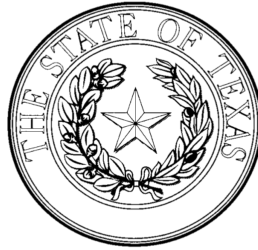
Opinion issued July 14, 2020



In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00864-CR

TED DAHL, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Brazoria County, Texas
Trial Court Case No. 237873

O P I N I O N

A jury found Ted Dahl guilty of speeding and assessed a $200 fine. Dahl appeals contending that the trial court violated his right to due process by erroneously assigning him the burden of proof in its jury charge. We affirm.

BACKGROUND

The material facts are undisputed. Officer B. Pierson of the Village of Jones Creek Police Department pulled Dahl over for speeding on State Highway 36. Pierson's radar showed that Dahl was traveling at a speed of 66 miles per hour along a stretch of the highway where the posted speed limit was 55 miles per hour. Pierson ticketed Dahl for speeding. *See* TEX. TRANSP. CODE §§ 545.351–.352.

Dahl does not deny that his speed exceeded the posted limit. He nonetheless contested the ticket in municipal court, which found him guilty and fined him $200. Dahl appealed to the county court at law, where the case was tried de novo before a jury. *See* TEX. CODE CRIM. PROC. art. 45.042(a), (b). The jury likewise found Dahl guilty and assessed a $200 fine.

Dahl now appeals from the county court's judgment. In a single issue, he contends that the county court violated his right to due process by assigning the burden of proof to him in the jury charge. The charge provided in part that:

> All persons are presumed to be innocent, and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The defendant is presumed innocent of the charge. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> * * *

The State must prove every element of the offense charged beyond a reasonable doubt. The burden of proof throughout the trial is always on the State. The defendant does not have to prove anything. If the State proves every element of the offense beyond a reasonable doubt, then you must find the defendant guilty. If the State does not prove every element of the offense beyond a reasonable doubt, then you must find the defendant not guilty.

* * *

The law requires that you render a verdict of either "guilty" or "not guilty." The verdict of "not guilty" simply means that the State's evidence does not prove the defendant guilty beyond a reasonable doubt.

* * *

A person commits the offense of speeding if he operates a motor vehicle at a speed greater than is reasonable and prudent under the circumstances then existing. An operator may not drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for actual and potential hazards then existing; and shall control the speed of the vehicle as necessary to avoid colliding with another person or vehicle that is on or entering the highway in compliance with the law and the duty of each person to use due care.

A speed in excess of the zone or posted speed is prima facie evidence that the speed is not reasonable or prudent and that the speed is unlawful.

* * *

You must determine whether the State has proved, beyond a reasonable doubt, that the defendant, Ted Emil Dahl, on or about the 22nd day of November 2017, in Brazoria County, Texas, did then and there drive and operate a motor vehicle in and upon a public highway, to wit: State Hwy 36 @ Smith Street, within the territorial limits of the City of Jones Creek, and within an urban district, at a speed which was greater than was then and there reasonable and prudent under the conditions then existing, having regard to the actual and potential

> hazards, to wit: at a speed of 66 miles per hour, at which time and place the posted speed limit was 55 miles per hour, and at such time was not operating an authorized emergency vehicle responding to calls; was not a police patrol; and was not a physician or ambulance responding to an emergency call.
>
> If you all agree the State has proved, beyond a reasonable doubt, each of the elements listed above, you must find the defendant "guilty" and assess a fine of not less [than] one dollar ($1.00) and not more than two hundred dollars ($200.00).
>
> If you all agree the State has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant "not guilty."

In the county court, Dahl objected to the charge's instruction that exceeding a posted speed limit is prima facie evidence that a driver's speed was not reasonable and prudent and thus unlawful. Dahl argued that this instruction should not be included in the charge because it unconstitutionally placed the burden of proof on him. According to Dahl, the concept of prima facie evidence entails shifting the burden of proof to the defendant after certain evidence has been introduced by the State. Thus, Dahl reasons, once the State introduced evidence that he had exceeded the posted speed limit, the prima facie evidence instruction then required him to disprove his guilt. The county court overruled his objection. He appeals.

