# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-16-00026-CR**
**NO. 02-16-00027-CR**

ROHN M. WEATHERLY — APPELLANT

V.

THE STATE OF TEXAS — STATE

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FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NOS. 1380491D, 1380528D

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## MEMORANDUM OPINION[1]

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In four points, Appellant Rohn M. Weatherly appeals his convictions for unlawful restraint of a child younger than 17 years and for theft of property valued between $1,500 and $20,000. *See* Tex. Penal Code Ann. § 20.02 (West 2011); Act of June 17, 2011, 82nd Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws

[1]*See* Tex. R. App. P. 47.4.

3301, 3309 (amended 2015) (current version at Tex. Penal Code Ann. § 31.03(a), (e)(4)(D) (West Supp. 2016)). We affirm.

## Background

On August 5, 2014, as Cheyla Palmer was parking her vehicle at her residence at Drummer's Inn, she was approached by Appellant, another resident of the motel with whom she was somewhat acquainted.[2] As Appellant approached, he yelled at Palmer, demanding that she "take him to his Aunt's house." Palmer called out for help to her friend Robert Byrnes, who tried unsuccessfully to restrain Appellant, but Appellant was able to jump into Palmer's vehicle and drive away—with Palmer's four-year-old daughter in the back seat screaming, "Let me go! Let me go!"

Approximately two hours later, Appellant returned to the motel, accompanied by his aunt, his uncle, and the child. Appellant was arrested and charged with kidnapping, unlawful restraint, unauthorized use of a vehicle, and theft. In October 2015, Appellant pleaded guilty to unlawful restraint of a child and to theft of property valued between $1,500 and $20,000. Appellant signed written plea admonishments in which he acknowledged that he was mentally competent and that his plea was "knowingly, freely, and voluntarily entered."

[2]The only recorded proceeding before the trial court was the punishment hearing, so there is limited information regarding the underlying incident in the record. However, the parties do not dispute the account given in the presentence investigation report (PSI), and we have therefore included facts regarding the underlying incident from that report.

Appellant testified at the punishment hearing that he had taken Palmer's car because he was trying to escape people who were threatening to stab him with a knife if he did not give them money. He also testified that he did not know that the child was in the car when he took it and that he did not mean to take the child. Appellant did not attempt to withdraw his guilty pleas at any time before or during the punishment hearing, nor did he object, either during the hearing or in a subsequent motion for new trial, to the trial court's failure to do so sua sponte.

The trial court found Appellant guilty of unlawful restraint of a child and theft of property valued between $1,500 and $20,000 and sentenced him to fifteen years' confinement.

**Discussion**

Appellant brings four points on appeal, all of which are based upon his assertion that his guilty plea was not entered knowingly and voluntarily. Because his first three points are related,[3] we will address them together.

A guilty plea must be entered knowingly, intelligently, and voluntarily in order to be consistent with due process. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711 (1969). To determine whether the plea was voluntary, we ask whether the plea represented a "voluntary and intelligent choice" available to

[3]Appellant's first and second points argue alternatively that the trial court erred by accepting his guilty plea because evidence "clearly established" that his plea was not knowing and voluntary and because there was not an adequate record to establish that his plea was knowing and voluntary. His third point argues that his due process rights were violated by the trial court's failure to conduct an inquiry to determine Appellant's understanding of his plea.

the defendant. *See Parke v. Raley*, 506 U.S. 20, 29, 113 S. Ct. 517, 523 (1992) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970)). We then examine the record to determine whether the defendant understood the charge and its consequences. *See DeVille v. Whitley*, 21 F.3d 654, 657 (5th Cir.), *cert. denied*, 513 U.S. 968 (1994).

Before accepting a guilty plea, a trial court must provide several admonitions to the defendant in compliance with article 26.13 of the code of criminal procedure. Tex. Code Crim. Proc. Ann. art. 26.13(a) (West Supp. 2016). The admonishments may be made orally or in writing. *Id.* art. 26.13(d). When the record indicates that the trial court duly admonished the defendant, this presents a prima facie showing that defendant's plea was voluntary. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). The burden then shifts to the appellant to show that he entered the plea without knowing its consequences and that he was thereby harmed. *Id.* This is a heavy burden; "[a] defendant's sworn representation that his guilty plea is voluntary 'constitute[s] a formidable barrier.'" *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App.), *cert. denied*, 549 U.S. 1052 (2006).

Appellant signed two written plea admonishments, one for the theft charge and one for the unlawful restraint charge, both of which complied with article 26.13(a). Tex. Code Crim. Proc. Ann. art. 26.13(a). Appellant and his counsel certified that Appellant was legally competent and was intelligently, knowingly, and voluntarily waiving his rights and that he understood the consequences of

entering a guilty plea. Additionally, the admonishments included a provision in which the trial court found that Appellant was "mentally competent and that his plea [wa]s intelligently, freely, and voluntarily entered."

