Affirmed and Opinion filed February 8, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00478-CR

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SHARON K. BENAVIDES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 778,626

O P I N I O N

A jury found appellant guilty of possession with the intent to deliver a controlled substance, cocaine. The trial court sentenced appellant to twenty-two years' imprisonment in the Texas Department of Criminal Justice—Institutional Division. Appellant, in two points of error, contends, 1) the trial court erred in denying her motion to suppress evidence obtained as a result of an illegal stop; and 2) the prosecutor engaged in improper jury arguments. We affirm.

Background

In the early morning of March 24, 1999, DPS Trooper Jarrid Tealer (Trooper Tealer), was patrolling Interstate 10 (I-10) in Baytown, Harris County, Texas. Traveling westbound on I-10, Trooper Tealer observed appellant coming up fast behind him in a white Firebird. At the time, Trooper Tealer was driving ten miles an hour below the speed limit. As Trooper Tealer continued traveling west on I-10 in the right hand lane, appellant slowed to pace Trooper Tealer's speed. According to Trooper Tealer, appellant's driving caught his attention because it appeared she did not want to pass his car. Eventually appellant did attempt to pass Trooper Tealer's car. In the process of passing Trooper Tealer's car in the left lane, the two left tires on appellant's vehicle crossed over the "fog line" onto the shoulder of the highway for about fifty yards. At that point, Trooper Tealer suspected that appellant might be intoxicated and made a traffic stop.

Trooper Tealer activated his rear flashing lights, and appellant pulled over to the right shoulder. Trooper Tealer then approached appellant's vehicle from the passenger side, and asked appellant for her driver's licence. Appellant could not find her driver's license, so Trooper Tealer asked for her insurance, which she produced. According to Trooper Tealer, appellant did not appear to be intoxicated, but was extremely nervous and jittery. Appellant told Trooper Tealer that she had just driven to Louisiana to give her grandmother money for an operation the next day, and had turned around to return.

On the way back to his patrol car to check her license status, Trooper Tealer noticed two suitcases through the hatchback window of appellant's car. Trooper Tealer testified that he found the presence of the suitcases suspicious, given the story appellant just told him. Trooper Tealer returned to his patrol car and ran appellant's license, which came back clear with no outstanding warrants or criminal history. Trooper Tealer then walked back to appellant's vehicle and questioned her regarding her story.

Upon being questioned, appellant changed her initial story, and said that she had actually stayed in Louisiana. Trooper Tealer then asked appellant for her consent to search the car, which she voluntarily gave. Trooper Tealer first looked inside the two suitcases in which he found women's clothing, and $21,005.00 in numerous bundles. Trooper Tealer immediately asked appellant to step out of her car, and asked her whether she knew anything about the money. Appellant denied knowing anything about the money. Trooper Tealer then handcuffed appellant and placed her in the back of his patrol car, and completed the search. In a box wrapped in Christmas paper, which Trooper Tealer found odd because it was late March, he discovered a large quantity of cocaine in both powdered and crack form.

Motion to Suppress

In a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *State v. Ballard*, 897 S.W.2d 889, 891 (Tex. Crim. App. 1999). Generally, almost total deference is afforded to a trial judge's determination of historical facts, especially when the findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). However, appellate courts review de novo a trial court's determination of mixed questions of law and fact that do not turn on an evaluation of credibility. *Id*. Here, because the historical facts of the case are undisputed and the trial court was not in a better position than us to ascertain the reasonableness of the traffic stop from those facts, we review the trial judge's ruling on the motion to suppress de novo. *See Aviles v. State*, 23 S.W.3d 74, 76 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); *State v. Arriaga*, 5 S.W.3d 804, 805 (Tex. App.—San Antonio 1999, pet. ref'd).

In his first point of error, appellant contends that the trial court erred in denying his motion to suppress evidence obtained as a result of an unjustified stop. Appellant argues that Trooper Tealer did not have a reasonable suspicion that appellant was driving while intoxicated or had committed a traffic offense. We disagree.

A police officer may stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion, supported by articulable facts, that the person detained actually is, has been, or soon will be engaged in criminal activity. *Woods v. State*, 956 S.W.2d 33, 35 (Tex. Crim. App. 1997); *Texas Dept. of Public Safety v. Chang*, 994 S.W.2d 875, 877 (Tex. App.—Austin 1999, no pet.); *Hernandez v. State*, 983 S.W.2d 867, 869 (Tex. App.—Austin 1998, pet. ref'd).

