Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01069-CR

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JOSE CRUZ CARRANZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 650,901

O P I N I O N

Jose Cruz Carranza appeals his jury conviction for two counts of involuntary manslaughter. The jury assessed his punishment at two years imprisonment on each count. In four points of error, appellant contends: (1) and (2) the evidence is legally and factually insufficient to sustain his conviction; (3) his trial counsel was ineffective; (4) the trial court erred in submitting an instruction telling the jury not to consider appellant's prior convictions as evidence. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

On November 1, 1992, at about 4:00 a.m., appellant exited an Exxon Station, drove across the northbound lanes of Highway 6, and hit the driver's side of Nevin Vora's car that was going south in the southbound lanes of Highway 6. Two of Vora's four children were killed.

Officer Tyler investigated the accident at the scene. Because the accident occurred six years previously, Tyler could not recall all of the details. Tyler stated he remembered leaning in appellant's car and smelling a strong odor of alcohol on appellant's breath, and observing that appellant's eyes were "glassed over." Tyler stated that appellant was transported to Ben Taub Hospital from the scene for treatment of his injuries. Tyler then called Officer Labby who prepared and accident reconstruction diagram of the scene.

Appellant's medical records reflecting his treatment for facial injuries, chest injuries, and multiple other contusions at the hospital were placed into evidence. The medical records showed that appellant's BAC (Blood Alcohol Concentration) at 7:23 a.m. was 0.176. The medical record also indicated that appellant admitted to "four beers" prior to the accident.

The court clerk testified that appellant failed to appear for a pretrial hearing on August 27, 1993, and his bail bond was forfeited, and a warrant for his arrest was issued. The clerk's record showed that appellant's next court appearance was April 28, 1998.

II. DISCUSSION.

A. Legal and Factual Sufficiency. In points one and two, appellant challenges the legal and factual sufficiency of the evidence to sustain his conviction. Specifically, appellant contends the evidence does not show his BAC was .10 or more at the time of the accident, nor does the evidence show he was reckless at the time.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App.1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App. 1993). In

reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex.Crim.App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex.Crim.App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex.Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex.Crim.App.1982).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id.* In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. The appropriate remedy on reversal is a remand for a new trial. *Id.*

A factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex.Crim.App.1997). This court's evaluation should not substantially

intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id*. The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Id.*

Appellant argues that this BAC of 0.176 showed his blood alcohol concentration at the hospital three hours and 28 minutes after the accident, and there was no evidence showing what his BAC would have been at the time of the accident. Furthermore, appellant argues there was no testimony by the officers stating that appellant's drinking caused the accident. Appellant cites *Mireles v. Texas Department of Public Safety*, 1998 WL 758032 (Tex.App.–San Antonio 1998) as authority for the proposition that the State must extrapolate what the BAC at the time it was taken would be at the time of the offense. The opinion cited by appellant was withdrawn by the San Antonio Court of Appeals and another opinion was issued in its place: *See Mireles v. Texas Department of Public Safety*, 993 S.W.2d 426 (Tex.App.–San Antonio 1999, no pet. h.) (defendant's BAC at time of offense based on evidence of chemical test after offense is question of fact). The original opinion in *Mireles* is attached as an appendix to the later opinion. *Id.* at 433.

Courts in the criminal context have generally found that this question of extrapolation is an issue for the trier of fact to weigh in its decision. *See Forte v. State*, 707 S.W.2d 89, 94-95(Tex.Crim.App.1986)(interpretingTEX.REV.CIV.STAT.ANN.art. 6701l--1(a)(2)(b))(now codified at. TEX. PENAL CODE § 49.01(2)(B)); *see also Owen v. State*, 905 S.W.2d 434 (Tex.App.--Waco 1996, pet. ref'd).

