COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00301-CR

DEAN ALAN KIRKPATRICK — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1431464D

MEMORANDUM OPINION[1]

Appellant Dean Alan Kirkpatrick appeals his conviction for possession of a controlled substance, methamphetamine, in an amount more than four grams but less than 200 grams. *See* Tex. Health & Safety Code Ann. §§ 481.102(6), 481.115(d) (West 2010). We affirm.

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

Background

Deputy Robert Segura of the Tarrant County Sheriff's Office (TCSO) was on patrol in the early morning hours of August 9, 2015, when he was dispatched to a serious car accident in rural Tarrant County. Deputy Segura described a "trail of car parts" at the scene, including the steering column lying approximately 30 feet away from a wrecked Camaro, with the keys still in the ignition. Firefighters and emergency personnel were already at the scene when he arrived, but Deputy Segura could see that a male, later identified as Appellant, was trapped inside the driver's seat of the car, pinned inside with the car "wrapped around his body." While he was still pinned inside the car, Appellant told Deputy Segura that his wife had been driving but was no longer in the car. Deputy Segura and other emergency personnel on scene searched for Appellant's wife nearby but could not locate her. Another officer drove to the Appellant's residence nearby and determined that his wife was there and was unharmed.

Appellant was eventually extracted from the vehicle and transported by CareFlite helicopter to Harris Hospital. Pace Copeland was working as a patient care technician in the emergency room when Appellant was brought in. As Copeland was cutting off Appellant's pants, he felt something fall out of the left pocket of Appellant's pants and hit his legs on the way down to the floor, and when Copeland looked down, he saw that it was a baggie containing a "crystal-like" substance and some loose bullets. Copeland picked up the baggie, showed

it to a nurse in the room, and then handed it to Lieutenant Fred Long of the Fort Worth Police Department, who was working as an off-duty officer with the Harris security personnel that evening. The substance in the baggie was subsequently tested and identified as 13.95 grams of methamphetamine.

Copeland, who described Appellant as a "belligerent person" that did not follow instructions or orders given by hospital staff, testified that Appellant was "pretty repetitive" and asked hospital staff the same questions over and over. Deputy Gavin Doumit of the TCSO testified at trial that although Appellant had been able to communicate with the nurses earlier, Appellant was uncooperative and uncommunicative with him when he later interviewed Appellant at the hospital. Because Appellant did not consent to providing a blood sample, Deputy Doumit obtained a warrant, and a blood draw was conducted on Appellant at approximately 8:47 a.m. Even though more than five hours had elapsed since the accident had occurred, Appellant's blood sample was positive for a high amount of methamphetamine.

Appellant was convicted of possession of a controlled substance in an amount of more than four grams but less than 200 grams, sentenced to thirteen years' confinement, and ordered to pay a $5,000 fine. *See* Tex. Health & Safety Code Ann. §§ 481.102(6), 481.115(d).

Discussion

I. The State's jury argument

In his first issue, Appellant argues that the trial court erred by overruling his objection to the State's jury argument that it was "undisputed" that Appellant possessed methamphetamine. Specifically, Appellant objected to the following argument by the prosecutor:

> The evidence is undisputed that this man possessed methamphetamine [in] the early morning hours of August 9th, 2015, in his jeans—in his pants. It's undisputed. So whatever trails Defense counsel wants to take you down about we didn't have measurements at the accident scene, we didn't have pictures or that unit couldn't get around the fire truck, any of that, tell yourself, but nobody disputed that he possessed—

Appellant's counsel then objected that the prosecutor's use of the term "undisputed" was an improper comment on Appellant's election not to testify before the jury. Appellant makes the same argument on appeal.

The code of criminal procedure provides that a defendant's failure to testify on the defendant's own behalf may not be held against him and that the State may not allude to the defendant's failure to testify. Tex. Code Crim. Proc. Ann. art. 38.08 (West 2005). To determine if a prosecutor's comment violated article 38.08 and constituted an impermissible reference to an accused's failure to testify, we must decide whether the language used was manifestly intended or was of such a character that the jury naturally and necessarily would have considered it to be a comment on the defendant's failure to testify. *Id.*; *see Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001); *Fuentes v.*

State, 991 S.W.2d 267, 275 (Tex. Crim. App.), *cert. denied*, 528 U.S. 1026 (1999). The offending language must be viewed from the jury's standpoint, and the implication that the comment referred to the accused's failure to testify must be clear. *Randolph v. State*, 353 S.W.3d 887, 891 (Tex. Crim. App. 2011); *Bustamante*, 48 S.W.3d at 765. A mere indirect or implied allusion to the defendant's failure to testify does not violate the accused's right to remain silent. *Wead v. State*, 129 S.W.3d 126, 130 (Tex. Crim. App. 2004); *Patrick v. State*, 906 S.W.2d 481, 490–91 (Tex. Crim. App. 1995), *cert. denied*, 517 U.S. 1106 (1996). Any ambiguities in the language used must be resolved in favor of it being a permissible argument. *Randolph*, 353 S.W.3d at 891.

Appellant relies upon *Madden v. State*, 799 S.W.2d 683, 699 (Tex. Crim. App. 1990), *cert. denied*, 499 U.S. 954 (1991), to argue that the prosecution's argument drew attention to the absence of evidence that only Appellant could supply. In *Madden*, the prosecutor argued,

> Then, also, the defense will argue that why in the world would someone who killed, murdered two people and stole this credit card sign their own name to the Texaco card? I don't know that; you don't know why. There's only one person here that knows why, and there's only one person here that knows the answer to all of these questions.
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> . . . .
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> I don't know why he did it (signed the credit card receipts). Maybe he wanted to be caught. Who knows what goes on in the mind of someone who has brutally murdered two people? I don't know, but that's certainly no reason for you to suspect that he is innocent of this crime.

