In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00012-CR

MANUEL CISNEROS ZANDATE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 207th District Court
Hays County, Texas
Trial Court No. CR-19-4048-B, Honorable Jack H. Robison, Presiding

January 30, 2023

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Manuel Cisneros Zandate appeals his conviction for evading arrest with a motor vehicle. Two issues pend for review. The first concerns an alleged prejudicial comment by the trial judge, while the second involves the absence of an instruction regarding the voluntariness of his conduct. We affirm.

Background

In early December 2019, Sergeant Akers stopped a driver, later identified as appellant. When he approached, Akers saw appellant reaching into the passenger seat.

Appellant was unresponsive to Akers's commands, and Akers ultimately deployed his taser. While being tased, appellant drove away, ran a stop sign, turned left at a corner, and continued ahead for roughly a minute through a residential area. The camera of a patrol car captured his driving. Appellant proceeded down the street while avoiding vehicles parked at the curb. His car also can be seen turning slightly right to follow a bend in the road before slowly pulling to the right curb. Once he stopped, officers ordered him to exit. He did so slowly with his hands raised. In response to another of their directives, he also walked backwards to the rear of his vehicle and knelt down. At that point, the video captured him placing a cylindrical object in his mouth. The officers later described the object as a crack pipe. Soon they forced him to the ground and effectuated the arrest.

Issue One—Comment on Weight of the Evidence

Through his first issue, appellant contends the trial court committed reversible error when it commented on the necessity of a translator. We overrule the issue.

The court made a translator available for use but perceived the individual's services as going unused. By that time, it had also read an exhibit indicating that appellant spoke English. That resulted in the trial judge saying: "If you're not going to use the translator, why are we going to have him here? You can't have it both ways. We're not going to have a translator throughout the trial if the man doesn't need him. It says on his chart that he's an English speaker. I don't know whether that's evidence. That's some evidence." The court then removed the jury and engaged in further dialogue about the situation. During that dialogue, appellant said that "[s]ometimes I need to understand; some words, I can get it. So sometimes I ask my lawyer what it is." The court replied

with: “I think you need to use a translator. If you asked for one and we’re paying for one, you need to use it.” And, appellant agreed. Now appellant characterizes the exchange as the trial court’s effort to comment on his truthfulness.

Appellant did not contemporaneously object to the court’s utterance. Yet, none was needed to preserve the particular ground for review. *Proenza v. State*, 541 S.W.3d 786, 801 (Tex. Crim. App. 2017) (stating that a complaint about the trial court improperly commenting on the evidence or case may be raised for the first time on appeal); *but see Mendez v. State,* No. 03-19-00546-CR, 2021 Tex. App. LEXIS 2326, at *6–7 (Tex. App.—Austin March 26, 2021, no pet.) (mem. op., not designated for publication) (suggesting the need to preserve improper comments by the trial court).

Next, statute proscribes certain comments by a judge. According to article 38.05 of the Code of Criminal Procedure:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

TEX. CODE CRIM. PROC. ANN. art. 38.05. A comment violates article 38.05 if it is “reasonably calculated to benefit the State or prejudice the defendant’s rights.” *Proenza*, 541 S.W.3d at 791.

The words of the court here, when read in context, do not allude to appellant’s truthfulness. Rather, the reasonable interpretation of the exchange was that of the trial court voicing concern about the need for a translator and the cost of having one present if none was needed. Most any comment may be twisted into meaning different things when stripped from its context. Yet, the test interjects the element of reasonableness. *Id.* In other words, we garner the reasonable interpretation of what was said when

assessing its potential impropriety. That requires consideration of the context. And, adding to the context the trial court's directive that appellant use the translator further exemplifies that the message imparted by the court reflected the need for a translator, not a viewpoint on appellant's truthfulness. *See Aguilar v. State*, 127 Tex. Crim. 247, 249–50 (Tex. Crim. App. 1934) (holding that the fact the trial court appointed a translator "discounted" any impropriety arising from its saying, in response to a request for a translator: "Ah, come on. These Mexicans can talk English as good as anybody. He is just stalling"). So, the utterance at bar was not reasonably calculated to benefit the State or prejudice the defendant's rights. It related to furthering the defendant's rights by assuring he understood what was being said.

Issue Two—Failure to Include Instruction Regarding Voluntariness

Through his second issue, appellant argues the trial court reversibly erred when it denied him a jury instruction of voluntariness. The evidence of his being tased, the pain ensuing from the act, and his desire to escape from that tasing and pain purportedly constituted some proof that his departure was nonvolitional. That allegedly entitled him to the instruction he requested. We overrule the issue.

It is true that a "person commits an offense only if he ***voluntarily*** engages in conduct, including an act, an omission, or possession." TEX. PENAL CODE ANN. § 6.01(a) (emphasis added). "Voluntariness" refers to one's physical body movements. *Febus v. State*, 542 S.W.3d 568, 574 (Tex. Crim. App. 2018). If such 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" then they are involuntary under section 6.01(a). *Rogers v. State,* 105 S.W.3d 630 (Tex. Crim. App. 2003). They are not involuntary merely because the actor did not intend what he did. *Rogers*, 105 S.W.3d at 638 (quoting *Adanandus v. State,* 866 S.W.2d 210 (Tex. Crim. App. 1993)).

Finally, an instruction is warranted when some evidence, irrespective of whether it is weak or strong, supports its submission. *Maciel v. State*, 631 S.W.3d 720, 722 (Tex. Crim. App. 2021). No less is true regarding an instruction on involuntariness.

That said, we begin by discounting the impact of appellant's intent mens rea into the equation. He may have left the scene because he wanted to avoid tasing and its pain, but that does not mean his conduct was involuntary. Indeed, leaving the scene due a desire to escape pain actually reflects a voluntary act.

As for the effect of tasing, appellant cites us to nothing of record indicating that the electrical impulse involved in the act can cause uncontrollable bodily movements that mirror the controllable movements necessary to drive a car. Maybe tasing and its effect on one's central nervous system can control bodily movements in a way that involuntarily forces a person to close a car door, accelerate the vehicle, and negotiate turns and curves, as did appellant here. Maybe it cannot. But more is needed in the syllogism proffered by appellant. It is not enough to simply say "because I was tased the act of driving away was reflexive, convulsive, or otherwise beyond physical control." There must be evidence linking the two. Without it, the cause and effect at issue here is mere speculation, and speculation is not evidence supporting the submission of an issue on the voluntariness of appellant's evading arrest.

Having overruled each of appellant's issues, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice

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