Opinion issued July 14, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00081-CR

ANTONIO GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1550443

MEMORANDUM OPINION

Late one evening, two Houston Police Department officers were patrolling a high-crime neighborhood when Antonio Garcia came to a screeching halt at a red light next to them and then quickly turned around in the other direction when the light turned green, as if he were trying to avoid them. Suspecting Garcia might be

driving while intoxicated or otherwise engaged in criminal activity, the officers tried to conduct a traffic stop. But Garcia fled, leading the officers on a dangerous, high-speed chase, which came to an abrupt stop when Garcia hit a parked car in a residential neighborhood on the other side of town. The officers arrested Garcia and, upon further investigation, determined that the vehicle he was driving had been recently stolen.

Garcia was charged with evading detention with a motor vehicle and unauthorized use of a motor vehicle. In a consolidated trial, he was convicted of both charges and sentenced to confinement for 25 and 4 years, respectively, with the sentences to run concurrently. Garcia now appeals the conviction for evading detention.

In six issues, Garcia contends that (1) the evidence is legally insufficient to support his conviction because the State failed to prove the officers' initial attempt to detain him was lawful, (2) the trial court made four charge errors relating to the lawfulness of the officers' initial attempt to detain him, and (3) the trial court erred in denying his motion to sever the two charges. We hold that (1) the State presented sufficient evidence that the officers' initial attempt to detain Garcia was lawful, (2) the charge errors, if any, did not egregiously harm Garcia, and (3) the trial court did not err in denying Garcia's motion to sever because the motion was untimely filed.

Accordingly, we affirm.

Background

On the evening of May 6, 2017, Houston Police Department Officers Morelli and Meola were patrolling a high-crime area in a marked police cruiser as part of a proactive crime reduction unit. A few minutes after midnight, the officers were stopped at a red light, when a Ford pickup truck driven by Garcia came to a screeching halt next to them. Then, when the light turned green, Garcia quickly turned around and drove off in the other direction, as if he were trying to avoid contact with them. Suspecting Garcia might be driving while intoxicated or otherwise engaged in criminal activity, the officers decided to conduct an investigatory traffic stop.

The officers turned around, caught up to Garcia, and activated the cruisers' overhead lights to conduct the stop. Garcia slowed and showed signs that he was going to pull over. But then he sped off, leading the officers on a dangerous, high-speed chase across town. During the chase, Garcia drove in excess of 100 miles per hour, drove on the wrong side of the road, drove without headlights, and ran several red lights.

The chase began on Fulton Street near I-45 north of I-610. Near the intersection of I-610 and I-45, the officers lost sight of Garcia. They found him again in the Galleria area driving with no headlights, and the chase resumed. The

chase continued into the neighborhoods off US 59 south. Garcia eventually hit a parked car, disabling the truck. Garcia then got out of the truck, discarded a screwdriver, and took off on foot but was quickly apprehended by the police. After they arrested Garcia, the officers returned to the disabled truck and observed damage to the driver's side door and the ignition area. The officers then contacted the registered owner, who advised that the vehicle was missing from his driveway.

Garcia was charged with evading detention with a motor vehicle and unauthorized use of a motor vehicle, both enhanced by two prior felony convictions. In a consolidated trial, the jury found Garcia guilty of both charges, found the enhancement allegations to be true, and assessed punishment at 25 years' confinement for the conviction for evading detention and 4 years' confinement for the conviction for unauthorized use of a motor vehicle. The trial court entered a judgment of conviction in accordance with the jury's verdict with the sentences to run concurrently.

Garcia now appeals the conviction for evading detention.

Legal Sufficiency

In his first issue, Garcia argues that the evidence is legally insufficient to support his conviction because the State failed to prove the officers' initial attempt to detain him was lawful.

A. Applicable law and standard of review

A person commits the offense of evading detention "if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him." TEX. PENAL CODE § 38.04(a). The only element of the offense Garcia challenges on appeal is the lawfulness of the officers' attempt to detain him.

Under the Fourth Amendment, a police officer may lawfully detain the driver of a vehicle for a brief investigatory traffic stop so long as the officer has reasonable suspicion to do so. *Navarette v. California*, 572 U.S. 393, 396–97 (2014); *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011). An officer has reasonable suspicion if he has specific and articulable facts that, combined with rational inferences from those facts, would lead him reasonably to believe the driver is, has been, or soon will be engaged in criminal activity. *Derichsweiler*, 348 S.W.3d at 914. Reasonable suspicion is an objective standard that disregards the actual subjective intent of the detaining officer and instead considers the totality of the circumstances to determine whether there was an objectively justifiable basis for the detention. *Id.*

We review de novo the legal question of whether the totality of the circumstances is sufficient to support an officer's reasonable suspicion. *Crawford*

v. State, 355 S.W.3d 193, 196–97 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

B. Analysis

At trial, the State's primary evidence of the lawfulness of Officers Morelli and Meola's initial attempt to detain Garcia was their testimony.

