MODIFY and AFFIRM; and Opinion Filed November 29, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00139-CR

No. 05-18-00141-CR

DENNIS EARL SIMS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court of Appeals No. 2
Dallas County, Texas
Trial Court Cause Nos. MA16-14174-M, MA16-14175-M

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Schenck

Appellant Dennis Earl Sims appeals his convictions for resisting arrest, search, or transportation and for having given a false name to a police officer when asked to identify himself. In his first issue, appellant argues his convictions should be reversed because the trial court judge was biased and acted as an advocate against him. In his second issue, appellant urges the trial court erred in assessing costs against him in both cases. We affirm the judgments as modified herein. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Police officers responded to a 9-1-1 call reporting a verbal disturbance at an apartment. Officer Meinzer was the first officer to arrive at the scene. He heard yelling and screaming coming

from inside an apartment occupied by appellant and his family, and decided he needed to investigate to determine whether family violence was involved. Officer Meinzer knocked on the door, and appellant responded by opening the door a crack. Although appellant attempted to block Officer Meinzer's view into the apartment, the officer was able to see that there were two children sitting on a sofa and observe that the apartment was in disarray. Officer Meinzer requested that appellant step outside and speak with Officer Mayberry, who had since arrived on the scene, so that he could speak to the other individuals inside the apartment to assess what was going on. Appellant refused to do so. Officer Meinzer placed his foot inside the door in an attempt to keep appellant from closing the door. The officers asked for his name, and appellant told them his name was "Joe." When asked if he had a last name, appellant answered "Blow." Appellant then tried to close the door on Officer Meinzer's foot and a scuffle ensued as the officers attempted to handcuff appellant.

The State charged appellant by complaint and information with two misdemeanor offenses arising from this encounter. The first offense was failure to identify, a Class B misdemeanor punishable by a fine not to exceed $2,000 and up to 180 days of confinement in jail. TEX. PENAL CODE ANN. §§ 12.21, 38.02(b), (c)(2). The second offense was resisting arrest, search, or transportation, a Class A misdemeanor punishable by a fine not to exceed $4,000 and up to one year of confinement in jail. *Id.* §§ 12.22, 38.03(a), (c). Although the trial court appointed counsel to represent appellant, appellant insisted that no one could represent him, and he chose to represent himself. The trial court honored his choice, and appointed counsel became standby counsel. Appellant pleaded "innocent" to both offenses, which the court entered as not guilty pleas, and the cases were tried together in a single jury trial. The jury found appellant guilty of both offenses. Appellant elected to have the court assess punishment. In the failure-to-identify case, the trial court assessed punishment at 150 days in jail, and, in the resisting-arrest case, the trial court

assessed punishment at 300 days in jail. The trial court granted appellant's request for 12 months of probation, suspending the confinement terms in both cases.

DISCUSSION

I. Judicial Bias

In his first issue, appellant urges the trial court committed reversible error of both a fundamental and structural nature because the trial court judge was biased against him and conducted himself as an adversarial advocate against appellant.

We begin by noting that appellant does not direct us to any portion of the record that would indicate that he made a request, objection, or motion based on the trial court's alleged bias. *See* TEX. R. APP. P. 33.1(a) (requiring a timely request, objection, or motion to preserve a complaint for appellate review). He specifically did not file a motion to recuse the trial court judge or seek a new trial on the basis of bias. Absent an objection, a defendant waives error unless it is fundamental—that is, the error creates egregious harm. *See Mendez v. State*, 138 S.W.3d 334, 338 (Tex. Crim. App. 2004). In this case, we need not determine whether the alleged error was fundamental because, after reviewing the record, we find no signs of relevant bias or partiality. *See Brumit v. State*, 206 S.W.3d 639, 644–45 (Tex. Crim. App. 2006) (declining to decide whether an objection is required to preserve an error of this nature and instead resolving the issue on the basis that the record did not reflect partiality of the trial court).