To support his argument, Appellant points to evidence in the record that he had an extensive mental health and psychiatric history and had been previously found incompetent. The PSI reported that Appellant had been diagnosed with psychosis and methamphetamine dependence at one point and that he had been admitted to North Texas State Hospital in December 2014, shortly after the incident that is the basis of this case. At that time, Appellant was found incompetent to stand trial and was diagnosed with schizoaffective disorder, bipolar type, and polysubstance dependence. However, an examination eight months later—in August 2015—yielded a medical opinion that Appellant did not meet the legal definition of insanity at the time of the offense. In September 2015, Appellant was adjudicated competent to stand trial.

A history of mental health issues alone is generally insufficient to establish that a guilty plea was involuntary. *See, e.g.*, *Doubout v. State*, 388 S.W.3d 863, 866 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding that references in the record that appellant was mentally "slow" were not sufficient to carry burden of demonstrating that he entered his plea involuntarily). Here, other evidence in the record showed that Appellant understood the charges against him and drew from his past experiences in the criminal justice system. In his initial competency evaluation, he had a factual understanding that he was charged with kidnapping

and auto theft, he knew that those offenses were considered felonies, and he knew he could spend time in prison. In a subsequent competency evaluation, Appellant was able to discuss the roles of court personnel, the purpose of a trial, and the general course of a trial, and he expressed an understanding that his own role in court was to "listen; pay attention to what's being said so [he] can consult with [his] attorney." He also said that he could plead "guilty, not guilty, not guilty by reason of insanity, and no contest," and he discussed the pleas available to him as well as the plea bargain process "in [an] informed fashion." Appellant also turned down a prior plea bargain offered by the State that offered a 20 year sentence. *See Fluellen v. State*, 443 S.W.3d 365, 372–73 (Tex. App.—Texarkana 2014, no pet.) (noting that appellant turned down a negotiated plea agreement prior to pleading guilty without a plea agreement in holding that appellant did not demonstrate the trial court failed to properly admonish him). During his punishment hearing, Appellant demonstrated his understanding of the criminal justice system based upon his past experiences by explaining the terms of a prior plea bargain he had entered into in 2011.

Appellant also argues that his confusion and inability to understand the proceedings and the consequences of his guilty pleas is apparent from the following exchange in the record:

> THE COURT: Mr. Weatherly, you appeared in this court on October 29th, 2015, and pled guilty in 1380491 to Count Two, offense of unlawful restraint of a child under 17 years, and also pled true to the enhancement allegation in that case, and pled guilty to the offense of theft 1500 to 20,000 and true to the enhancement in

that case, and asked the Court to conduct your sentencing. Is that correct?

THE DEFENDANT: I thought I only pled guilty to the one case. I'm not for sure I know about the auto theft or the theft 1500 to 20,000. Did I?

MR. COUCH: Okay.

. . . .

THE COURT: I have the admonishment documents which reflect your signature . . . in the theft 1500 to 20,000, which was the other pending indictment against you.

THE DEFENDANT: Okay.

THE COURT: . . . I tell you what, let's go off the record. Why don't you talk with your client for a second.

(Discussion held off the record.)

. . . .

THE COURT: After talking to your attorney, Mr. Weatherly, do you recall entering a plea of guilty as to the theft case as well?

THE DEFENDANT: Yes, ma'am, I guess I did.

While Appellant argues that this exchange "put the court on notice that he was not even aware ***of*** his plea, let alone the ***consequences*** of said plea," his argument ignores the exchange between Appellant and the trial court that immediately followed the above excerpt. The trial court went on to explain the potential range of punishment in each case:

THE COURT: So you're looking at a potential range of punishment of two years to 20 years in each of these cases. You understand that, sir?

THE DEFENDANT: Yes ma'am. Yes.

THE COURT: Okay. And we discussed that back at the time of your plea.

This excerpt and that other evidence discussed above supports the conclusion that Appellant was properly admonished by the trial court and that Appellant understood the consequences of his plea. *See Burnett v. State*, 88 S.W.3d 633, 641 (Tex. Crim. App. 2002) ("The reviewing court must examine the entire record for evidence that appellant was or was not aware of the consequences of his plea. Moreover, while an express acknowledgment by appellant would be helpful, the lack of such evidence does not necessarily show that appellant was unaware of the consequences of his plea."). We therefore overrule Appellant's first two points, which argue that the evidence established his plea was not knowing and voluntarily or, alternatively, that there is not an adequate record establishing that his plea was knowing and voluntary. Because we hold that the record adequately establishes that his plea was made knowingly and he was therefore aware of the consequences of his plea, we also overrule Appellant's third point of error. *See* Tex. Code Crim. Proc. Ann. art. 26.13(c) (providing that substantial compliance by the trial court with article 26.13 is sufficient unless the defendant affirmatively shows that he was not aware of the consequences of his plea).