With regard to DWI investigatory detentions, the Court of Criminal Appeals has set forth the totality of the circumstances test as the current reasonableness standard for reviewing warrantless arrests. *Hulit v. State*, 982 S.W.2d 431, 438 (Tex. Crim. App. 1998); *State v. Arriaga*, 5 S.W.3d 804, 805 (Tex. App.—San Antonio 1999, pet. ref'd).

Trooper Tealer stopped appellant based on a reasonable suspicion that appellant was driving while intoxicated. Under the totality of the circumstances test, we agree. Trooper Tealer articulated at least three facts, which when taken together, support his suspicion that appellant was intoxicated: 1) appellant was stopped at roughly 3:00 a.m. traveling west on I-10; 2) appellant drove up behind Trooper Tealer's vehicle going faster than he was, then slowed to pace his speed which was below the posted speed limit; and 3) appellant, in passing Trooper Tealer's vehicle, failed to maintain her lane, driving over the "fog line" and onto the shoulder of the highway.

Appellant relies upon *Tarvin v. State*, 972 S.W.2d 910 (Tex. App.—Waco 1998, pet. ref'd), and *Hernandez v. State*, 983 S.W.2d 867(Tex. App.—Austin 1998, pet. ref'd) for the proposition that a single instance of crossing a lane of traffic traveling in the same direction without exhibiting unsafe behavior is insufficient to give an officer reasonable suspicion that a ticketable traffic offense had been committed. We agree. We find, however, *Tarvin* and *Hernandez* clearly distinguishable from our present case.

In *Tarvin*, the court noted that the defendant never crossed another lane of traffic or

exhibited difficulty in maintaining a safe speed. *Tarvin*, 972 S.W.2d at 913. Moreover, the court in *Tarvin* acknowledges that the record failed to indicate that the officer believed that the defendant was intoxicated. *Id*. Likewise in *Hernandez*, the court noted that the testimony of the officer failed to provide any objective circumstances such as time, location, or vehicle movement that would lead a officer to suspect intoxication. *Hernandez*, 983 S.W.2d at 870. Rather, according to the officer, his sole basis for the stop concerned the "well being" of the driver. *Id*.

Unlike *Tarvin* and *Hernandez*, the record in our case establishes that Trooper Tealer stopped appellant for suspicion of intoxication, not for merely crossing the "fog line" and driving on the shoulder. Moreover, Trooper Tealer provided objective circumstances with regard to time, location, and vehicle movement that would lead an officer to suspect intoxication. Accordingly, we hold that it was not unreasonable for Trooper Tealer to conclude that appellant was intoxicated. Appellant's first point of error is overruled.[1]

Improper Jury Arguments

Appellant, in her second point of error, complains of four improper statements made by the state during closing argument.

It is well settled that permissible jury argument falls into four categories: 1) summation of the evidence; 2) reasonable deduction from the evidence; 3) answer to the argument of opposing counsel; and 4) a plea for law enforcement. *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997); *Moody v. State*, 827 S.W.2d 875, 894 (Tex. Crim. App. 1992); *Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990). Any argument outside of these areas will not constitute reversal unless the argument is manifestly improper, violates a

[1] Having determined that appellant's initial detention was based on reasonable suspicion of intoxication, appellant's consent to search her vehicle, therefore, was not tainted as a result of an illegal detention.

mandatory statute, or injects new and harmful facts into the proceeding. *Harris v. State*, 905 S.W.2d 708, 710 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *Moore v. State*, 804 S.W.2d 165, 167 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

In order to preserve error in jury argument for appellate review, the defendant must: 1) make an objection; 2) request an instruction to disregard; and 3) make a motion for mistrial. *Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993); *see McGinn v. State*, 961 S.W.2d 161, 165 (Tex. Crim. App. 1998) (explaining that if a trial court sustains an objection to improper jury argument, the complaining party must request an instruction to disregard to preserve error on appeal, if the instruction could have cured the error). Defendant must have objected and pursued that objection to an adverse ruling. *McFarland*, 989 S.W.2d at 751; *Cockrell v. State*, 933 S.W.2d 73, 79 (Tex. Crim. App. 1996); *Cook*, 858 S.W.2d at 473. Appellant complains of four instances in which the prosecutor's arguments to the jury were impermissible, but has only successfully preserved error as to three.[2]

A. First Statement

Appellant first complains that the following statement violates her fifth amendment right not to testify, and is not supported by the evidence at trial:

> How does she act when the officer points out the items to her? Oh, my God, there's cocaine in my car? No. It's not mine. Somebody borrowed my car. Somebody. Somebody used my car. Not Joe Smith used my car today. Oh my God, he must have left something in it. Here's his number, here's his address, talk to him, it's not mine.

