No. 01-24-00030-CR

In The Court of Appeals
For the First District of Texas



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Joseph Leonel Rivera,
Appellant

v.

The State of Texas,
Appellee

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On Appeal from Cause Number 2359037
From the County Criminal Court at Law #10
of Harris County, Texas

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# Brief for Appellant

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ORAL ARGUMENT NOT REQUESTED

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## IDENTITY OF PARTIES AND COUNSEL

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|---|---|
| APPELLANT: | Joseph Leonel Rivera<br>SPN # 02955743<br>Harris County Jail<br>1200 Baker Street<br>Houston, TX 77002 |
| TRIAL PROSECUTORS: | Mitchell Williams<br>State Bar No. 24125884<br>Gabriel Kabak<br>State Bar No. 24129379<br>Assistant District Attorneys<br>Harris County, Texas |
| DEFENSE COUNSEL AT TRIAL: | Ricardo Loredo<br>State Bar No. 24085437<br>231 W. Southmore Ave.,<br>Ste. 321<br>Houston, Texas 77502 |
| PRESIDING JUDGES: | Hon. Juanita Jackson |
| APPELLANT'S COUNSEL: | Amanda Koons<br>Assistant Public Defender<br>State Bar No. 24110105<br>1310 Prairie St., 13th floor<br>Houston, Texas 77002<br>(713) 274-6700 |

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## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested in this case.

## STATEMENT OF THE CASE

On December 6, 2023, a jury found Appellant guilty of Evading Arrest. On December 6, 2023, the Court assessed punishment at 120 Days County Jail. Notice of Appeal was filed on January 4, 2024.

## ISSUES PRESENTED

1. Did the court violate Article 38.05 and undermine the presumption of innocence by informing the jury that, in her opinion, this was not a controversial case?

## STATEMENT OF FACTS

This is a case about the right to a fair trial and to hold the state to its burden of proof.

The state set out to prove with a single law enforcement witness, that Mr. Rivera intentionally fled from J. Gonzalez, a peace officer employed by Baytown Police Department lawfully attempting to detain him, and that he knew that the complainant was a peace officer, and that the complainant was attempting to detain him (C.R. at 8).

The judge in this case informed the jury that she saw herself in the role of teacher on first day of trial. (2 R.R. 25). The jury looked to her, as juries do, to understand the law and the nature of the case they would be hearing. Although the judge had given the

jury information about the state's burden and the presumption of innocence earlier in the day, she let her personal opinion slip in her concluding instructions for the day: "Now, I don't think this -- this is not going to be a big controversial case or anything, not in my opinion. . ." (2 R.R. 154).

The case at trial ultimately came down to a single element according to defense counsel: "Judge, our whole case is he didn't know who he was running from. That's the argument." (3 R.R. 14). The judge expressed skepticism to the parties about this defense argument. *Id.*

Other elements were undisputed: the parties stipulated that Officer Gonzalez had at least reasonable suspicion to justify stopping Mr. Rivera (2 R.R. 139; 3 R.R. 16) and did not dispute that Mr. Rivera was hiding at one point (3 R.R. 41) and ran away from Officer Gonzalez after he came up behind him. (3 R.R. 35-36). After running for several seconds, Mr. Rivera slowed and turned to face Officer Gonzalez then stopped running (State's Exhibit 1 offered and admitted 3 R.R. 27).

The state admitted footage from the officer's body worn camera (State's Exhibit 1). Officer Gonzalez admitted that he did not verbally identify himself as a Baytown Police Officer when he came up behind Mr. Rivera (3 R.R. 45). Nothing in the body camera footage admitted showed that Mr. Rivera got a good look at the officer or his vehicle. When reviewing his body camera footage

with defense counsel, Officer Gonzalez pointed out only a "quick glance" from Mr. Rivera in the footage of the moments after the officer had already exited his police vehicle. (3 R.R. 43).

Defense counsel also spent considerable time establishing that Baytown's civilian patrol and private security vehicles and uniforms look similar, especially at a glance, to those used by Baytown Police Officers (3 R.R. 58-71). Officer Gonzalez admitted that it is illegal to evade a Police Officer, but not to evade a citizen patrol or private security (3 R.R. 48-49).

The State asked the jury to merely take the officer's word that there was another, longer and more definitive look of recognition (3 R.R. 43), but that this look happened to occur before officer Garcia activated his body worn camera (3 R.R. 30).

The jury retired to deliberate on the single important point of difference between the state and defense arguments: was Mr. Rivera unaware that Jose Gonzalez was a police officer when he ran from him? As they heard evidence and deliberated, the jury knew what the judge thought—there wasn't much controversy here. They returned with a guilty verdict.