Due process requires a neutral and detached judge. *Id.* at 645. A judge should not act as an advocate or adversary for any party. *Id.* To reverse a judgment on the ground of improper conduct or comments of the judge, we must find (1) that judicial impropriety was in fact committed, and (2) probable prejudice to the complaining party. *Id.* The scope of our review is the entire record. *Id.* Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties, or their cases, ordinarily do not support a bias or partiality

challenge. *Id.* Judges are not potted plants. Judicial remarks may suggest improper bias if they reveal an opinion deriving from an extrajudicial source, but when no extrajudicial source is alleged, such remarks will constitute grounds for reversal only if they reveal such a high degree of favoritism or antagonism as to make a fair judgment impossible. *Id.* To constitute bias clearly on the record, the deep-seated antagonism must be apparent from the judicial remarks themselves, without "interpretation or expansion" by an appellate court. *Gaal v. State*, 332 S.W.3d 448, 457 (Tex. Crim. App. 2011).

In this case, appellant does not allege that the trial court judge's remarks revealed an opinion derived from an extrajudicial source; therefore, he must show that the trial court displayed a deep-seated favoritism or antagonism that would make fair judgment impossible. *See Brumit*, 206 S.W.3d at 645. He alleges three instances in the record show the trial court's bias and determination to assist the State in prosecuting him. These instances are: (1) the trial court's alleged denial of his request to review and inspect the State's recorded evidence and ruling that the recorded evidence would be played for the jury; (2) the trial court's reaction when appellant attempted to make his jurisdictional argument; and (3) the trial court's reaction when appellant objected that the witness's answer to a question he posed was speculation. None of these instances show bias in and of themselves, and the record considered as a whole reveals that the trial court was neither biased against appellant nor an "adversarial advocate" for the State.

We note that appellant does not challenge the merits of the trial court's rulings on either his jurisdictional challenge or his speculation objection that allegedly revealed a bias. We further note that appellant's complained-of statements with respect to his jurisdictional challenge and discovery requests were made by the trial court outside the presence of the jury and that the jury determined his guilt, not the trial court.

A. Complained-of Statements Made Concerning Viewing Recordings

Appellant contends that prior to voir dire he specifically asked to be shown the State's recorded evidence and that the trial court dismissed his request by stating that the State would play the recorded evidence for the jury, thereby denying him the right to discovery to facilitate the preparation of his defense. Appellant urges that such alleged conduct clearly favored the State, helped the State in the presentation of its case, and was not the action of any unbiased judicial officer. But the record shows otherwise. Specifically, it shows that on the day trial was set to begin, while discussing the State's motion in limine, appellant asked, "[a]nd we will be able to view the evidence and everything?" To which the trial court responded, "[w]ell, they have already given you a lot of the evidence." Appellant then clarified, "[n]o. I mean the videos, the videos, the actual videos from the police officer." The trial court then stated, "I am sure they're going to play them for the jury." Appellant responded, "[o]kay. Correct." This exchange did not apprise the trial court that appellant had not had an opportunity to view the recordings, and the record is devoid of any evidence establishing he did not have an opportunity to view them. Appellant did not affirmatively request to view the recordings before they were shown to the jury during this exchange. The trial court could have easily interpreted appellant's question as a request for confirmation that the videos would be shown at trial. Moreover, appellant made no objection to the State showing the recordings to the jury and did not object to their admittance into evidence. Accordingly, nothing in this exchange reflects the sort of deep-seated antagonism that would make fair judgment impossible throughout trial.

B. Complained-of Statements Concerning Appellant's Jurisdictional Challenge

Appellant next urges that the trial judge improperly exhibited bias in his (1) response to appellant's inquiry about the timing of a jurisdictional challenge; (2) ruling on appellant's jurisdictional challenge without asking the State for a response; and (3) warning that he would

hold appellant in contempt. The actual exchange between appellant and the trial court concerning jurisdiction was as follows:

> [APPELLANT]: And if I'm not mistaken, jurisdiction can be challenged at any time. Am I correct?
>
> THE COURT: No.
>
> [APPELLANT]: Okay.
>
> THE COURT: But you can challenge it. Let's deal with it. So, where is the Motion?

Appellant had not filed a motion challenging the trial court's jurisdiction. Nevertheless, the trial court allowed appellant to present argument in support of his jurisdictional challenge. Appellant reiterated an earlier assertion that the court needed to produce the "Delegation of Authority" to establish jurisdiction over the cases. The trial court produced the information in each case, and explained that an information confers jurisdiction. The trial court denied appellant's jurisdictional challenge.

