrest and she began spinning and slapping at my  
7 hand.

8 Q. Officer, do you realize that pulling away and  
9 spinning around does not constitute resisting arrest?

10 A. Yes, I do.

11 Q. You talked about Ms. Pupko running. Actually, in  
12 your information, you said that she pulled away, running  
13 and hitting at your arm and pushing off your hand. Did she  
14 run?

15 A. I would like to see that. I don't see that in my  
16 report.

17 Q. It's not in your report. It's in the  
18 information.

19 MR. MORALES: May I approach?

20 THE COURT: Yes, you may.

21 Q. (By Mr. Morales) Do you see where it says she  
22 was running?

23 A. Yes, sir.

24 Q. Was she running?

25 A. No, sir.

1 Q. So that was wrong to be in there, correct?

2 A. Yes.

3 Q. Now, I wanted to ask about actual slapping and  
4 hitting at your hand. Can you describe in what manner she  
5 slapped and hit your hand?

6 A. Pushing away at them. My hand was -- I had a  
7 lock on her wrist, and she was pushing away at my hand.

8 Q. With the other hand?

9 A. Yes.

10 Q. In what manner?

11 A. She was pushing at them trying to get my arm off  
12 of her's.

13 Q. In a defensive manner?

14 A. In an attempt to getaway from me.

15 Q. As you just mentioned, you had a lock on her  
16 wrist, and she was pushing at your hands like this  
17 (indicating)? That is the exact motion that she used. Is  
18 that correct?

19 A. Yes.

20 Q. Is that the complete nature of the alleged force  
21 against you?

22 A. At that point, yes.

23 Q. Did you consider yourself to be at risk of  
24 injury?

25 A. Not at that point, no.

1 Q. Would you consider that a violent act?

2 A. I would consider it resisting. As far as  
3 violent, yes, it is violent. She was striking me.

4 Q. You just said she was doing like this right here  
5 (indicating)? *a brushing motion*

6 A. Yes. She was hitting my hand in that motion.

7 Q. Now, in your actual affidavit for arrest, you  
8 write that she began pushing your hands away from her.  
9 Now, when you say, "away from her." Like you said,  
10 "pushing your hand away from her," would you consider that  
11 a defensive action?

12 A. A defensive action, yes.

13 Q. So if she was pushing her hands away from you,  
14 was it because possibly she was in pain and she was doing  
15 that to stop you from hurting her?

16 A. Possibly.

17 Q. What would you say if I told you that you broke  
18 her wrist when you put it behind her back?

19 A. If that's the case, I would believe you.

20 Q. Do you think that in hindsight that you used  
21 reasonable force in this matter?

22 A. Yes, I did.

23 THE COURT: We're not here to try a civil  
24 case. Let's get down to what this is all about. What I  
25 need to know from this witness is, at what point did he



1 consider her to be under arrest.

2 OFFICER DUTTON: At the point that I had her  
3 penned against the vehicle.

4 THE COURT: What had you planned on  
5 detaining her for in the first place?

6 OFFICER DUTTON: I was investigating the  
7 assault on the Gerban's.

8 THE COURT: What they had alleged to be an  
9 assault with water?

10 OFFICER DUTTON: Yes.

11 THE COURT: Somebody sprayed them with water  
12 is what the allegations are?

13 OFFICER DUTTON: Yes.

14 THE COURT: So you went there, you talked to  
15 the lady and she gave the name. You are obviously at her  
16 house. She, at that point, wouldn't give you her date of  
17 birth, correct?

18 OFFICER DUTTON: Correct.

19 THE COURT: So at that point in time, she  
20 tried to walk away from you, correct?

21 OFFICER DUTTON: Correct.

22 THE COURT: Originally, you had decided that  
23 she was failing to identify, right?

24 OFFICER DUTTON: Yes.

25 THE COURT: But at that point in time, you

1 didn't have her under arrest, right?

2 OFFICER DUTTON: When she failed to  
3 identify, no, sir, she wasn't under arrest at that point?

4 THE COURT: All right. So what was she  
5 escaping from?

6 OFFICER DUTTON: From my investigation, and  
7 she failed to identify. At that point, I placed her under  
8 arrest for failure to identify and she began to walk away  
9 from me.

10 THE COURT: But the statute says you only  
11 fail to identify if you are under a lawful arrest.

12 OFFICER DUTTON: Yes, sir.

13 THE COURT: So that's what I am having  
14 trouble with here. So how could she be under arrest for  
15 failure to identify if you didn't already have her under  
16 arrest?

17 OFFICER DUTTON: She was detained for the  
18 investigation purposes on the original assault --  
19 disturbance.

20 THE COURT: I think maybe the State can  
21 clear that up for me. Go ahead with your questioning. I'm  
22 not here to try a civil case.

23 MR. MORALES: Yes, Judge.

24 THE COURT: I'm just here to decide whether  
25 the arrest was good or not.

1 MR. MORALES: Okay.

2 Q. (By Mr. Morales) When you attempted to arrest  
3 Ms. Pupko, your only basis, at that point, was for failing  
4 to I.D. Is that correct?