We disagree. This statement is merely a reasonable deduction from the evidence at trial. Trooper Tealer's testimony and the videotape of appellant's detention clearly demonstrates a

[2] Appellant failed to preserve error as to the following statement: "No, we can't open up Sharon Benavides' head and say: This is what she's thinking. And, of course, as the Judge has told you, she has a Fifth Amendment right not to say anything." Appellant's trial counsel objected, and the trial judge sustained the objection and instructed the jury to disregard. Appellant's trial counsel, however, failed to move for a mistrial, and therefore did not pursue her objection to an adverse ruling.

lack of shock or outrage on behalf of the appellant, which the State had a right to point out. Moreover, the evidence at trial reflects an attempt by appellant to shift the responsibility for the drugs to some unspecified person who had her car that day in Louisiana. Trooper Tealer was asked, "You noticed that on the tape Ms. Benavides tells you that somebody else had her car that day in Louisiana, correct?", to which he responds, "Yes, that's correct." Trooper Tealer then testifies that he never found out the identity of the person who allegedly used appellant's vehicle while she was in Louisiana.

Accordingly, the above quoted statement made by the prosecution was permissible as a reasonable deduction from the evidence presented at trial, and does not implicate appellant's Fifth Amendment rights.

B. Second Statement

Next, appellant complains of the following statement, "Based on his instincts and training and gut feeling, we've got almost 900 grams of cocaine off the street. Thank you, Trooper Tealer." The trial court sustained appellant's objection, instructed the jury to disregard, and denied her motion for mistrial.

A mistrial is an extreme remedy for prejudicial events which occur during the course of a trial. *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). The trial court's ruling on a motion for mistrial is reviewed under an abuse of discretion standard. *Id*. at 698. A trial court commits error in denying a motion for mistrial only if the argument is extreme, manifestly improper, injects new and harmful facts into the case or violates a mandatory statutory provision and was thus so inflammatory that its prejudicial effect cannot be reasonably removed from the minds of the jury by an instruction to disregard. *Foster v. State*, 25 S.W.3d 792, 798 (Tex. App.—Waco 2000, pet. ref'd); *Carlock v. State*, 8 S.W.3d 717, 725 (Tex. App.—Waco 1999, no pet. h.). If the reviewing court finds that an instruction cured any prejudicial effect caused by the improper argument, the trial court did not err. *Foster*, 25

S.W.3d at 798; *Faulkner v. State*, 940 S.W.2d 308, 312 (Tex. App.—Fort Worth 1997, pet. ref'd). However, if the instruction did not cure the prejudicial effect, error results, and the reviewing court proceeds with a harm analysis. *Foster*, 25 S.W.3d at 798; *Carlock*, 8 S.W.3d at 724.

The above quoted portion of the State's argument was neither extreme, nor manifestly improper. It also did not inject new and harmful facts into the case or violate a mandatory statute. In reviewing the record, nothing indicates that the State intended to taint the proceedings through this statement. Furthermore, the jury is presumed to have obeyed the instruction, and a review of the record reveals no indication that the jury failed to follow the instruction. *See Bauder*, 921 S.W.2d at 698. Assuming, without deciding, the argument was improper, we hold the instruction given by the trial court cured the prejudicial effect, if any.

C. Third Statement

Lastly, appellant argues that the following constituted an impermissible jury argument:

> In his questions to Trooper Tealer, Mr. Gerger made sure to ask: Did you call the grandmother? Did you get a phone number? Did you try to check that out? Remember, there is no burden on the defendant at all, but they do have rights. They have rights to call witnesses.

We disagree. A prosecutor's remark constitutes an impermissible comment on a defendant's failure to testify if the remark alludes to missing evidence that could only be supplied by the defendant. *Angel v. State*, 627 S.W.2d 424, 426 (Tex. Crim. App. 1982). The present statement does not allude to missing evidence that only the defendant could supply. Clearly, appellant's grandmother could have provided the missing evidence. Accordingly, the above quoted statement made by the prosecution was permissible.

Having found no impermissible jury arguments made by the State, we overrule appellant's second point of error.

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed February 8, 2001.

Panel consists of Chief Justice Murphy and Justices Hudson and Amidei.[3]

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[3] Former Justice Maurice Amidei sitting by assignment.