Despite the trial court's ruling, appellant continued to argue that the trial court needed a letter of authority to have jurisdiction. The trial court explained to appellant how rulings work.

> Now, here is the thing. When you disagree with a ruling of the Court, okay, your option at that point is to be obstinate and end up in jail or you can go forward with the hearing with the denial and then appeal it to whoever you want to, the Court of Appeals, the United States Court of Appeals, the Supreme Court, your court, what have you. Those are what your rights are. Okay? But at this point the jurisdiction of these cases have attached to you, whether you agree with it or not. And you're down to two choices at this point. And that is to go forward with this case with a trial. Okay? Or you can plead to the charge and accept the plea bargain as punishment.

After a discussion about whether appellant was entitled to the trial court's "bond number," appellant again argued that the trial court did not have jurisdiction without a letter of authority. The trial court reminded appellant that it had already ruled on that issue.

> THE COURT: Dennis, Dennis, we are going in circles now. We have already gone over the letter of authority. Okay?

[APPELLANT]: And you are denying that?

THE COURT: Right. So, unless you have something new to present—

Appellant interrupted because he was "puzzled with the law." The trial court again explained how rulings and appeals work. Nevertheless, appellant tried to raise his letter-of-authority complaint again. When the trial court refused to re-open argument on the issue, the following exchange occurred.

> [APPELLANT]: Even though I am being violated of due process and being violated, I have no choice but to proceed, right?
>
> THE COURT: No. I told you what your choices were.
>
> [APPELLANT]: Can you tell me that again?
>
> THE COURT: You can proceed, or you can not proceed and you will probably end up in jail over it.

Appellant thought the trial court was threatening him with contempt, so the trial court clarified: "No. I am not going to hold you in contempt. You have to be present for your court date. If you don't show up for your court date, then you are in violation of your bond[.]" Consequently, the record demonstrates the trial court did not threaten to hold appellant in contempt for challenging jurisdiction and did not deny him the right to do so. Additionally, appellant's argument the trial court acted as an adversarial advocate by failing to ask the State to respond to appellant's argument, is without merit and unsupported by the law. We conclude the trial court's handling of appellant's jurisdictional challenge is inconsistent with the sort of deep-seated antagonism that would make fair judgment impossible.

C. Complained-of Ruling on Appellant's Speculation Objection

Appellant contends that, in ruling on his speculation objection to Officer Meinzer's response to a question he asked, the trial court demonstrated a bias against him. The actual exchange and ruling are as follows:

[APPELLANT]: Was possible family violence included in that 911 call?

[OFFICER MEINZER]: They said that there was screaming and yelling coming from an apartment downstairs.

[APPELLANT]: Uh-huh. So, again, was there possible violence family violence in there?

[OFFICER MEINZER]: At the time there could be. But that is when we have to initiate our investigation.

[APPELLANT]: Objection, Your Honor.

THE COURT: What is the objection?

[APPELLANT]: Speculating. He said possible.

THE COURT: Well, you asked a speculative question. Overruled.

[APPELLANT]: Well, I asked him a fact.

THE COURT: Okay. Ask your next question.

In the context in which the trial court commented on the speculative nature of appellant's question, it is apparent that the trial court was simply trying to educate appellant as to why his objection would be overruled. It was a comment on the question itself, not on the weight of the evidence, or the merits of the case, or the credibility of the witness. *See Price v. State*, 347 S.W.2d 616, 616–17 (Tex. Crim. App. 1961) (reversing when the trial court judge not only commented on the weight of the evidence, but also had vouched for the credibility of a witness and bolstered his testimony); *Bachus v. State*, 803 S.W.2d 402, 405 (Tex. App.—Dallas 1991, pet. ref'd) (reversing where appellant timely objected to the judicial comment "I now find that there is evidence of a conspiracy" in a jury trial for conspiracy). Moreover, had the comment been improper, each charge submitted to the jury instructed it to disregard any trial court opinions or commentary.[1] Absent

[1] You are instructed that you are not to allow yourselves to be influenced in any degree whatsoever by what you may think or surmise the opinion of the Court to be. This Court has no right by any word or act to indicate any opinion respecting any matter of fact involved in the case, nor indicate any desire respecting its outcome.