5 A. Correct.

6 Q. But you were wrong in terms of the law. Is that  
7 correct?

8 A. In terms of the statute, yes.

9 Q. Okay. So at that point, you didn't have probable  
10 cause to arrest her?

11 A. At that point, I believed I had probable cause.

12 Q. Did she commit an offense of failure to I.D.?

13 A. At that time, I believed it was an offense.

14 Q. But did she?

15 A. After reading the statute, no, she had not.

16 MR. MORALES: No further questions.

17 CROSS-EXAMINATION

18 BY MR. HOBBS:

19 Q. Detective, just briefly, how are you currently  
20 employed?

21 A. I'm a detective with the sheriff's department.

22 Q. How long have you been so employed?

23 A. Seven years, five months.

24 Q. Are you a certified Texas peace officer?

25 A. Yes, sir.

1 Q. On December 6th, 2002, were you in uniform?

2 A. Yes, I was.

3 Q. Marked patrol unit?

4 A. Yes, sir.

5 Q. On duty?

6 A. Yes.

7 Q. When you responded to this call about the water  
8 over the fence, what was that location?

9 A. 108 Hickory Street.

10 Q. Is that within Williamson County and the State of  
11 Texas?

12 A. Yes.

13 Q. Is that where you made contact with the Defendant  
14 in this case?

15 A. Yes, sir.

16 Q. Do you see the person you made contact with in  
17 the courtroom today?

18 A. Yes.

19 Q. Can you identify her by an article of clothing  
20 and location in the courtroom?

21 A. Blue jacket with a white shirt.

22 Q. So we can clear it up for the Court, after she  
23 refused to give her date of birth, at that point, when she  
24 initially refused to give her date of birth, was she under  
25 arrest?

1 A. When she refused, no, she was not.

2 Q. Approximately, how many times, after that, did  
3 you ask her for her date of birth?

4 A. Approximately, four times.

5 Q. Was she under arrest at that point?

6 A. No.

7 Q. When she was backing into her garage, at that  
8 point, did you decide to make an arrest?

9 A. Yes, I did.

10 Q. Now, in your mind, what were you making an arrest  
11 for at that point?

12 A. Fail to identify.

13 Q. At that point, did you believe that she had  
14 committed an offense against the State of Texas?

15 A. Yes, I did.

16 Q. And, in fact, if she had been under arrest, at  
17 that point, for some other offense and refusing to give her  
18 date of birth, she would have been committing another  
19 offense?

20 A. Correct.

21 Q. If she had given a false date of birth; that  
22 would have been an offense?

23 A. Correct.

24 Q. At that point, in good faith, you honestly  
25 believed she was failing to identify?

1 A. Yes, sir.

2 Q. So at that point, when she was walking away from  
3 you, are you familiar with the policies and procedures of  
4 the sheriff's department of Williamson County?

5 A. Yes, I am.

6 Q. Did you follow those policies and procedures to  
7 impede her progress back into the house?

8 A. Yes, I did.

9 Q. And what did you do?

10 A. I used the minimum amount of force to effect the  
11 arrest.

12 Q. Do you believe that she -- did you identify  
13 yourself and the agency you were with on that date?

14 A. Yes, I did.

15 Q. And at that point, were you trying to effect an  
16 arrest?

17 A. Yes, I was.

18 Q. After you grabbed her arm, what did she do?

19 A. She began spinning around, which caused me to  
20 spin around trying to handcuff her.

21 Q. And after she was spinning around, and y'all both  
22 were spinning around, what did she do?

23 A. She was hitting at my hand -- pushing and hitting  
24 at my hand.

25 Q. Do you believe that to be force against you?

1 A. Yes, I do.

2 Q. What did you do after she was slapping at your  
3 hand and she used force against you?

4 A. I pushed her towards her car to use the vehicle  
5 to cease her movement and penned her against the car.

6 Q. Now, is this a procedure that you are taught in  
7 the Academy or your time with the sheriff's department?

8 A. Yes.

9 Q. Did you follow those procedures in trying to gain  
10 control of the situation?

11 A. Yes, I did.

12 Q. You said that on questioning that she was  
13 crying. Is it unusual for someone to be crying?

14 THE COURT: We do not need to get into all  
15 of that. I am not trying a civil suit here. What I want  
16 to know is this: Was it a bad arrest? I don't care what  
17 he thought. If nothing happened that was a breach of the  
18 peace or something that happened in his presence, it's a  
19 warrantless arrest. He started out wanting to arrest her  
20 for something that's not against the statute. I don't care  
21 what kind of good faith it was, you didn't have any right  
22 to arrest her at that point in time. My question is:  
23 Having said that, she was ultimately charged with  
24 intentionally or knowingly to prevent or obstruct this  
25 officer from effecting an arrest and search of her. So the

1 legal question is, did she prevent an illegal arrest? I  
2 need to know that.

3 MR. HOBBS: Your Honor, I believe we have  
4 testimony on that. I have case law. I have statute  
5 argument, if you would like to hear that.

6 THE COURT: Well, then let's get on with it  
7 because I am not here to decide whether he violated any  
8 policies or any of that other stuff. I need to know if the  
9 arrest is good. So if you've got something, let's get on  
10 with it.

11 Q. (By Mr. Hobbs) In retrospect, at that time, was  
12 she lawfully arrested when you grabbed her arm to put her  
13 under arrest for failure to identify?

14 A. As I read it now, no.

15 MR. HOBBS: Your Honor, I believe we have  
16 all of the information we need. Pass the witness.

17 MR. MORALES: No further questions, Judge.

18 THE COURT: Thank you, Officer. You may  
19 step down. You may go on about your business.