Opinion issued December 8, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00506-CR

LUKE MATTHEW TEAL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1144223

MEMORANDUM OPINION

Appellant, Luke Matthew Teal, was charged by indictment with robbery.[1] Appellant pleaded not guilty. The jury found appellant guilty, found two

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[1] *See* TEX. PENAL CODE ANN. § 29.02(a) (Vernon 2011), § 31.03(a) (Vernon Supp. 2011).

enhancement paragraphs to be "true," and assessed punishment at 60 years' confinement. In two issues, appellant argues the trial court erred by (1) not conducting a competency hearing during the trial and (2) denying his request to instruct the jury on the lesser-included offense of theft. The State contends that the judgment of the trial court erroneously indicates that appellant pleaded true to two enhancement paragraphs and requests that we modify the judgment to reflect that appellant pleaded not true.

We modify the judgment of the trial court and affirm as modified.

Background

Jennifer Engdale, complainant, was waiting for her food at a Jack-in-the-Box drive-through window on the night of December 3, 2007. She saw appellant wandering around the premises, his hand wrapped in a bloody towel, yelling for soda water. After she received her food, appellant approached, put his hand through her window holding a couple of dollars, and asked her to buy a soda for him. Engdale asked him to remove his hand from her vehicle. Appellant then unlocked the door to her car, opened the door, and lunged inside, reaching for the ignition key. Engdale and appellant began to fight for possession of the key. During the struggle, appellant told Engdale, "Get out of the car, ma'am. I don't want to have to shoot you." Engdale fled into the Jack in the Box, and appellant left in the car.

Luis Castro was inside the Jack in the Box when the incident occurred. He saw appellant approach Engdale's car and the struggle that followed.

Police were notified of the incident, and appellant was located a short time later in Engdale's car. Appellant tried to elude the police but was ultimately captured and arrested.

After his arrest, appellant was diagnosed with bipolar disorder type one, which is characterized by psychotic features including hearing voices. The voices appellant hears tell him to hurt himself, which he has done on multiple occasions.

A psychiatric evaluation was performed on appellant. The report determined appellant to be incompetent to stand trial in May 2008. Appellant began to receive treatment to return him to a competent state. On November 25, 2009, he was declared competent to stand trial.

Trial was set for June 7, 2010. Voir dire occurred on that day. Prior to the commencement of voir dire, appellant told the trial court three times that he was God. Early the next morning, appellant cut himself twice and reported hearing voices. Appellant's counsel then suggested to the trial court that appellant was not competent to stand trial. The trial court conducted an informal inquiry and determined that there was insufficient evidence to necessitate a full competency hearing.

The jury subsequently found appellant guilty and assessed punishment at 60 years' confinement.

Competency to Stand Trial

In his first issue, appellant argues the trial court abused its discretion by denying his request for a competency hearing.

A. Standard of Review

We review the trial court's determination on whether to empanel a jury for the purpose of conducting a competency hearing under an abuse of discretion standard. *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999). A trial court abuses its discretion if the decision is arbitrary or unreasonable. *Montoya v. State*, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009).

B. Analysis

"A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (Vernon 2006). "A person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person." *Id.* art. 46B.003(a).

Determination of competency is a three-stage process. First, there must be a suggestion of incompetence. *Id.* art. 46B.004(a) (Vernon 2011). This can be raised by the defendant, the State, or the trial court. *Id.* art. 46B.004(a), (b). Second, upon suggestion of incompetence, the trial court must conduct an informal inquiry to determine "whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial." *Id.* art. 46B.004(c). Third, if it determines there is some evidence of incompetence, the trial court must order an examination for competency and empanel a jury to conduct a competency hearing. *Id.* art. 46B.005(a), (b) (Vernon 2006).

In this case, a suggestion of incompetence was raised by defendant on the second day of trial, triggering the trial court's obligation to conduct an informal inquiry. *See id.* art. 46B.004(c). Appellant takes the position that the trial court refused to conduct an informal inquiry and that is the posture of the case on appeal.[2] We disagree.

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[2] The concurrence claims that we are misinterpreting appellant's arguments. The concurrence, quoting appellant's statement of his first issue, argues that appellant concedes an informal inquiry occurred and argues, instead, that the trial court reached the wrong conclusion at the end of the inquiry. We quote the following portions of appellant's brief as support for our interpretation that he denied that an informal inquiry took place:

- "No inquiry was done by the trial court"
- "The trial court made no inquiry over the most recent events detailed above . . . ."