The Court has not intended to express any opinion upon any matter of fact in this case, and if you have observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it.

evidence to the contrary, we assume that the jury followed the instruction given. *Luquis v. State*, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002).

We conclude that none of the trial court's rulings or remarks of which appellant now complains revealed any judicial impropriety, let alone such a high degree of favoritism or antagonism as to make fair judgment impossible.

Moreover, the record as a whole demonstrates that the trial court tried to ensure that appellant understood the process throughout trial. The trial court allowed appellant to address the panel during jury selection, explained preemptory strikes, and informed appellant that he could give an opening statement after the State's opening statement, before he began his case-in-chief. In three instances, the trial court helped appellant clarify his questions so as to elicit a productive answer. On objections, the trial court generally ruled without commentary and sustained several of appellant's evidentiary objections. Occasionally, it became necessary to explain a principle of trial procedure to appellant. When appellant moved for a directed verdict, the trial court urged him to articulate which elements he thought had not been met for the record. The trial court included appellant's requested instruction on use-of-force in the resisting arrest jury charge and his requested limiting instruction on extraneous offense evidence in the failure to identify jury charge. The record as a whole reveals no impropriety or deep-seated antagonism that would make fair judgment impossible.

We overrule appellant's first issue.

II. Court Costs

In his second issue, appellant asks this Court to delete court costs from the judgment in his failure to identify case. In a single criminal action, such as the one involved here, in which a defendant is convicted of two or more offenses, the court may assess each court cost or fee only once against the defendant. TEX. CODE CRIM. PROC. ANN. art. 102.073(a). The two charges

against appellant—resisting arrest and failure to identify—were tried in a single proceeding, and thus fall within a single criminal action. *See Callaway v. State*, Nos. 05-95-01824-CR, 05-95-01825-CR, 1997 WL 472333, at *2 (Tex. App.—Dallas Aug. 20, 1997, no pet.) (mem. op., not designated for publication). Therefore, court costs should only be assessed for one of the offenses and the imposition of costs in both cases is duplicative. CRIM. PROC. art. 102.073(a). The bill of costs in appellant's resisting arrest case reflects costs totaling $422, including a fine of $100. The bill of costs in appellant's failure to identify case reflects costs totaling $472, including a court appointed attorney fee of $150. Appellant should have been assessed the costs in the resisting arrest case only, because it is the higher category of offense. *Id.* at 102.073(b). We conclude that the duplicative court cost was imposed in violation of article 102.073, and accordingly sustain appellant's second issue.

The State concedes that appellant should not be assessed costs in the failure to identify case and requests that we modify the resisting arrest judgment to reflect a total amount due of $572. This includes the court appointed attorney fee of $150, which was referenced in the bill of costs for the failure to identify case and not the resisting arrest case. Because the resisting arrest case is the higher category offense, this cost should have been assessed in that case, not the failure to identify case.

When a judgment improperly includes amounts assessed as court costs, this Court may modify the judgment to delete the improper fees. TEX. R. APP. P. 43.2(b); *see also, Robinson v. State*, 514 S.W.3d 816, 828 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (citing *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013)).

CONCLUSION

We modify the trial court's failure to identify judgment to delete the imposition of court costs. We modify the trial court's resisting arrest judgment to include the court appointed

attorney's fee of $150, bringing the total cost assessed in that case to $572. As modified, we affirm the trial court's resisting arrest and failure to identify judgments.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DENNIS EARL SIMS, Appellant	On Appeal from the County Criminal Court of Appeals No. 2, Dallas County, Texas
No. 05-18-00139-CR V.	Trial Court Cause No. MA16-14174-M.
	Opinion delivered by Justice Schenck.
THE STATE OF TEXAS, Appellee	Justices Lang and Fillmore participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> Include the court appointed attorney's fee of $150, bringing the total costs assessed to $572.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of November, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DENNIS EARL SIMS, Appellant	On Appeal from the County Criminal Court of Appeals No. 2, Dallas County, Texas
No. 05-18-00141-CR V.	Trial Court Cause No. MA16-14175-M.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Schenck. Justices Lang and Fillmore participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

Delete the imposition of court costs.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of November, 2018.