Id. at 699–700 (holding that such argument was improper as a direct comment on appellant's failure to testify). Likewise, in *Lee v. State*, the court of criminal appeals found error in a statement that clearly pointed out that only the defendant knew his own motive or knew why he acted the way he did. 628 S.W.2d 70, 71 (Tex. Crim. App. [Panel Op.] 1982) (holding prosecutor's statement that "[t]he only person that knows the motive or what he was really doing with this gun is [the defendant]" was an improper comment on defendant's failure to testify). And in *Angel v. State*, 627 S.W.2d 424, 425–26 (Tex. Crim. App. [Panel Op.] 1982), the court of criminal appeals held that it was error for the prosecutor to state that whether the defendant had intentionally and knowingly committed indecency with a child was not contested because there was no other witness to the offense than the victim and the defendant. The court went on to say,

> Thus, the only person who could have 'contested' the argument that appellant knowingly and intentionally committed the alleged acts was appellant himself. When the remark is viewed from the standpoint of the jury, it may have been construed as a reference to appellant's failure to testify and thus contest the existence of the elements of the offense.

Id. at 426; *see also Montoya v. State*, 744 S.W.2d 15, 35 (Tex. Crim. App. 1987) (holding prosecutor's statement, made while gesturing towards defendant, asking in part, "What do we hear from this man over here?" was not a direct allusion to defendant's failure to testify but to his failure to produce testimony from witnesses other than himself), *overruled on other grounds*, *Cockrell v. State*, 933

S.W.2d 73, 89 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1173 (1997); *Dubose v. State*, 531 S.W.2d 330, 331–32 (Tex. Crim. App. 1975) (holding similarly in case where only the complainant and the victim were witnesses to the crime).

The prosecutor's argument in this case, while similar, is distinguishable from those cases. Here, the prosecutor's statement did not specifically identify Appellant as the only person who could have disputed his possession of methamphetamine, nor, on these facts, was he. As the State points out, multiple witnesses were present and involved at the accident scene and later in the hospital room when the drugs fell out of his pants. Any of these witnesses could have been called upon to dispute the State's allegation that methamphetamine was discovered on Appellant's person. Because Appellant was not the only person who could have provided such evidence to dispute the State's charge, and because the prosecutor's argument did not identify him as such, the prosecutor's statement did not rise to the level of an improper comment on Appellant's decision not to testify. We therefore overrule Appellant's first issue.

II. Testimony as to street value of methamphetamine

In his second issue, Appellant argues that the trial court erred by admitting evidence of the street value of methamphetamine through the testimony of Lieutenant Long:

> Q: I'm going to show you what's been previously marked as State's Exhibit 6.

Do you see that?

A: Yes, sir.

Q: Okay. If that was a—or a bag of meth similar to that that weighs about, I don't know 13 grams—13, 14 grams, how much would that cost on the street?

[Appellant's counsel]: Objection, Your Honor, as to relevancy. Street value or value of the product is not in contention here. I would object under 404.3, 404.4.

THE COURT: Overruled. You may answer.

A: Anywhere from 600 to $800.

Q: Okay. So that baggie right there with methamphetamine in it is worth between six to $800?

A: Generally if you're buying it as that package.

Appellant argues that this evidence was irrelevant because the State was not required to prove the value of the controlled substance at issue, methamphetamine. *See* Tex. Health & Safety Code § 481.115(d) (providing elements of offense of possession of a controlled substance).

We review a trial court's rulings on evidentiary objections for an abuse of discretion. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). A trial court does not abuse its discretion unless its ruling is arbitrary and unreasonable; the mere fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Foster v. State*, 180 S.W.3d 248, 250 (Tex. App.—Fort Worth 2005, pet. ref'd) (mem. op.).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1990) (citing Tex. R. Evid. 401). The court of criminal appeals has held that it is not error to admit evidence regarding the value of narcotics, observing that such testimony is helpful in assisting the jury by "translating the testimony into terms that [are] easily comprehended by the jury." *Ex parte Lane*, 303 S.W.3d 702, 711 (Tex. Crim. App. 2009); *see also Kemner v. State*, 589 S.W.2d 403, 406 (Tex. Crim. App. [Panel Op.] 1979) (holding that testimony concerning the value of a narcotic recovered by law enforcement is admissible to translate the amount of narcotic recovered into terms understandable by the jury) (citing *Castro v. State*, 432 S.W.2d 948, 950 (Tex. Crim. App. 1968)). We are bound by the decisions of the court of criminal appeals. *See Wiley v. State*, 112 S.W.3d 173, 175 (Tex. App.—Fort Worth 2003, pet. ref'd).

Here, the testimony provided contextual evidence to assist the jury in understanding whether "13.95 grams of methamphetamine" was a substantial amount of methamphetamine or an insignificant amount of the substance. We therefore hold that the trial court did not abuse its discretion by permitting Lieutenant Long to testify regarding the street value of methamphetamine. We overrule Appellant's second issue.

Conclusion

Having overruled both of Appellant's issues, we affirm the judgment of the trial court.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: MEIER, GABRIEL, and SUDDERTH, JJ.

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

DELIVERED: May 25, 2017