In *Casey*, the Court of Criminal Appeals held that it was error for a trial court to refuse to conduct a competency inquiry when the suggestion of competency had been raised by the defendant's counsel. *Casey v. State*, 924 S.W.2d 946, 949 (Tex. Crim. App. 1996). In that case, the defendant's counsel raised the issue of competence at the end of a hearing on the State's motion to revoke probation. *Id.* at 947. Regardless, the trial court expressly refused to consider the defendant's competence to stand trial and refused to rule on the suggestion. *Id.*

Here, appellant's counsel brought the suggestion of competency to the trial court's attention. The trial court indicated it was aware of the bases for the suggestion of incompetence, explained its reasons for determining that a full competency hearing was not required, and gave appellant's counsel an opportunity to state the factors he considered relevant in determining whether appellant was competent to stand trial. As its name suggests, an "informal inquiry" does not have specific formal requirements. The record shows that the grounds for asserting incompetence to stand trial were presented to and considered by the trial court. We hold the trial court conducted an informal inquiry and determined that a full

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- "The trial court's patent refusal to conduct an inquiry into the competency of Mr. Teal on the day trial began violated due process and Texas law . . . ."
- "The trial court erred in not conducting an informal inquiry into Mr. Teal's competence."

competency hearing was not required. It is this determination by the trial court that we review.

Because appellant had previously been declared incompetent to stand trial—and subsequently declared competent—the issue before the trial court was whether there was new evidence of a change in the defendant's mental condition since the last determination of competency.[3] *See Learning v. State*, 227 S.W.3d 245, 250 (Tex. App.—San Antonio 2007, no pet.); *Clark v. State*, 47 S.W.3d 211, 218 (Tex. App.—Beaumont 2001, no pet.). In determining whether a competency hearing is required, "the trial court is to consider only the evidence tending to show incompetency, and not evidence showing competency." *Moore*, 999 S.W.2d at 393. The trial court must "find whether there is some evidence, a quantity more than none or a scintilla, that rationally could lead to a determination of incompetency." *Id.*; *see also* TEX. CODE CRIM. PROC. ANN. art. 46B.004(c) (requiring trial court to determine whether there is "some evidence from any source" supporting a finding of incompetency). "A competency hearing is not

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[3] The concurrence expresses a concern that our holding implies that a defendant who has previously been declared incompetent and then subsequently competent cannot establish incompetence by the same grounds for which he was found incompetent the first time. Our holding has no such implication. A relapse could constitute a change in the defendant's mental condition since his last determination of competency. The relevant inquiry becomes, as it is in this case, whether the evidence of relapse establishes proof of an inability to consult with the person's lawyer with a reasonable degree of rational understanding or the lack of a rational, as well as factual, understanding of the proceedings against the person. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (Vernon 2006).

required unless the evidence is sufficient to create a *bona fide* doubt in the mind of the judge whether the defendant meets the test of legal competence." *Moore*, 999 S.W.2d at 393.[4]

The new evidence that appellant relies on to show a change since his previous determination of competence to stand trial is (1) asserting three times prior to the commencement of voir dire that he was God; (2) cutting himself twice the next morning before the resumption of trial; (3) claiming to hear voices telling him to kill himself; and (4) his history of recent mental illness.

Taking the last point first, appellant's history of recent mental illness existed when he had been declared incompetent to stand trial. He was subsequently declared competent to stand trial. His history of mental illness was not, then, a new change in his mental condition since his last determination of competency and, accordingly, was not a ground to support a new showing of incompetency. *See Learning*, 227 S.W.3d at 250; *Clark*, 47 S.W.3d at 218. The remaining points, while perhaps reflective of appellant's known mental illness, do not demonstrate

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[4] Effective September 1, 2011, a new subsection was added to article 46B.004 of the Texas Code of Criminal Procedure. *See* Act of May 19, 2011, 82nd Leg., R.S., ch. 822, § 2, 2011 Tex. Sess. Law Serv. 1893, 1893 (West) (codified at TEX. CODE CRIM. PROC. ANN. art. 46B.004(c–1) (Vernon Supp. 2011)). The new subsection states, in part, that "the court is not required to have a bona fide doubt about the competency of the defendant." *Id.* We do not need to determine the effect, if any, of this language to denials of requests for competency hearings, however, because this subsection was not in effect at the time of the hearing and neither party has suggested its application.

appellant lacked the ability to consult with his lawyer or lacked a rational as well as factual understanding of the proceedings against him. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003(a); *see also Grider v. State*, 69 S.W.3d 681, 685 (Tex. App.—Texarkana 2002, no pet.) (holding evidence that defendant was paranoid schizophrenic, taking medication, hearing voices, and seeing visions was not evidence that defendant lacked ability to consult with lawyer or understand the proceedings); *Rice v. State*, 991 S.W.2d 953, 957 (Tex. App.—Fort Worth 1999, pet. ref'd) (holding that competency test is not whether someone labored under mental, behavioral, or psychological impairment).