Officer Morelli testified that he is a 12-year veteran of the HPD and that, on the night of Garcia's arrest, he and his partner, Officer Meola, were patrolling a high-crime area in a marked cruiser as part of a proactive crime reduction unit. Morelli testified that, just after midnight, he and Meola were stopped at a red light when a Ford pickup truck driven by Garcia came to a "screeching halt" next to them, which caught his attention. Morelli explained that, based on his training and experience in identifying potential DWI suspects, a vehicle coming to a screeching halt is a sign that the driver might be intoxicated. Morelli testified that when the light turned green, he and Meola continued to drive forward, but Garcia turned around and "kind of sped off a little bit," which again caught his attention, leading him to believe Garcia might be "trying to get away" from them. Morelli testified that he and Meola then decided to conduct a traffic stop "to make sure [Garcia] wasn't drunk." The officers turned around, caught up to Garcia, and activated their cruiser's overhead lights to conduct the stop. Garcia slowed and showed signs that

he was going to pull over. But then Garcia suddenly sped off, leading the officers on a dangerous, high-speed chase.

Officer Meola's testimony corroborated Officer Morelli's. Meola testified that, like Morelli, he is a 12-year veteran of the HPD. Meola testified that, on the night of Garcia's arrest, he was on patrol with Morelli and suddenly heard "screeching tires," which caught his attention. He then looked over and saw Garcia's vehicle "failing to maintain a single lane." Meola testified that this signaled to him that the vehicle might be "leaving the scene" of a crime or the driver might be "impaired." Meola testified that he and Morelli therefore decided to conduct a traffic stop.

Thus, the officers testified that their attempt to detain Garcia was primarily based on three specific and articulable facts: (1) Garcia drove the vehicle while failing to maintain a single lane, (2) came to a screeching halt at a red light next to the officers' marked police cruiser, and then (3) quickly turned around and began driving in the other direction when the light turned green.

The officers explained the rational inferences they made from those facts. From the facts that Garcia failed to maintain a single lane and came to a screeching halt at the red light, the officers inferred that Garcia might be intoxicated, as they had been trained to identify such driving behavior as evidence of drunk driving. *See Leming v. State*, 493 S.W.3d 552, 563–64 (Tex. Crim. App. 2016) (weaving

within lane is relevant factor in determining reasonable suspicion of DWI); *Curtis v. State*, 238 S.W.3d 376, 381 (Tex. Crim. App. 2007) (holding that record supported determination that officer had reasonable suspicion that defendant was DWI in part because officer had received specialized training in detecting DWI). From the fact that Garcia quickly drove off in the other direction, the officers inferred that Garcia might be trying to evade them, which, if true, would further support their suspicion that Garcia might be drunk driving. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.").

Finally, the officers testified to additional circumstances that further indicate their belief that Garcia might be DWI was reasonable. The officers both testified that they are experienced 12-year veterans and trained to recognize drunk drivers. *See Curtis*, 238 S.W.3d at 381; *Ford v. State*, 158 S.W.3d 488, 494 (Tex. Crim. App. 2005) (officer's training and experience are relevant factors in determining reasonable suspicion); *see also United States v. Cortez*, 449 U.S. 411, 419 (1981) ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion."). The officers testified that they attempted to stop Garcia a little after midnight, a time at which one would reasonably suspect there to be more drunk

drivers. *See Foster v. State*, 326 S.W.3d 609, 613–14 (Tex. Crim. App. 2010) (time of day is relevant factor in determining reasonable suspicion of DWI); *Curtis*, 238 S.W.3d at 381 (criticizing court of appeals for failing to consider "the lateness of the hour" at which driver was observed weaving in and out of lane). And the officers testified that they tried to stop Garcia in a high-crime area, a location at which one would reasonably suspect there to be more crime. *See Wardlow*, 528 U.S. at 124 (whether stop occurred in "high crime area" is "among the relevant contextual considerations" in determining reasonable suspicion); *Foster*, 326 S.W.3d at 613–14 (location is relevant factor in determining reasonable suspicion).

We hold that the evidence is sufficient to show that the officers' attempt to detain Garcia was based on specific and articulable facts that, combined with rational inferences from those facts, could have led a reasonable officer to believe Garcia was DWI. Thus, the evidence is sufficient to show the officers' attempt to detain Garcia was based on reasonable suspicion and therefore lawful.

We overrule Garcia's first issue.

