Opinion issued October 2, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00097-CR

NICHOLAS ARTHUR DOZET, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Case No. 81296-CR

MEMORANDUM OPINION

The jury found appellant, Nicholas Arthur Dozet, not guilty of the offense of burglary of a building,[1] but found him guilty of the lesser-included offense of

[1] TEX. PENAL CODE ANN. § 30.02(a)(1) (West Supp. 2017).

criminal trespass.[2] The trial court assessed punishment at six months' confinement. In his sole issue, appellant contends that the trial court abused its discretion by allowing a police officer to testify about a statement made by appellant when he was arrested. Appellant asserts that he was in custody when the officer elicited the statement and that he had not been advised of his rights pursuant to *Miranda v. Arizona*.[3]

We affirm.

BACKGROUND

Appellant, a homeless man, was living in a concession stand located at the athletic fields for the Angleton Independent School District ("Angleton ISD"). During a high school soccer match on February 14, 2017, Lynda Thomas, a concession stand volunteer, discovered appellant in the baseball field concession stand. Startled, appellant fled. Patrol officers arrived at the fields and Thomas described appellant's appearance to them. The officers searched for appellant but were unable to find him.

On March 2, 2017, while watering the baseball field, Brian Lostracco, an Angleton ISD baseball coach, saw a man in the left field bleachers. The man fled, and Lostracco lost sight of him. Having heard of the incident on February 14th,

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2 *Id*. § 30.05 (West Supp. 2017)

3 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Lostracco called the police. Once Officer Falks and Angleton ISD Police Chief Gayle arrived, Lostracco unlocked the baseball field concession stand.

When the police entered the concession stand, appellant fled through the back entrance. Lostracco and Gayle pursued appellant through the building, while Falks ran around the building to intercept appellant. Cornered, appellant stopped running.

Without touching appellant, Falks asked him why he was in the concession stand. Appellant responded that he was sleeping there and that he had nowhere to go. Falks arrested appellant and brought him to the police station for an interview.

At trial, the State attempted to introduce appellant's statement through Falk's testimony, and appellant's counsel objected. Counsel argued that, at the time Falks spoke to appellant, appellant was in custody and had not been *Mirandized*. Therefore, counsel argued, appellant's statement was inadmissible. Counsel for the State responded that Falks was investigating, not arresting, appellant. Accordingly, counsel argued, the *Miranda* protections did not yet apply to appellant. The trial court overruled appellant's objection.

Upon completion of the trial, the jury found appellant not guilty of the offense of burglary of a building, but guilty of the lesser included offense of criminal trespass. Appellant elected to have the court decide punishment, and the trial court sentenced appellant to six months' confinement.

CUSTODIAL INTERROGATION

In his sole issue, appellant contends that the trial court erred in admitting his statements to Officer Falks because he was under arrest and had not been *Mirandized*. Appellant argues that, at the time that Officer Falks spoke to him, he was in custody. Because appellant was in custody and because no one had yet read him his *Miranda* rights, appellant argues, his statement that he was sleeping in the concession stand was inadmissible. The State responds that appellant was not in custody but had been detained for investigation. Because officers need not read *Miranda* rights to persons detained for investigative purposes, the State asserts, appellant's response to Falks was not subject to *Miranda's* protections.

A. Standard of Review

The standard of review for a trial court's motion to suppress is abuse of discretion. *Ervin v. State*, 333 S.W.3d 187, 202 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). We review determinations of custody under a bifurcated standard of review. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). We give almost total deference to the trial court's assessment of historical fact and conclusions with respect to mixed questions of law and fact that turn on credibility and demeanor. *State v. Saenz*, 411 S.W.3d 488, 494 (Tex. Crim. App. 2013). In contrast, we review *de novo* mixed questions of law and fact that do not fall within this category. *Id.*

When, as here, the trial court does not make findings of fact, we view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its ruling so long as those findings are supported by the record. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). If the trial judge's decision is correct on any theory of law applicable to the case, we will sustain the decision. *Id.* at 856.

In summary, we apply a deferential standard of review to the trial court's factual assessment of the circumstances surrounding the interrogation and a *de novo* review to its ultimate legal determination that appellant was not in custody. *Saenz*, 411 S.W.3d at 493.