The concurrence quotes additional considerations stated by the trial court, which indicate that appellant was exaggerating his condition to try to avoid going to trial. At a competency inquiry, however, the trial court is tasked with determining "whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial." TEX. CODE CRIM. PROC. ANN. art. 46B.004(c). The Court of Criminal Appeals has made clear that "the trial court is to consider only the evidence tending to show incompetency, and not evidence showing competency." *Moore*, 999 S.W.2d at 393. "[A]ny indicators or alternative explanations in the record that might have led the trial court to conclude appellant was competent are legally irrelevant." *Reed v. State*, 14 S.W.3d 438, 441 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

The concurrence relies on a Court of Criminal Appeals opinion to establish that this other information could be considered by the trial court. *See McDaniel v. State*, 98 S.W.3d 704, 713 (Tex. Crim. App. 2003) (holding appellant courts "cannot ignore the trial court's first-hand factual assessment of appellant's mental competency"). The issue under consideration in *McDaniels* concerns the first stage of determining incompetence: whether there was a suggestion of incompetence. As the court noted, the defendant's attorney had requested a competency evaluation but had not actually raised a suggestion that the defendant was in fact incompetent. *Id.* at 711. Accordingly, the issue was whether the trial court was required to *sua sponte* raise a suggestion of incompetency. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.004(a) (providing that either party, or court on its own motion, may suggest incompetence). The Court of Criminal Appeals held, in that stage, that the trial court is allowed to consider both evidence indicating incompetence and evidence indicating competence. *See McDaniel*, 98 S.W.3d at 712–13 (holding evidence before the trial court indicated competence and highlighting evidence indicating competence).

Appellant, however, was in a different stage of determining incompetence. In the second stage, the only relevant evidence is evidence suggesting incompetence. TEX. CODE CRIM. PROC. ANN. art. 46B.004(c); *Moore*, 999 S.W.2d

at 393; *Reed*, 14 S.W.3d at 441. Accordingly, the concurrence's other considerations are irrelevant to our inquiry.

The concurrence also argues that the Court of Criminal Appeals opinion on which we rely—*Moore*—supports the concurrence's position for considering the evidence establishing that appellant was exaggerating his condition. While we agree with the concurrence that the bases for incompetence cannot be considered in a vacuum, we disagree that there are no constraints on what can be considered. Again, the Court of Criminal Appeals has made clear that "the trial court is to consider only the evidence tending to show incompetency, and not evidence showing competency." *Moore*, 999 S.W.2d at 393.

The concurrence argues the Court of Criminal Appeal's consideration of the appellant's mental health history in *Moore* means we can consider appellant's clinical records in this case. We disagree. In *Moore*, the defendant raised three grounds that he claimed established his incompetence: (1) certain comments and outbursts; (2) his mental health history; and (3) his decision to represent himself during portions of the trial. *Id.* The Court of Criminal Appeal considered each of these in turn and determined that none of them were sufficient to support a finding of incompetence. *Id.* at 393–97. The concurrence, in contrast, considers evidence not asserted by appellant to establish incompetence and uses that evidence to

counteract appellant's bases for incompetence. Moore provides no authority for this analysis; instead, it prohibits it. *Id.* at 393.

We hold that the trial court did not abuse its discretion in denying appellant's request for a full competency hearing. We overrule appellant's first issue.

Lesser-Included Offense

In his second issue, appellant argues the trial court erred by denying his request to instruct the jury on the lesser-included offense of theft.

A. Standard of Review & Applicable Law

A defendant is entitled to an instruction on an offense if (1) the offense is a lesser-included offense of the charged offense and (2) there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *Guzman v. State*, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006).

The analysis of the first requirement is a question of law. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). Under prong one, to be considered a lesser-included offense, the offense must be included within the proof necessary to establish the offense charged. *Campbell v. State*, 149 S.W.3d 149, 152 (Tex. Crim. App. 2004).

If the first prong is satisfied, we then determine, in prong two, if there is some evidence in the record from which a jury could rationally find that, if the defendant is guilty, he is guilty only of the lesser offense. *See id.* If both of the prongs are met, the defendant is entitled to a charge on the lesser-included offense. *Guzman*, 188 S.W.3d at 189.