Jury Charge

In his second, third, fourth, and fifth issues, Garcia contends that the trial court made four jury charge errors related to the lawfulness of the officers' initial attempt to detain him. Garcia contends that the cumulative effect of these errors caused him egregious harm.

A. Applicable law and standard of review

In every felony case tried to a jury, the trial court must "deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury." TEX. CODE CRIM. PROC. art. 36.14. "The purpose of the jury charge is to inform the jury of the applicable law and guide them in its application to the case." *Beltran De La Torre v. State*, 583 S.W.3d 613, 617 (Tex. Crim. App. 2019) (quoting *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996)).

We review a jury-charge issue in two steps. *See Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013). First, we determine whether error exists in the jury charge. *See id.* Second, if error exists, we determine whether sufficient harm was caused by that error to require reversal. *See id.*

"The degree of harm necessary for reversal depends upon whether the error was preserved." *Hutch*, 922 S.W.2d at 171. When, as here, the defendant fails to object to the charge, we will not reverse for jury-charge error unless the record shows "egregious harm" to the defendant. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). For egregious harm to be established, the charge error must have affected "the very basis of the case," "deprive[d] the accused of a

valuable right," or "vitally affect[ed] his defensive theory." *Id.* at 172 (internal quotation marks and citations omitted). To assess whether egregious harm occurred, we look to the particular facts of the case and consider: (1) the entire jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the parties' arguments, and (4) all other relevant information in the record. *Id.* at 171. We conduct this review of the record to "illuminate the actual, not just theoretical, harm to the accused." *Id.* at 174.

B. Analysis

The charge addressed the lawfulness of the officers' initial attempt to detain Garcia in the following five paragraphs:

> You are instructed that under our law no evidence obtained or derived by an officer or other person as a result of an unlawful stop and detention or an unlawful arrest shall be admissible in evidence against such accused.
>
> An officer is permitted to make a temporary investigative detention of a person if the officer has a reasonable suspicion that some activity out of the ordinary is or has occurred, that the person detained is connected with such activity, and that there [is] some indication that the activity is related to crime or a criminal offense.
>
> You are further instructed that a peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.
>
> Under our law, a person commits the offense of evading arrest or detention if he intentionally flees from a person he knows is a peace officer attempting to arrest him or detain him for the purpose of questioning or investigating possible criminal activity, provided however, that the initial arrest, detention, is lawful.

> Now, bearing in mind these instructions, if you find from the evidence, or if you have a reasonable doubt thereof, that on the occasion in question, prior to the stop, detention, or attempted stop or detention of the defendant by the peace officer involved herein, if any, the officer lacked the authority under the law to make a temporary investigative detention, then such stop or attempted stop of the accused would be illegal, and if you find the facts so to be, you will disregard the testimony of the officer relative to his stopping or attempting to stop the defendant and his conclusions drawn as a result thereof and you will not consider such evidence for any purpose whatsoever.

Garcia argues that these paragraphs are erroneous because they (1) fail to instruct the jury that reasonable suspicion "must be supported by specific, articulable facts," (2) fail to instruct the jury that reasonable suspicion is "an objective standard that disregards the subjective intent of the officer," (3) fail to instruct the jury to acquit upon finding the officers' initial attempt to detain was unlawful and instead instruct the jury to disregard certain parts of the officers' testimony, and (4) fail to apply the law of reasonable suspicion to the facts of the case.

Assuming without deciding the charge contains these errors, they do not entitle Garcia to reversal and a new trial because they did not cause him egregious harm.

The state of the evidence. The evidence of the lawfulness of the officers' initial attempt to detain Garcia consisted primarily of the testimony of Officers Morelli and Meola. As discussed above, the officers testified to specific and

articulable facts giving rise to their belief that Garcia might be intoxicated: namely, that (1) Garcia failed to maintain a single lane, (2) came to a screeching halt at a red light next to the officers' marked police cruiser, and (3) quickly turned around and drove in the other direction when the light turned green. Garcia did not offer evidence to rebut the officers' testimony, although he did demonstrate several inconsistencies and inaccuracies in other parts of the officers' testimony on cross examination. This factor weighs against egregious harm.

The argument of counsel. At closing, Garcia's principal argument was that the officers were not telling the truth about what they saw before their attempt to conduct the traffic stop. Garcia pointed to various inaccuracies and inconsistencies in the officers' testimony to argue that the officers had been "exaggerating" when they described Garcia's driving and their reasons for pulling him over. Garcia criticized the officers' "subjective" testimony that Garcia had not been "acting normal." He ended by reminding the jurors that if they found the officers' attempt to detain to have been unlawful, they had to acquit.

