



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-16-00672-CR

Brian ALLEN,  
Appellant

v.

The STATE of Texas,  
Appellee

From the 399th Judicial District Court, Bexar County, Texas  
Trial Court No. 2014CR9045  
Honorable Ray Olivarri, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice  
Karen Angelini, Justice  
Patricia O. Alvarez, Justice

Delivered and Filed: September 13, 2017

**AFFIRMED**

Brian Allen was indicted for three counts of sexual assault of a child and one count of indecency with a child. Pursuant to a plea bargain agreement, Allen entered a plea of nolo contendere to one count of sexual assault of a child, and the State dismissed the remaining counts in the indictment and capped punishment at fifteen years. The State also opposed deferred adjudication. The trial court accepted Allen's plea and sentenced him to fifteen years in prison. Allen subsequently filed a motion for new trial, claiming his plea was involuntary. The trial court

denied the motion. In a single issue, Allen argues the trial court abused its discretion by denying his motion for new trial. We affirm.

#### **PROCEEDINGS IN THE TRIAL COURT**

Before accepting Allen's plea, the trial court advised Allen of the range of punishment for the offense of sexual assault of a child. Allen told the trial court that he understood the range of punishment and that his lawyer had reviewed the indictment with him. Allen also told the trial court that he had signed a document called "Court's Admonishment and Defendant's Waivers and Affidavit of Admonitions," that his lawyer had reviewed the document with him, and that he understood it.<sup>1</sup> Furthermore, Allen's lawyer informed the trial court that he believed that Allen had a factual and rational understanding of the charge against him and that Allen was mentally competent.

Allen then entered his plea of nolo contendere. Immediately after entering his plea, Allen told the trial court that no one had forced him to plead no contest and that he had not been promised anything that was not in the plea agreement. The trial court accepted the plea and set the matter for sentencing.

A few days after the plea hearing, Allen filed a motion seeking to withdraw his plea. The trial court denied this motion.

At the sentencing hearing, the trial court denied Allen's application for deferred adjudication and assessed punishment at fifteen years in prison. Thereafter, Allen filed a motion for new trial, claiming that his plea was involuntary because he was sick with the flu and was

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<sup>1</sup>Among other things, this document stated that Allen's lawyer had explained Allen's constitutional and legal rights to him; that Allen was mentally competent on the day of the plea hearing; that Allen had not been threatened or coerced into entering a plea; that the terms of the plea agreement were fully set forth in the plea bargain agreement and no one had made any other promises to Allen; that Allen's lawyer had explained to him the requirements and consequences of Chapter 62 of the Texas Code of Criminal Procedure; that Allen was satisfied with the advice and representation of his lawyer; that Allen's lawyer had explained to him any immigration consequences; and that Allen understood the court's admonishments as contained in the document.

taking medication on the day he entered his plea. The trial court held a hearing on the motion for new trial and denied the motion. The trial court gave Allen permission to appeal its ruling denying the motion for new trial.

### DISCUSSION

We review the trial court's ruling on a motion for new trial for an abuse of discretion, reversing only if the trial court's ruling was clearly erroneous and arbitrary. *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013). "[A] trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling." *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004). In reviewing the trial court's ruling on a motion for new trial, we view the evidence in the light most favorable to the trial court's ruling, defer to the trial court's credibility determinations, and presume that all reasonable fact findings in support of the ruling have been made. *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014).

"No plea of guilty or nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary." TEX. CODE CRIM. PROC. ANN. art 26.13(b) (West Supp. 2016). To be voluntary, a guilty plea must be the expression of the defendant's own free will and must not be induced by threats, misrepresentations, or improper promises. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). A record showing that a defendant was properly admonished by the trial court is prima facie evidence of a knowing and voluntary plea. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998); *Crawford v. State*, 890 S.W.2d 941, 944 (Tex. App.—San Antonio 1994, no pet.). The burden then shifts to the defendant to show that he did not understand the consequences of his plea and that he suffered harm. *Martinez*, 981 S.W.2d at 197; *Crawford*, 890 S.W.2d at 944. When the record shows that the defendant states at the plea hearing that he understands the nature of the proceeding and that

no outside influence coerced him into to making the plea, he has a heavy burden to prove that his plea was involuntary. *Crawford*, 890 S.W.2d at 944. In evaluating the voluntariness of a plea, we review the entire record. *Martinez*, 981 S.W.2d at 197.