B. Analysis

Appellant was charged with robbery. *See* TEX. PENAL CODE ANN. § 29.02(a) (Vernon 2011), § 31.03(a) (Vernon Supp. 2011). He argues the trial court should have instructed the jury on the lesser-included offense of theft. *See id.* § 31.03(a). The State concedes that theft is a lesser-included offense of robbery. *See Earls v. State*, 707 S.W.2d 82, 84–85 (Tex. Crim. App. 1986) (holding theft is lesser-included offense of robbery). We next consider, then, whether the jury could have rationally found that, if appellant were guilty, he was guilty only of the lesser offense of theft. *See Campbell*, 149 S.W.3d at 152.

Theft is defined as unlawfully appropriating property with intent to deprive the owner of property. TEX. PENAL CODE ANN. § 31.03(a). A person commits the offense of robbery if:

> in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Id. § 29.02(a).

Appellant presents three arguments for why the jury could have found him guilty of only theft. First, he argues that Engdale, the complainant, did not testify that she was placed in fear by appellant's threat until the State's allegedly leading questions elicited the desired response. Second, he argues that Castro's testimony that he did not hear any threats was sufficient to allow the jury to determine no threats were made. Third, he argues that, because no weapon was found on him at his arrest, the court should have instructed the jury on theft.

First, Engdale testified that, during their struggle for the car key, Appellant said, "Get out of the car, ma'am. I don't want to have to shoot you." Appellant argues that Engdale's testimony that this statement placed her in fear for her life was only obtained as a result of the State's allegedly leading questions. Assuming without deciding that the State elicited the relevant testimony through leading questions, appellant did not raise this objection before the trial court and, accordingly, any error is waived. *See* TEX. R. APP. P. 33.1(a); *see also Myers v. State*, 781 S.W.2d 730, 733 (Tex. App.—Fort Worth 1989, pet. ref'd) (holding failure to object to leading question waives error).

Second, appellant asserts that Castro, who observed the incident, did not hear appellant make any threats. Castro did not testify that appellant did not make

any threats, however. He testified that he was inside, that the incident occurred outside, and that, as a result, he could not hear anything. This does not affirmatively show that appellant did not make the threat. *See Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994) (holding evidence must affirmatively show only lesser-included offense committed).

Finally, appellant argues that, because no weapon was found on him when he was arrested shortly after the incident, the court should have instructed the jury on theft. Appellant relies on *Bignall* as authority for this argument. *See id.*

In *Bignall*, the defendant was charged with aggravated robbery. *Id.* at 22. Aggravated robbery, as it applies to that case, requires the use or exhibition of a weapon. *Id.* at 23; *see also* TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 2011). No verbal threats were made in *Bignall*. *See Bignall*, 887 S.W.2d at 22–23. The Court of Criminal Appeals concluded that, due to the complainant's uncertainty on many key facts and the lack of any weapon when the perpetrators were arrested a short time later, there was sufficient evidence to suggest that appellant had only committed theft. *Id.* at 24.

Bignall is not applicable to appellant's circumstances. No one alleged that appellant ever had a weapon. The basis for his charge of robbery—not aggravated robbery—is a verbal threat putting Engdale in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a). The State was not required to prove

that appellant in fact had a weapon. Accordingly, the fact that no weapon was ever found on him has no bearing on whether appellant could only be found guilty of the lesser-included offense of theft.

We overrule appellant's second issue.

Modification of Judgment of Trial Court

The State contends that the judgment of the trial court erroneously indicates that appellant pleaded true to two enhancement paragraphs and requests that we modify the judgment to reflect that appellant pleaded not true.

An appellate court has the authority to reform an error in the judgment when the matter has been called to its attention by any source. *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (holding that appellate court could reform judgment to reflect jury's affirmative deadly weapon finding and adopting reasoning in *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd) ("The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court.")); *see also Rhoten v. State*, 299 S.W.3d 349, 356 (Tex. App.—Texarkana 2009, no pet.) (reforming judgment to correctly reflect appellant's plea). "The Texas Rules of Appellate Procedure also provide direct authority for this Court to modify the trial court's

judgment." *Rhoten*, 299 S.W.3d at 356 (citing TEX. R. APP. P. 43.2(b) (providing that court of appeals may modify trial court's judgment and affirm as modified)).

The record reflects that, at the punishment phase of the trial, appellant pleaded not true to the two enhancement paragraphs. The judgment asserts, instead, that appellant pleaded true. We therefore conclude that the judgment should be modified to reflect that appellant pleaded "not true" to the enhancement paragraphs.

Conclusion

We modify the judgment of the trial court to reflect that appellant pleaded "not true" to the allegations in the two enhancement paragraphs. We affirm the judgment of the trial court as modified.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).