## SUMMARY OF THE ARGUMENT

Trial judges have a statutory and constitutional duty to refrain from telling juries their opinions about a criminal case. This duty ensures that the public sees trial

judges as disinterested referees and that juries decide cases based on the evidence before them instead of the judge's outsized opinion of how a case should be decided.

By telling the jury before any evidence was presented that, in her opinion, this was not a big controversial case, the trial judge violated this duty. Her comment harmed Mr. Rivera by making it more likely that the jury would dismiss doubts raised by defense counsel and find him guilty.

## ARGUMENT AND AUTHORITIES

### POINT OF ERROR NUMBER ONE

THE TRIAL JUDGE VIOLATED HER DUTY AND IMPUGNED THE PRESUMPTION OF INNOCENCE WHEN SHE EXPRESSED HER OPINION THAT THERE WAS NOT A BIG CONTROVERSY IN THE CASE THE JURY WAS ABOUT TO HEAR.

#### *A. Standard of Review*

The existence of an article 38.05 violation is a question of law that an appellate court reviews de novo. *Costilla v. State*, 650 S.W.3d 201, 218 (Tex. App.—Houston [1st Dist.] 2021, no pet.).

#### *B. Applicable Law*

Article 38.05 of the Texas Code of Criminal Procedure states that the trial judge "may not comment on the weight of the evidence or convey an opinion of the case in the jury's presence at any stage of trial." This dictates that a judge must refrain from making any remark calculated to convey to the jury her opinion of the case. *Brown v. State*, 122 S.W.3d 794, 798 (Tex.Crim.App.2003).

Such a comment that is "reasonably calculated to benefit the State or prejudice the defendant's rights" under Article 38.05 is reversible error. *Ex Parte Scott*, 541 S.W. 3d 104 (Cr. App. 2017). The Court of Criminal Appeals has explained that this rule exists because "jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved." *Brown*, 122 S.W. 3d at 798. Because the trial judge has total authority over her courtroom and is seen as a neutral decisionmaker, the judge's opinion about a case, if expressed to the jury, could sway its decision. See *Brown v. State*, 122 S.W.3d at 798 & n.8 (Tex. Crim. App. 2003); *Ward v. State*, 243 S.W.2d 695, 697 (Tex. Crim. App. 1951). Thus, article 38.05 ensures that the public continues to see the trial judge as impartial, "dispensing justice without fear, favor, or affection" rather than acting as "an advocate for one side." *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

A defendant doesn't need to object at trial to preserve article 38.05 error. *Proenza v. State*, 541 S.W.3d 786, 801 (Tex. Crim. App. 2017). The duty to refrain from signaling an opinion about the case is a responsibility that rests with the judge alone and cannot be forfeited by party inaction. *Id.* (Citing *Marin v. State*, 851 S.W. 2d. 275 (Tex. Crim. App. 1993)("the right is "at least a category-two, waiver-only right")). Furthermore, objecting to a judge's expression of bias

would "be futile at best, and at worst could reinforce to the jury that the trial judge stands solidly in the corner" of the State. *Id.* at 799.

*C.* Analysis

In evaluating a claim of error under article 38.05, an appellate court must first determine if the trial judge made a comment that violated it. *Moore v. State*, 624 S.W.3d 676, 681 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd). A comment that "implies approval of the State's argument" violates article 38.05. *Id.*

The trial judge in this case touched the third rail of judicial commentary by directly stating her personal opinion of the case before the jury. The comment in this case was framed in words that exactly mimic what is prohibited by Article 38.05 statutory duty: "in my opinion." The judge's remark not only conveyed her opinion of the case overall: "this is not going to be a big controversial case or anything," it also implied favor for the State's case and cast doubt on the defense's ability to generate any controversy by pointing out reasonable doubts.[1]

[1] For context, the trial judge elaborated this opinion in a sidebar by expressing her doubt regarding Mr. Rivera's choice of defense theory: "Okay. Well, make that argument. You think you can make it? I saw the video, broad daylight officer in uniform. I saw a police car. . . I saw three or four police cars. I saw the guy hiding under. . . [s]o why would he be hiding if you didn't do anything wrong?"(3 R.R. 14).

The judge's skepticism about Mr. Rivera's defense was telegraphed to the jury before any evidence was ever presented.

If the trial judge made a comment that violated article 38.05, the court must next determine whether the comment was "material." *Moore v. State*, 624 S.W.3d at 682. "A comment is material if the jury was considering the same issue." *Id.* Indeed, this Court's sister appeals court has found judges' comments material when they indirectly suggested support for the State's theory of the case. See *Moore*, 624 S.W.3d at 682 (judge's comments in family-violence case were material because they indicated support for the complainant's testimony that the defendant assaulted her); *Simon v. State*, 203 S.W.3d 581, 592, 594 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (judge's comments in DWI case suggesting older breath test machine, which defendant used, was as reliable as newer breath test machine were material because they went to issue of whether defendant was intoxicated).

