Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-19-00889-CR

Cameron Antoine **ROBY**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CR6809
Honorable Velia J. Meza, Judge Presiding

Opinion by: Lori I. Valenzuela, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Irene Rios, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: November 10, 2021

AFFIRMED

A jury convicted Cameron Antoine Roby of murder. On appeal, Roby asserts two issues: (1) alleged egregious error based on the trial court's failure to *sua sponte* include an unrequested voluntary conduct instruction in the jury charge; and (2) insufficient evidence of costs assessed in the judgment. We affirm.

BACKGROUND

Roby and Adrienne Dameron were in a dating relationship. On April 26, 2018, Roby and Dameron verbally argued in John Harvey's apartment. During the argument, Dameron was shot in

the head and died from the gunshot wound. Harvey was standing five feet away from Dameron when she died. Harvey and Roby describe the events surrounding Dameron's death in starkly different terms.

According to Harvey's testimony at trial, during the verbal argument, Roby—with a six-month-old child in one arm—pulled a gun out from his waistband, put a clip into the gun, held it directly to Dameron's head, and told Dameron to be quiet. About a second later, Roby pulled the trigger, and Dameron fell to the floor. Roby then told Harvey that it was an accident, entered the bathroom, washed his hands, and left his gun on the bathroom counter.

According to Roby, the gun was sitting on a shelf in the kitchen area, and Dameron accidentally bumped into the shelf, causing the gun to slide and fall. Roby reached for the gun, "caught it midair," and it discharged, killing Dameron.

After the gun discharged, Roby left the apartment with his child. As Roby was going down the stairs, he saw two deputy constables who were at the apartment complex serving eviction notices. Roby told the constables, "I shot my baby, I shot my baby." Because of the baby in Roby's arm, the constables were initially confused, but followed Roby back to Harvey's apartment, where they discovered a deceased Dameron.

Officers and crime scene investigators from the San Antonio Police Department (SAPD) arrived to investigate the scene. They took photographs of the scene, collected evidence, and swabbed Roby's hands for a gunshot residue test. Later that day, a detective with the SAPD Homicide Unit conducted an interview with Roby at the police station. A copy of the video recording of the interview was admitted into evidence and played for the jury. Through the interview, the jury learned of Roby's account of the events leading to Dameron's death, including his recitation that the gun fell from the shelf and discharged.

Dameron's autopsy confirmed she died from a gunshot wound to the head. At trial, the medical examiner testified that the burn mark on Dameron's temple was consistent with the gun being pressed against Dameron's head at the time of discharge. Additional testimony established the caliber of gun that killed Dameron does not accidentally discharge, and the projectile passed through the walls horizontally, which is inconsistent with the gun having been discharged while falling.

On September 23, 2019, the trial court began jury selection. At Roby's request, the trial court charged the lesser included offense of manslaughter. The defense did not request (and the trial court did not include) a voluntary conduct instruction. After a five-day trial, the jury returned a verdict finding Roby guilty of murder. Appellant pleaded "true" to the allegation of a prior felony conviction, and the trial court assessed punishment at imprisonment for life and a fine of $10,000. The trial court also taxed costs against Roby in the amount of $339. Roby appealed.

JURY CHARGE

In his first issue, Roby asserts the trial court's jury charge erroneously failed to include a voluntary conduct instruction. "A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." TEX. PENAL CODE § 6.01(a). The issue of one's voluntariness of conduct is separate from the issue of one's mental state and relates only to one's own physical body movements. *Febus v. State*, 542 S.W.3d 568, 574 (Tex. Crim. App. 2018). "If those physical movements are the nonvolitional result of someone else's act, are set in motion by some independent non-human force, are caused by a physical reflex or convulsion, or are the product of unconsciousness, hypnosis or other nonvolitional impetus, that movement is not voluntary." *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App. 2003).

In criminal cases, the trial court is required to submit a written charge distinctly setting forth the law applicable to the case. TEX. CODE CRIM. PROC. art. 36.14; *Walters v. State*, 247

S.W.3d 204, 208 (Tex. Crim. App. 2007). In the videotaped interview, Roby stated that the gun fell off a shelf after Dameron bumped against it and Roby reached for the gun to catch it. According to Roby, this provided some evidence that he did not voluntarily pull the trigger; therefore, the trial court erred in failing to set forth the law applicable to the case—the voluntary conduct instruction. We hold the voluntary conduct instruction is not the law applicable to the case for two, independent reasons.

Voluntary Conduct Is a Defensive Issue

Although the trial court must submit a charge setting forth the law applicable to the case, Article 36.14 does not impose a duty on trial courts to sua sponte instruct the jury on unrequested defensive issues. *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). "An unrequested defensive issue is not law applicable to the case." *Taylor v. State*, 332 S.W.3d 483, 487 (Tex. Crim. App. 2011); *see also Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013) ("A defendant cannot complain on appeal about the trial judge's failure to include a defensive instruction that he did not preserve by request or objection: he has procedurally defaulted any such complaint."). The State asserts that the voluntary conduct instruction is a defensive issue that Roby did not request be charged; accordingly, it is not law applicable to the case, and the trial court did not err in failing to sua sponte instruct it.