Appellant's fourth point argues that the trial court abused its discretion by failing to sua sponte withdraw Appellant's guilty plea "in light of evidence of his

innocence," relying on Appellant's testimony during the punishment hearing that he did not intend to kidnap the child and that his actions were committed under duress or were necessary to avoid imminent harm.[4]

Appellant acknowledges in his brief that the court of criminal appeals has held that, when the defendant has waived a jury trial, the trial court has no duty to withdraw the defendant's guilty plea upon the presentation of evidence of innocence. *Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978). Rather, it is the trial court's duty to consider the evidence submitted as the trier of fact and to decide whether the defendant is guilty as he pleaded, guilty of a lesser-included offense, or not guilty. *Aldrich v. State*, 104 S.W.3d 890, 894 (Tex. Crim. App. 2003); *Moon*, 572 S.W.2d at 682.

In any event, "the evidence must do more than merely tend to raise a defensive issue[,] [i]t must 'reasonably and fairly raise the issue'" in order to trigger the trial court's duty to sua sponte withdraw a guilty plea. *Griffin v. State*, 703 S.W.2d 193, 196 (Tex. Crim. App. 1986). Although Appellant states in his brief that he acted under duress, he relies upon the penal code provision for the defense of necessity. However, both defenses require the defendant to have

[4]Although Appellant phrased his point of error as a failure of the trial court to withdraw his guilty plea in light of evidence of his innocence, portions of his argument complain of the trial court's alleged failure to consider Appellant's mental health status and order another examination by a mental health professional. Because we have addressed this argument in relation to his first three points and concluded that the record establishes that Appellant's plea was made knowingly and voluntarily, we decline to address it again here.

acted under a threat of imminent harm; a defense of duress particularly requires that there be a threat of "imminent death or serious bodily injury to himself or another." *Compare* Tex. Penal Code Ann. § 8.05(a) (West 2011) *with id.* § 9.22 (West 2011). Harm is imminent when there is an emergency situation and it is "immediately necessary" to avoid that harm, in other words, when a "split-second decision" is required without time to consider the law. *Murkledove v. State*, 437 S.W.3d 17, 25 (Tex. App.—Fort Worth 2014, pet. ref'd, untimely filed).

Appellant points to his testimony that he ran to Palmer's car because he was fleeing people who had held a knife to his throat and threatened to stab him unless he gave them money. Appellant testified that he was "fleeing for [his] personal safety" and did not realize that Palmer's daughter was in the car. However, Appellant's testimony does not show that taking Palmer's car was necessary to avoid imminent harm—by his own testimony, after he jumped in Palmer's car and asked her to take him to his aunt's, Palmer's friend Byrnes asked Appellant to get out of the car and come talk to him. According to Appellant, at that point, he and Palmer got out of the car and went inside Palmer and Byrnes' apartment where the three of them talked. Appellant testified that he grew frustrated and ran out of their apartment and left in Palmer's car, not knowing that the little girl was in the back seat.[5] But Appellant admitted that as

[5]According to Appellant's version of the facts, during this discussion between the adults inside the apartment, the little girl remained in the back seat of the vehicle.

he was driving out of the parking lot, he then realized she was in the back seat. Nevertheless, he proceeded to drive Palmer's car to Parker County and did not return for at least an hour and a half. This evidence does not "reasonably and fairly" raise the issue of necessity or the issue of duress because it does not show that Appellant faced imminent harm—and especially not imminent death or serious bodily injury—making it immediately necessary for him to take Palmer's car for an hour-and-a-half drive with the little girl in the back seat. *See, e.g.*, *id.* ("Even if one could infer that Murkledove feared the possibility of or potential for harm to himself or his family, no evidence exists upon which an inference could be made that harm was imminent when he decided to act.").

The trial court was not under a duty to withdraw Appellant's plea of guilty sua sponte, *see Moon*, 572 S.W.2d at 682, and in any event, neither the defense of necessity nor of duress was reasonably and fairly raised by the evidence, *see Griffin*, 703 S.W.2d at 196. We therefore overrule Appellant's fourth point.

**Conclusion**

Having overruled Appellant's points, we affirm the trial court's judgments.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED:  December 8, 2016