DISCUSSION

Standard of Review

We review an alleged jury charge error regardless of preservation. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). Our review of jury charge error

consists of a two-step process. *Id.* We first determine whether the challenged instruction is erroneous. *Id.* When we review a charge for error, we consider the charge as a whole rather than as a series of isolated and unrelated statements. *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012). If the charge is erroneous in some respect, we then analyze the error for harm. *Kirsch*, 357 S.W.3d at 649. The degree of harm required for reversal varies depending on whether error was preserved. *Id.* If the error was preserved, it is reversible if it caused some harm. *Jordan v. State*, 593 S.W.3d 340, 346 (Tex. Crim. App. 2020). Under this standard, any harm whatsoever requires reversal. *Chambers v. State*, 580 S.W.3d 149, 154 (Tex. Crim. App. 2019). If the error was not preserved, it is reversible if it caused egregious harm. *Jordan*, 593 S.W.3d at 346. Under this standard, the error warrants reversal only if it resulted in so much harm that it deprived the defendant of a fair and impartial trial. *Chambers*, 580 S.W.3d at 154.

Applicable Law

A driver "may not drive at a speed greater than is reasonable and prudent under the circumstances then existing." TEX. TRANSP. CODE § 545.351(a). A speed in excess of a posted limit "is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful." *Id.* § 545.352(a). Speeding is a misdemeanor subject to a fine between $1 and $200. *Id.* §§ 542.301, 542.401.

In a prosecution for speeding, no particular weight is assigned to "prima facie evidence" other than that is legally sufficient to support a conviction. *See Thomas v. State*, 474 S.W.2d 692, 695 (Tex. Crim. App. 1972). Thus, a jury may find a defendant guilty based on prima facie evidence, but it need not do so. *See id.*; *see also Pittman v. State*, 554 S.W.2d 190, 191 (Tex. Crim. App. 1977); *see, e.g.*, *Tollett v. State*, 219 S.W.3d 593, 601 (Tex. App.—Texarkana 2007, pet. ref'd).

Dahl's Argument

Dahl contends that the county court's instruction on prima facie evidence should not have been included in the jury charge because it "lowers the State's burden to prove its case beyond a reasonable doubt." A posted speed limit is merely one circumstance that a jury may consider in deciding whether a driver's speed was reasonable and prudent. Dahl maintains that the county court's instruction instead required the jury to presume—unless he proved otherwise—that his speed was not reasonable and prudent simply because he drove in excess of the posted limit. According to Dahl, the instruction therefore constituted a mandatory presumption of guilt, which impermissibly shifted the burden of proof to him.

Analysis

The charge instructed the jury that a driver commits the offense of speeding if his speed is "greater than is reasonable and prudent under the circumstances then existing." While the charge stated that a speed in excess of a posted limit is prima

facie evidence that the speed is not reasonable and prudent, it did not direct the jury to find that Dahl's speed was not reasonable and prudent based on this evidence. Nor did the charge direct the jury to find Dahl guilty based on this evidence. Instead, the charge informed the jury that it had to decide whether the State proved "beyond a reasonable doubt" that Dahl drove "at a speed which was greater than was then and there reasonable and prudent under the conditions then existing, having regard to the actual and potential hazards." The charge further instructed that if the State failed to carry its burden of proof, the jury was to find Dahl "not guilty." Finally, the charge instructed the jury that Dahl was presumed innocent, the burden of proof remained with the State throughout trial, and Dahl did not have the burden to prove anything. When viewed as a whole, the charge made plain that Dahl's speed relative to the posted limit was merely a relevant fact for the jury to consider in deciding whether the State carried its burden to prove beyond a reasonable doubt that his speed was not reasonable and prudent under the circumstances. Accordingly, we hold that the jury charge did not lower the State's burden of proof or shift that burden to Dahl.

