In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00324-CR
NO. 09-15-00325-CR
NO. 09-15-00326-CR
NO. 09-15-00327-CR

JOSE LUIS ALEJO-ZAVALIJA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 15-05-04837-CR (Counts 1 through 4)

MEMORANDUM OPINION

Jose Luis Alejo-Zavalija entered a guilty plea and a plea of true to the use of a deadly weapon on one count of evading arrest or detention with a motor vehicle, two counts of endangering a child, and one count of driving while intoxicated with a child passenger younger than fifteen years of age. The trial court convicted Alejo

and imposed four concurrent ten-year sentences. In two issues[1], Alejo argues that the trial court erred by allowing the State to question him about the deterrent effect of his potential punishment and by allowing the State to argue from opinion in closing argument. We overrule the issues and affirm the trial court's judgments.

Alejo drove on Interstate 45 in the wrong direction for the lane of traffic, then attempted to evade detention by driving the wrong way down the inside shoulder of the highway, at times in excess of 100 miles per hour. Two young children were in the car with him, improperly restrained, and toxicology tests established that Alejo had methamphetamine in his system.

Alejo testified that he became intoxicated involuntarily after he smoked a cigarette with some acquaintances he could not name. During cross-examination in the punishment phase of his trial, Alejo stated that he entered a guilty plea to driving while intoxicated because he was taking responsibility for using methamphetamine even though he did not knowingly ingest it. The following exchange occurred between Alejo and the prosecutor:

> Q. [By the State] Mr. Alejo, what kind of message do you think it sends to the community for somebody who is high on meth, with a 2-year-old and 3-year-old in their car, going on a chase that covers over ten miles of this community, going the wrong way on a highway at over 100 miles an hour, what kind of message do you think the minimum punishment sends?

[1] The trial court granted permission to appeal punishment issues.

A. [By Appellant] I have no idea for punishment.

Q. What kind of deterrent effect do you think that has on other people who think, you know, maybe I'll get high and get behind the wheel?

[By Defense Counsel]: Your Honor, I object to that question.

THE COURT: It's overruled.

[By Defense Counsel]: It's speculation.

THE COURT: It's overruled.

A. [By Appellant] I don't think it's good at all.

In redirect examination, defense counsel asked Alejo, "Do you think -- do you think that if the Judge sentences you to two years, do you think that the message that the Court will give to the community is that you can be punished, but you have the opportunity to rehabilitate?" Alejo responded, "I think we all have the opportunity to be rehabilitate[d]."

A lay witness may testify in the form of an opinion, provided that the opinion is rationally based on his perception and helpful in clearly understanding the witness's testimony or in determining a fact issue. Tex. R. Evid. 701. Alejo argues it was clear from his answer to the previous question that he lacked personal knowledge of the deterrent effect his punishment would have on others. The State argues the question called for a lay opinion drawn from Alejo's own experiences,

and that Alejo's response was helpful to a clear understanding of his request for the minimum punishment.

The trial court possesses a great deal of discretion in deeming what evidence is relevant to sentencing. *Ellison v. State*, 201 S.W.3d 714, 721 (Tex. Crim. App. 2006). Additionally, the trial court may exercise its discretion in determining whether an opinion meets the fundamental requirements of Rule 701. *Fairow v. State*, 943 S.W.2d 895, 901 (Tex. Crim. App. 1997). Alejo was not better positioned than the trial court to draw conclusions concerning the deterrent effect of a minimum sentence, but the trial court could have decided that a question probing Alejo's awareness of how his actions would be perceived by others would be helpful in determining an appropriate punishment. We overrule issue one.

In his second issue, Alejo complains that the trial court allowed the prosecutor to argue from opinion when he stated, "the fact that him having his two children in the car, wasn't sufficient deterrent to him to not partake in the activities he decided to do, and I don't buy for a second that he smoke[d] some random cigarette from some unknown guy because clearly there was no PCP[.]" Defense counsel objected, "He can['t] say what the prosecutor is thinking. He can talk -- he has to talk about the facts." The trial court overruled the objection, which arose during the punishment phase of Alejo's trial.

The four permissible areas of argument include: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to an argument of opposing counsel, and (4) plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). "[I]t is well settled that the prosecutor may argue his opinions concerning issues in the case so long as the opinions are based on the evidence in the record and not as constituting unsworn testimony." *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985). In this case, the prosecutor appears to have been arguing that Alejo's suggestion that a cigarette that an acquaintance shared with him had been laced with drugs was inconsistent with the toxicology report that failed to detect phencyclidine in Alejo's system. As such, the trial court could conclude that the argument was a reasonable deduction from the evidence. Furthermore, the argument was neither manifestly improper nor did it interject facts that were not in evidence. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). We overrule issue two and affirm the trial court's judgments.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on May 3, 2017
Opinion Delivered May 31, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.