Most of the State's argument focused on the evidence supporting the other elements of the charged offenses. But when the State addressed the lawfulness of the officers' initial attempt to detain Garcia, the State highlighted the factual bases for the officers' belief that Garcia might be DWI. The State noted that the officers were experienced police veterans familiar with the area they were patrolling. The

State explained that the officers' belief that Garcia might be DWI arose from his failure to maintain a single lane, coming to a screeching halt at the red light, and otherwise erratic driving. The State reminded the jury that the officers did not have to observe Garcia commit a traffic violation as a condition to pulling him over and that it was enough for them to reasonably suspect Garcia of DWI.

Thus, the arguments of counsel focused on the alleged facts giving rise to the officers' belief that Garcia might be DWI and whether the officers' testimony about those facts was truthful. We hold the argument of counsel weighs against egregious harm.

Other relevant information. During jury deliberations, the jury requested a read-back of the officers' testimony concerning the reasons for the stop. In response, the trial court provided forms requiring the jury to specify the name of the witness, the examining lawyer, and the point in dispute. The jury then requested a read-back of the State's examination of Officers Morelli and Meola. The jury indicated that the "point in dispute" was the "behavior" that Garcia "display[ed] that led the officer to suspect that something was wrong" and that Garcia "might need to be detained."

The trial court read the jury the following testimony from Morelli:

> Q And talk about after you exited the freeway.
>
> A So we're sitting at the red light and the defendant comes to a screeching halt which caught my attention.

> Q So, in regards to what you saw the defendant's vehicle doing, you say you saw him come to a screeching halt. What did you do after that?
>
> A I looked over to see what was going on, make sure there wasn't an accident or anything and—
>
> Q At any point did you decide to pull the defendant over?
>
> A I was thinking, you know, he caught my attention. I wanted to see what was going on. I wanted to make sure he wasn't drunk or—
>
> And the trial court read the jury the following testimony from Meola:
>
> Q Could you talk about your first initial encounter with the defendant?
>
> A So, we're just driving around and a Ford F-350 caught our attention. I believe we heard some tires squeal. We looked over and saw that the truck was kind of like failing to maintain a single lane.
>
> Q Officer Meola, after you heard the—you said the screeching tires and you saw him failing to maintain a single lane, what did that signal to you in your mind?
>
> A That the vehicle could be maybe leaving a scene or that the driver could be impaired.

The jury's requests for read-backs—and the trial court's responses to them—strongly indicate that, in determining the lawfulness of the officers' initial attempt to detain Garcia, the jury considered the specific and articulable facts giving rise to the officers' stated belief that Garcia might be DWI. This weighs against egregious harm.

Conclusion. Assuming the charge weighs in favor of egregious harm, the other relevant factors weigh against egregious harm.

From the alleged charge errors, there was a theoretical harm that the jury would improperly find the officers' attempt to detain was lawful based on the officers' subjective opinions and other improper criteria. *See id.* But our review of the relevant factors leads us to conclude Garcia was not actually harmed in this way. *See id.* On balance, these factors tend to show the jury properly based its finding on the specific and articulable facts to which the officers testified. We hold that the record fails to show Garcia suffered egregious harm from any errors in the jury charge.

Accordingly, we overrule Garcia's second, third, fourth, and fifth issues.

Motion for Severance

In his sixth issue, Garcia contends that the trial court erred in denying his motion to sever the two offenses for which he was charged, namely, evading detention in a motor vehicle and unauthorized use of a motor vehicle.

Subject to some exceptions not applicable here, whenever two or more offenses have been consolidated for trial, the defendant has the right to a severance of the offenses. *See* TEX. PENAL CODE § 3.04. But because a motion for severance is a "pleading of the defendant" under article 28.01, it must be raised pretrial to be considered timely. *Thornton v. State*, 986 S.W.2d 615, 617 (Tex. Crim. App. 1999)

(per curiam); *see* TEX. CODE CRIM. PROC. art. 28.01, §§ 1(2), 2. Thus, if a motion for severance is not raised until the first day of a trial's setting, the motion is not timely, and the trial court does not err in denying it. *See Writt v. State*, 541 S.W.2d 424, 425–26 (Tex. Crim. App. 1976) (pretrial motions filed "the day of trial" are untimely under article 28.01 and trial court does not err in denying them).

Here, Garcia did not move to sever the offenses until just before the start of voir dire on the first day of the trial's setting. Therefore, Garcia's motion was not timely, and the trial court did not err in denying it. *See Hemphill v. State*, Nos. 03-99-00784-CR & 03-99-00785-CR, 2000 WL 962846, *2–3 (Tex. App.—Austin July 13, 2000, pet. ref'd) (not designated for publication) (severance request made "just before beginning jury voir dire" was not timely).

We overrule Garcia's sixth issue.

Conclusion

We affirm.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

Do not publish. TEX. R. APP. P. 47.2(b).