The decision of the Court of Criminal Appeals in *Pittman* is instructive. In *Pittman*, the Court confronted a similar challenge to the charge in a speeding case on similar facts. A patrolman ticketed Pittman for speeding. *See* 554 S.W.2d at 190. The patrolman's radar showed that Pittman had been driving 74 miles per hour on a

stretch of highway where the posted limit was 55 miles per hour. *See id.* at 190–91. In the county court, a jury found Pittman guilty and fined him $150. *Id.* at 190.

Pittman appealed on the basis that the court had erred in its definition of prima facie evidence in the charge. *See id.* at 190–91. The charge provided:

> You are further instructed that under the laws of the State of Texas, it is provided that any speed in excess of the limits specified or established shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.
>
> "Prima facie" as used herein is that degree of evidence which is sufficient on the face of it to establish the facts above stated and if not rebutted remains sufficient for such purpose.

Id. Pittman argued that this charge shifted the burden of proof to him and, contrary to the presumption of innocence, did not require the State to prove his guilt beyond a reasonable doubt to obtain a conviction. *See id.* at 191.

The Court rejected Pittman's argument. It noted that the charge instructed the jury to find Pittman guilty if the evidence showed "beyond a reasonable doubt" that he drove "at a rate of speed greater than 55 miles per hour and that such speed was unreasonable and imprudent under the conditions then and there existing, having regard to the actual and potential hazards." *Id.* Otherwise, the jury was instructed to acquit Pittman. *Id.* The charge also instructed the jury that Pittman was presumed innocent and that the State had the burden of proof. *Id.* The Court held that the charge, when viewed as a whole, did not shift or lessen the burden of proof and did not direct the jury to find Pittman guilty based on prima facie evidence as a matter

of law. *Id.* The charge allowed the jury to assign the prima facie evidence whatever weight it thought was appropriate and thus was not erroneous. *Id.*

Like the *Pittman* charge, the charge here instructed the jury on the presumption of innocence and provided that the State bore the burden to prove Dahl's speed was not reasonable and prudent under the circumstances and that the State had to prove this beyond a reasonable doubt for the jury to find Dahl guilty of speeding. The charge as a whole thus is not erroneous in that it allowed the jury to assign whatever weight it thought exceeding the speed limit merited under the circumstances of the case. *See id.* at 190–91.

The *Pittman* charge differs from Dahl's in one material respect, but this difference reinforces our holding. Unlike the charge before us, the *Pittman* charge provided that a speed in excess of the posted limit was prima facie evidence of speeding and was sufficient to support a finding of guilt unless rebutted. *See id.* The *Pittman* charge thus arguably suggested the kind of burden-shifting Dahl complains about. Yet the Court of Criminal Appeals rejected Pittman's contention that this language shifted or lessened the State's burden. *See id. Pittman* is even more persuasive in this case, where the charge does not include similar language stating that prima facie evidence remains sufficient unless rebutted.

Dahl's characterization of the charge's prima face evidence instruction as an unconstitutional mandatory presumption fails for the same reasons. A presumption

is mandatory if it requires the factfinder to find an elemental fact based on proof of a predicate fact or requires the defendant to disprove the elemental fact once the predicate fact has been established. *Willis v. State*, 790 S.W.2d 307, 309 (Tex. Crim. App. 1990). Thus, the charge's instruction on prima facie evidence would constitute an impermissible mandatory presumption only if it required:

- the jury to find that Dahl's speed was not reasonable and prudent and thus unlawful if the State proved that Dahl exceeded the posted limit; or
- Dahl to disprove that his speed was not reasonable and prudent and thus unlawful once the State showed that he had exceeded the posted limit.

See id. The charge did neither. As explained, it allowed—but did require—the jury to find that a speed in excess of the posted limit was not reasonable and prudent and thus unlawful. Thus, the charge was a constitutionally permissible one. *See id.*

We overrule Dahl's sole issue.

CONCLUSION

We affirm the trial court's judgment.

Gordon Goodman
Justice

Panel consists of Justices Kelly, Goodman, and Hightower.

Publish. TEX. R. APP. P. 47.2(b).