In *Forte*, the court of criminal appeals was faced with a challenge to the amended statute, which for the first time defined "intoxication" as either loss of faculties or having an alcohol concentration of .10 or greater in the body. The court found this new per se definition of intoxication did not constitute a mandatory conclusive presumption, and its explanation sheds light on our case:

> To be sure, if the State relies upon the 0.10% definition of intoxication, then such proof will normally appear in the form of a chemical test showing the alcohol concentration in a defendant's body near the time of the offense. However, a conviction will not necessarily follow from the offer of such a test. First, the trier of fact must still be convinced beyond a reasonable doubt that the chemical test provides trustworthy evidence of alcohol concentration in a defendant's breath, blood or urine. Second, the jury must still be convinced beyond a reasonable doubt that an inference can be made from the results of the chemical test that the defendant had a 0.10% alcohol concentration in his body *at the time of the offense*.
>
> Nothing prevents a defendant from challenging the validity of the test itself by attacking the reliability of the machine or the qualifications of the operator. [citations omitted] Nor does anything prevent a defendant from arguing that his alcohol concentration increased from the time of the arrest to the time of testing. In no way does Article 6701l--1, supra, encourage a jury to ignore such defensive evidence on the issue of intoxication in favor of a presumption, whether mandatory or permissive.

Forte, 707 S.W.2d at 94-95 (emphasis in original).

Thus, in a criminal case, in which the state must prove guilt beyond a reasonable doubt, the question of the lag time between driving and the chemical test is a matter to be weighed by the jury. *Mireles,* 993 S.W.2d 426, 429-430. To use a classic phrase, the question of lag time goes to weight, not admissibility. *Id.*

In *Owen*, a prosecution for involuntary manslaughter, the defendant challenged a breath test on the grounds that it had been administered about an hour after the accident and no testimony had linked the result to her condition at the time of the accident. *Owen*, 905 S.W.2d at 437-438. The reviewing court rejected this argument. It noted that in mandating the admissibility of such evidence, the Legislature implicitly accepted the fact that delay between the offense and test would be inevitable, and that it was for a properly instructed trier of fact

to determine the weight to be given such evidence. *Id*. at 439. As with *Forte*, *Owen* involved the much higher standard of review involved in a criminal case. *Id*. at 435.

In this case, evidence of appellant's ingestion of alcohol was in appellant's medical records which showed his BAC of 0.176 three hours and 28 minutes after the accident. The records also showed appellant admitted that he had consumed "four beers" prior to the accident. Officer Tyler stated he leaned in appellant's car and smelled the strong odor of alcohol on appellant's breath, and observed appellant's eyes were glassy. We find a rational trier of fact could have found beyond a reasonable doubt that appellant had an alcohol concentration of .10 or more at the time of the offense and caused the deaths of the children by reason of his intoxication.

Here, the jury returned a general verdict of guilty of involuntary manslaughter without specifying the theory of the offense. The case was submitted to the jury in the disjunctive; that is, they could find appellant guilty of involuntary manslaughter if they found he recklessly caused the deaths of the children, or if they found he caused their deaths by reason of intoxication. Having found the evidence is legally sufficient to support the jury's finding for involuntary manslaughter by intoxication, we will not address the sufficiency of the evidence to support a jury finding of involuntary manslaughter by recklessness. Where a general verdict is returned, and the evidence is sufficient to support a finding under any of the theories submitted, the verdict will be applied to the offense finding support in the facts. *Aguirre v. State*, 732 S.W.2d 320, 326 (Tex.Crim.App. 1982) (Opinion on Rehearing).

Appellant further contends the same evidence is factually insufficient to sustain his conviction. Appellant's contention goes to the weight and credibility of the evidence. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State,* 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id*. at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id.* at 410. In performing a factual

sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis,* 922 S.W.2d at 129. After reviewing the record, we conclude the jury's finding that appellant's intoxication caused the deaths of the children is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We find the evidence is factually sufficient to sustain appellant's conviction, and we overrule his points of error one and two

B. Ineffective assistance of counsel. In point three, appellant contends his trial counsel was ineffective for the following reason: Failing to object to the prosecutor's jury argument where he told the jury, in part, "[T]he law tells you that a defendant's flight is evidence of guilt."

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex.Crim.App.1992), *cert. denied,* 113 S.Ct. 3062 (1993). A reasonable probability is defined as probability sufficient to undermine confidence in the outcome. *Miniel v. State,* 831 S.W.2d 310, 323 (Tex.Crim.App.1992).