The judge's comment in this case was general and overarching: it was set up like a lens before the beginning of testimony. In doing so, the judge's comment reached the core issues of the state's burden and the presumption of innocence. This painted the jury's perception of all the evidence produced thereafter and their perception of any "controversy" the defense attempted to develop in response to the State's case in chief.

This impact was material especially because it minimized the importance of a defense that was based on a single element of the offense: Whether Mr. Rivera knew that Officer Gonzalez was in fact a police officer attempting to detain him. The jury was influenced from the outset to see this single-element defense as trivial and insignificant rather than as a doubt that might controvert the state's case and cause them to fall short of their all-important burden of proof.

### D. *Harm*

If the judge's comment was material, the court must finally decide whether the comment was harmful. *Moore*, 624 S.W.3d at 681. Because a violation of article 38.05 is a statutory violation, it is typically analyzed under Texas Rule of Appellate Procedure 44.2(b)'s standard for nonconstitutional harm. *Id.* Under Rule 44.2(b), a nonconstitutional error "must be disregarded" unless it affected a defendant's "substantial rights." Tex. R. App. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

"[A]n error had a substantial and injurious effect or influence if it substantially swayed the jury's judgment." *Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016). If the error did substantially sway the jury's judgment, or if the appellate court has "grave doubt" as to whether it did, the conviction must be

reversed. *Moore*, 624 S.W.3d at 683 (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). "Grave doubt' means that 'in the judges mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Hankston v. State*, 656 S.W.3d 914, 919 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd) (quoting *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App.2002)).

The error in this case may merit an even more rigorous harm review—an error that undermines a defendant's presumption of innocence is reviewed under Texas Rule of Appellate Procedure 44.2(a)'s standard for constitutional harm. *Miles v. State*, 204 S.W.3d 822, 826–27 (Tex. Crim. App. 2006). "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). One "basic component of a fair trial" is the "presumption of innocence." Id. Another "necessary component of a fair trial is an impartial judge." *Weiss v. United States*, 510 U.S. 163, 178 (1994). In *Blue v. State*, the Court of Criminal Appeals explained that when a judge makes comments in front of a jury indicating that he believes in the defendant's guilt, it violates a defendant's right to a fair trial, 41 S.W.3d 129, 132–33 (Tex. Crim. App. 2000). The four judges in the plurality wrote that such comments violate a defendant's right to a fair trial because they "vitiate[] the presumption of innocence." *Id.* (internal quotation marks omitted). In separate concurring opinions, Judges Mansfield and Keasler opined that such comments violate a

defendant's right to a fair trial because they show that the trial judge was biased against the defendant. Id. at 135 (Mansfield, J., concurring) and id. at 138–39 (Keasler, J., concurring). Under Rule 44.2(a), a constitutional error requires reversal unless the appellate court "determines beyond a doubt that the error did not contribute to the conviction." Tex. R. App. P. 44.2(a); *Miles*, 204 S.W.3d at 822.

As discussed above, the jury was influenced by the judge's opinion to think that the State would not have a hard time meeting its burden since the case was "not going to be a big controversial case or anything." Declaring from the outset that there would be no big controversy vitiated the presumption of innocence; the presumption of innocence should always remain if there is doubt as to even a single element of the offense. The judge's comment could have led jurors to disregard whatever controversy *was* generated by counsel at trial since their defense only involved a single element of the offense—no big controversy. Ultimately the idea that the decision the jury had to make in this case wasn't a controversial one undermined the state's burden to prove *every element* beyond a reasonable doubt.

Even if the court does not find that this is constitutional error, reversal is nevertheless warranted under the 44.2(b) standard due to the comment's influence on the jury's perception of the evidence. The lens effect of the

judge's opinion cannot be disregarded—the jury was primed from the outset to see the defense's single-element controversy from her perspective: as insignificant.

"[T]he influence of the trial judge on the jury is necessarily and properly of great weight … his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). In Mr. Rivera's case, the trial judge used her words to signal to the jury that the question of his guilt was uncontroversial. This revealed the judge to be more than a teacher or a neutral arbiter, but a partial player who placed her confidence on the side of the state. The possibility that the jury could have been infected by the judge's skepticism of Mr. Rivera's defense cannot be underestimated.

## CONCLUSION AND PRAYER

For the reasons stated above, Mr. Rivera prays that this Honorable Court sustain his point of error, reverse the judgement of conviction entered below, and remand to the trial court for a new trial.

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## CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.

/s/ Amanda Koons
_____
Amanda Koons

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 2454 words printed in a proportionally spaced typeface.

/s/ Amanda Koons
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Amanda Koons

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