B. Applicable Law

1. General

An accused, held in custody, must be given certain warnings before custodial interrogation. *Miranda*, 384 U.S. at 471, 86 S. Ct. at 1626. Failure to comply with *Miranda* results in the forfeiture of the use of any statement obtained during interrogation. TEX. CODE CRIM. PROC. ANN. art. 38.22 §§ 2(a), 3(a) (West 2005); *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

A person is in custody only if, under the circumstances, a reasonable person would believe that his freedom was restrained to the degree associated with a formal

arrest. *Stansbury v. California*, 511 U.S. 318, 322-243, 114 S. Ct. 1526, 1528–30 (1994). Four general situations may constitute custody:

1. The suspect is physically deprived of his freedom of action in any significant way;

2. A law enforcement officer tells the suspect he is not free to leave;

3. Law enforcement officers create a solution that would lead a reasonable person to believe that his freedom of action has been significantly restricted; and

4. There is probable cause to arrest the suspect, and law enforcement officers do not tell the suspect that he is free to leave.

Dowthitt v. State, 931 S.W.2d, 244 255 (Tex. Crim. App. 1996)

2. *Dowthitt's* Situation Four

Appellant's argument is based on the fourth situation described in *Dowthitt*, *i.e.*, that the police officers had probable cause to arrest appellant, but did not tell him that he was free to go. This situation applies only if the officers manifest their knowledge of probable cause to the suspect or if the suspect manifests such knowledge to the officers. *Ervin*, 333 S.W.3d at 205. The manifestation of probable cause does not automatically establish custody. *Dowthitt*, 931 S.W.2d at 255. Rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. *Id.*

An officer manifests probable cause to the suspect, and the suspect manifests probable cause to the officer, when one party, by word or deed, conveys knowledge or belief of probable cause to the other party. *Saenz*, 411 S.W.3d at 497. The reasonable person standard presupposes an innocent person. *Ortiz v. State*, 382 S.W.3d 367, 373 (Tex. Crim. App. 2012).

For example, probable cause is manifested when an officer asks the suspect questions or make statements to the suspect that presuppose the suspect's guilt. *See e.g.*, *Ortiz*, 382 S.W.3d at 473–74 (asking, "How much drugs are in the car?") (asking, "What kind of drugs does she [suspect's wife] have?"); *Randall v. State*, No. 14-06-00468-CR, 2008 WL 5262738, at *4 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (stating, "We've got you [suspect] if we want you" and "[y]ou [suspect] need to do '"damage control"'"); *Ervin*, 333 S.W.3d at 208–11 (holding police officers did not manifest probable cause when asking defendant what transpired at crime she witnessed); *Harrison v. State*, No 14-11-00534-CR, 2012 WL 6061836, at *17–*18 (Tex. App.—Houston [14th] Dist. 2012, no pet.) (holding police officer did not manifest probable cause for possession of firearm when asking defendant why he evaded traffic stop and whether he had anything illegal in car).

Similarly, probable cause is manifested when a suspect reveals information that implies guilt. *See e.g.*, *Ard v. State*, 418 S.W.3d 256, 259, 262 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding that suspect did not manifest probable

cause until confessing to stealing clothes from store); *Harrison*, 2012 WL 6061836 at *4–7 (holding that suspect did not manifest probable cause until confessing to having firearm under car seat).

Additionally, neither police pursuing a suspect, nor a suspect fleeing from an officer, by itself, manifests probable cause. *See Harrison*, 2012 WL 6061836 at *17–18 (holding probable cause for possession of firearm not manifested when appellant evaded traffic stop and when police pursued appellant); *Bell v. State*, 845 S.W.2d 454, 458–60 (Tex. App.—Austin 1994, no pet.) (finding no manifestation of probable cause for possession of drugs when appellant fled police).

3. Investigative Detentions

In contrast to an arrest, a person held for an investigative detention is not in custody. *Dowthitt*, 931 S.W.2d at 255. An investigative detention involves detaining a person reasonably suspected of criminal activity to determine his identity or to momentarily maintain the *status quo* in order to garner more information. *Terry v. Ohio*, 392 U.S. 1, 30–31, 88 S. Ct. 1868, 1884–85 (1968).

A detention differs from an arrest in the amount of force used, the duration of the detention, and the efficiency of the investigation. *State v. Sheppard*, 271 S.W.3d 281, 290–91 (Tex. Crim. App. 2008). Officers may use such force as is reasonably necessary to further the goal of the detention. *Koch v. State*, 484 S.W.3d 482, 489 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *see Salazar v. State*, 893 S.W.2d

138, 139–140, 142 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd, untimely filed) (holding fleeing suspect detained when told to stop for questioning); *Ard*, 418 S.W.3d at 261–62 (holding suspect detained when he was voluntarily taken to police station and questioned for five minutes); *c.f. Hoag v. State*, 728 S.W.2d 375, 379 (Tex. Crim. App. 1987) (holding suspect in custody when removed from car at gunpoint, moved to the rear of car, and read *Miranda* rights); *Dowthitt*, 931 S.W.2d at 256–57 (holding suspect in custody when questioned for many hours and denied access to wife).