Here, Allen claims his plea was involuntary because at the time he entered his plea he was sick with the flu and taking medication for his symptoms. The record before us indicates that Allen was properly admonished and that he stated that he understood the nature of the proceedings and that no outside influence coerced him into making the plea. Thus, Allen had a heavy burden to prove that his plea was involuntary because he did not understand the consequences of his plea. *See Martinez*, 981 S.W.2d at 197; *Crawford*, 890 S.W.2d at 944.

In support of his motion for new trial, Allen presented his own affidavit and his wife's testimony. In his affidavit, Allen stated that on the day he entered his plea he was "terribly sick" with the flu and was taking Theraflu, an over-the-counter medicine, for his symptoms. Allen claimed he was drowsy, nervous, and unable to think clearly. Allen further stated that he needed his wife to be present in court with him in order to guide him to an informed and intelligent decision. Allen further stated that he told his lawyer he was not feeling well and he needed his wife to be present, and therefore, his lawyer requested a reset but the request was denied. Allen claimed that he then entered into a plea of guilty or no contest without understanding the effects of his plea. However, Allen also claimed that as soon as he left the courthouse he knew that he had made a mistake. Therefore, Allen told his lawyer that he wanted to "undo" his plea and go to trial because he did not feel that pleading no contest was in his best interest.

Additionally, Allen's wife, Christy Allen, testified in support of his motion for new trial. Mrs. Allen testified that Allen had asked for a plea bargain, but he did not realize what he was asking for. On the day Allen entered his plea, he was sick with the flu and was not feeling very well. Allen's skin was a pale yellow. Before going to court, Allen took Theraflu. Some of the side

effects of Theraflu are drowsiness and tiredness. Mrs. Allen did not go to court with her husband on the day he entered his plea because she had to work. When her husband came home from court, he was not sure what had happened. Allen called his lawyer and talked to him about it. Allen's lawyer then filed a motion seeking permission to withdraw Allen's plea. According to Mrs. Allen, the combination of her absence and his illness caused her husband to enter the plea. Mrs. Allen felt that her absence from court was a factor because she and her husband usually discussed what to do and she was not with him in court to help him decide what to do. Mrs. Allen said that her recommendation would have been to go to trial. Mrs. Allen further indicated that after entering his plea her husband had "buyer's remorse."

On cross-examination, Mrs. Allen admitted that on the day her husband entered his plea, she was able to communicate clearly with him and he was able to understand her. Mrs. Allen added that even though her husband was able to understand her, he did not understand what had happened in court that day. Mrs. Allen further testified that her husband was twenty-eight years old, had graduated from high school, was "pretty smart," operated a business, and did not have a mental disability.

Notwithstanding the testimony asserting that Allen did not understand the consequences of his plea, the trial court could have concluded otherwise. The trial court was free to disbelieve part or all of the testimony provided by Allen and his wife. *See Charles*, 146 S.W.3d at 213 (providing that the trial court was free to believe all, some, or none of the affidavit testimony presented in support of a motion for new trial). The trial court could have relied on its own observations of Allen's demeanor at the plea hearing. At the plea hearing, the trial court questioned Allen at length and Allen responded appropriately. Furthermore, even according to the testimony provided by Allen's wife, Allen was able to communicate clearly with her and to understand her on the day of the plea hearing. Additionally, the trial court could have found that the testimony that Allen wanted

to “undo” his plea immediately after the hearing and that Allen had “buyer’s remorse” did not necessarily mean that Allen failed to understand the consequences of his plea, but rather that he simply regretted his plea of no contest. On this record, the trial court could have reasonably concluded that Allen did not meet his heavy burden to show that his plea was involuntary.

Deferring to the trial court’s credibility determinations and viewing the evidence in the light most favorable to the trial court’s ruling, we hold that the trial court did not abuse its discretion in denying Allen’s motion for new trial. Allen’s sole issue is overruled.

**CONCLUSION**

The judgment of the trial court is affirmed.

Karen Angelini, Justice

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