We agree with the State that the voluntary conduct instruction is a defensive issue. *See Payne v. State*, 985 S.W.2d 682, 683 (Tex. App.—Houston [1st Dist.] 1999) (holding defendant was entitled to defensive instruction regarding voluntary conduct), *vacated on other grounds*, 11 S.W.3d 231 (Tex. Crim. App. 2000) (reversing and remanding to appellate court due to lack of harm analysis); *Whitehead v. State*, 696 S.W.2d 221, 222 (Tex. App.—San Antonio 1985, pet. ref'd) (voluntariness is defensive jury issue that must be submitted upon request when some evidence is offered to support that issue); *see also Perez Hernandez v. State*, 13-16-00696-CR,

2019 WL 2127895, at *14 (Tex. App.—Corpus Christi May 16, 2019) (not designated for publication) (holding unrequested voluntary conduct instruction is a defensive issue and not law applicable to the case). Because the voluntary conduct instruction was an unrequested defensive issue, it is not the law applicable to the case. *Posey*, 966 S.W.2d at 62; *Taylor*, 332 S.W.3d at 487.

The Evidence Did Not Raise Voluntariness

Even if voluntariness were not a defensive issue, the instruction is not required because it is not the law applicable to *this* case. The voluntary conduct defense is only implicated "if the accused admits committing the act or acts charged and seeks to absolve himself of criminal responsibility for engaging in the conduct." *Peavey v. State*, 248 S.W.3d 455, 465–66 (Tex. App.—Austin 2008, pet. ref'd) (citing *Trujillo v. State*, 227 S.W.3d 164, 169 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) and *Bell v. State*, 867 S.W.2d 958, 962 (Tex. App.—Waco 1994, no pet.)). "When a person claims the involuntary act defense he is conceding that his own body made the motion but denies responsibility for it." *Id.* (quoting *Rogers v. State*, 105 S.W.3d 630, 639 n.30 (Tex. Crim. App. 2003)).

In this case, Roby did not (1) concede that his finger pulled the trigger but (2) denies responsibility because it was the result of an involuntary action. The only evidence Roby argues entitles him to the instruction is Roby's police interview. In the interview, Roby blamed Dameron for bumping against the shelf allegedly holding the gun and expressly disclaimed pulling the trigger: "I swear to God, my finger didn't wrap around the trigger. I didn't – I swear to the Holy God I didn't get control of the gun. I just knew it was going to fall. . . . I didn't point it. I didn't grab it. That [expletive] went off. I don't know. I didn't wrap my finger around it. I didn't have the gun – I didn't have it."

On appeal, Roby explains his defensive theory is that Dameron bumped a shelf and the gun accidentally discharged when Roby caught it midair as it fell. At trial, expert testimony established

the caliber of gun that killed Dameron does not accidentally discharge. The defense's cross-examination of the forensic scientist that performed the gunshot residue test focused on the lack of gunshot residue on Roby's hands—although residue was found on Dameron's hands.[1] Throughout the trial, Roby sought to establish that Dameron—not Roby—fired the weapon. In closing, defense counsel emphasized Dameron's responsibility:

> What we know in this particular case is that the gunshot residue was found on [Dameron]. It was not found on [Roby]. And the reason for that is simple. It's because he did not fire that weapon. . . . But, again, the question is who fired the weapon, not whether or not the weapon was fired. . . . But, again, the important thing is who fired it? And we can't get to a point where we can explain why it is that he doesn't have the gunshot residue and she does.

Because there is no evidence implicating voluntariness, we hold the instruction is not the law applicable to the case, and we need not perform an egregious harm analysis. *See Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc); TEX. CODE CRIM. PROC. art. 36.19. We overrule Roby's first issue.

COSTS

In his second issue, Roby challenges the sufficiency of the evidence supporting the trial court's assessment of court costs. In a criminal case, the sufficiency of the evidence supporting court costs is reviewable on direct appeal. *See Mayer v. State*, 309 S.W.3d 552, 554–56 (Tex. Crim. App. 2010). A trial court is required to assess the costs of court against a convicted criminal defendant. TEX. CODE CRIM. PROC. art. 42.16. Costs must be substantiated by a bill of costs entered into the record of the case. TEX. CODE CRIM. PROC. art. 103.001(b); *see also Solomon v. State*, 392 S.W.3d 309, 310 (Tex. App.—San Antonio 2012, no pet.).

[1] The State explains the lack of gunshot residue on Roby's hands by Harvey's testimony that Roby washed his hands before leaving the apartment to find help. Harvey's testimony was buttressed by police photographs admitted into evidence showing the gun was found on the bathroom sink counter.

The trial court's judgment assesses court costs in the amount of $339. The record originally contained no bill of costs or other accounting substantiating this assessment. Consequently, Roby sought reformation of the trial court's judgment to delete the assessment of court costs unless the record was supplemented with a bill of costs. The record was subsequently supplemented with a bill of costs substantiating these amounts. We overrule Roby's second issue as moot.

CONCLUSION

Having overruled both issues, the judgment of the trial court is affirmed.

Lori I. Valenzuela, Justice

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