In an investigative detention, police officers may not ask questions that "are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 300–01, 100 S Ct. 1682, 1689–90 (1980); *see Ramirez v. State*, 105 S.W.3d 730, 740 (Tex. App.—Austin 2003, no pet.) (holding suspect detained when officer asks suspect "general questions") (holding suspect in custody when officer tells suspect "You [suspect] are being detained. . . . I can see the residue, the drug paraphernalia. . . . Is there anything else I'm going to find in there that's illegal, any more marijuana?").

C. Analysis

Appellant asserts that *Dowthitt*'s fourth situation applies here because Falks had probable cause, and manifested it to appellant, by cornering him after he ran out of the concession stand. We disagree. We need not determine whether Falks had

probable cause to arrest appellant. Even if Falks had probable cause, he did not manifest the probable cause to appellant and appellant did not manifest probable cause to Falks.

Flight does not necessarily manifest probable cause. *See Harrison*, 2012 WL 6061836 at *6. The reasonable person standard presupposes an innocent person. *Ortiz*, 382 S.W.3d at 373. Appellant may have believed that Falks had probable cause to arrest him. Because the reasonable person standard presupposes an innocent person, however, the suspect's subjective belief is irrelevant. While appellant's flight may justify his detention and investigation, it does not manifest probable cause of a specific crime. *See Salazar*, 893 S.W.2d at 139–140, 142. Indeed, appellant did not manifest probable cause until he told Falks that he had been sleeping in the concession stand. *See Ard*, 418 S.W.3d at 262.

Similarly, pursuit does not necessarily manifest probable cause. *See Harrison*, 2012 WL6061836 at *6; *Salazar*, 893 S.W.2d at 41. Officers may use such force as is reasonably necessary to further the goal of the detention. *Koch*, 484 S.W.3d at 489. After appellant fled, it was reasonable for Falks to pursue and corner him to investigate. In pursuing and cornering appellant, Falks did not convey his belief that appellant had committed or was committing a crime. Rather, Falks took only such action as was necessary to continue the investigation.

Finally, once Falks cornered appellant, he did not manifest probable cause by speaking to appellant. Investigative questions do not manifest probable cause. *See Ortiz*, 382 S.W.3d at 373–74. Falks did not ask appellant if he had been trespassing in the concession stand or if he had stolen anything. Rather, Falks asked appellant what he was doing in the concession stand. Falks's question was investigative and did not manifest probable cause.

The manifestation of probable cause is only one factor in the custody analysis. *Dowthitt*, 931 S.W.2d at 255. Ultimately, a person is in custody only if, under the circumstances, a reasonable person would believe that his freedom was restrained to the degree associated with a formal arrest. *Stansbury*, 511 U.S. at 322–24, 114 S. Ct. at 1528–30. The remainder of the circumstances show that the cornering of appellant was more like a detention than it was like an arrest.

A detention differs from an arrest in the amount of force used, the duration of the detention, and the efficiency of the investigation. *Sheppard*, 271 S.W.3d at 290–91. To investigate appellant's presence in the concession stand, Falks needed to prevent appellant from fleeing. By cornering appellant, Falks used a relatively small amount of force. *c.f. Hoag*, 728 S.W.2d at 379 (when officers trained their firearms at the suspect and demanded that he stand against the back of a car). The detention lasted only for the time it took for Falks to corner appellant and ask him what he was doing. *c.f. Dowthitt*, 931 S.W.2d at 255–57 (when officers held suspect for many

hours). Lastly, a detention must involve actual investigation. *Terry*, 392 U.S. at 30–31, 88 S. Ct. at 1868. In an investigative detention, police officers may not ask questions that "are reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 298, 100 S Ct. at 1682. Falks asked appellant general questions to investigate his presence in the concession stand and not to obtain an incriminating response. *See Ramirez*, 105 S.W.3d at 740.

We conclude that, under all the circumstances, a reasonable person would not have felt as if his freedom was restrained to the degree associated with a formal arrest. At the time Falks spoke to appellant, appellant was not in custody. Therefore, the trial court did not abuse its discretion by overruling appellant's objection.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Brown and Caughey.

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