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *McFarland v. State,* 845

S.W.2d 824, 843 (Tex.Crim.App.1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670. The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. *Cannon v. State*, 668 S.W.2d 401, 403 (Tex.Crim.App.1984). *Strickland* applies to ineffective assistance of counsel claims at noncapital punishment proceedings. *Hernadez v. State*, 988 S.W.2d 770, 773-774 (Tex.Crim.App.1999).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App.1994)(en banc). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id.* In *Jackson*, the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. *Id*. at 772. *See also Jackson v. State*, 973 S.W.2d 954, 956-957 (Tex.Crim.App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

Appellant filed a motion for a new trial, but he failed to develop evidence of trial counsel's strategy at a hearing on that motion as was suggested by Judge Baird in his concurring opinion in *Jackson*, 877 S.W.2d at 772. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston[1st Dist.] 1994, pet. ref'd) (generally, trial court record is inadequate to properly evaluate ineffective assistance of counsel claim; in order to properly evaluate an ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex.App.–Corpus Christi 1992, pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim). *See also Beck v. State*, 976 S.W.2d 265, 266 (Tex.App.–Amarillo 1998, pet. ref'd) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim).

In the present case, the record is silent as to the reasons appellant's trial counsel chose the course he did. The first prong of *Strickland* is not met in this case. *Jackson,* 877 S.W.2d at 771; *Jackson,* 973 S.W.2d at 957. Due to the lack of evidence in the record concerning trial counsel's reasons for these alleged acts of ineffectiveness, we are unable to conclude that appellant's trial counsel's performance was deficient. *Id*. Because appellant produced no evidence concerning trial counsel's reasons for choosing the course he did, nor did he demonstrate prejudice to his defense, we overrule appellant's contention in point of error three that his trial counsel was ineffective.

C. Charge Error. In point four, appellant asserts that the trial court erred in submitting an instruction to the jury not to consider any evidence that appellant had been charged and convicted of an offense other that the one for which he was on trial. The instruction went onto say that such evidence was admitted before them for aiding them in passing on the weight they would give to appellant's testimony. Appellant's trial counsel did not object to the charge, and appellant contends he was "egregiously harmed" by the instruction. The instruction states:

> You are instructed that certain evidence was admitted before you in regard to the defendant's having been charged and convicted of an offense or offenses other than the one for which he is now on trial. Such evidence cannot be considered by you against the defendant as any evidence of guilt in this case. Said evidence was admitted before you for the purpose of aiding you, if it does aid you, in passing upon the weight you will give his testimony, and you will not consider the same for any other purpose.

The standard of review for errors in the jury charge depends on whether the defendant properly objected. *Mann v. State,* 964 S.W.2d at 641; *Almanza v. State,* 686 S.W.2d 157, 171 (Tex.Crim.App.1984)(opinion on reh'g); *Hines v. State,* 978 S.W.2d 169, 174 (Tex.App.–Texarkana 1998, no pet.). If a proper objection was raised, reversal is required if the error "is calculated to injure the rights of the defendant." *Almanza,* 686 S.W.2d at 171. The court of criminal appeals has interpreted this to mean *any* harm, regardless of degree, is sufficient to require reversal. *Arline v. State,* 721 S.W.2d 348, 351 (Tex.Crim.App.1986).

If a defendant does not object to the charge, reversal is required only if the harm is so egregious that the defendant has not had a fair and impartial trial. *Almanza,* 686 S.W.2d at 171. Errors which result in egregious harm are those which affect "the very basis of the case," deprive the defendant of a "valuable right," or "vitally affect a defensive theory." *Id*. at 172. If the jury charge contains error, the reviewing court must conduct a harm analysis considering the following four factors: (1) the charge itself; (2) the state of the evidence including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. *Abnor v. State,* 871 S.W.2d 726, 733 (Tex.Crim.App.1994); *Almanza,* 686 S.W.2d at 171.

Appellant contends that there was no evidence that he had ever been convicted of any other crime, and the court's charge erroneously tells the jury that he has been charged and convicted. Appellant argues that such an instruction is a comment on the weight of the evidence. Thus, appellant argues he has been egregiously harmed. Appellant fails to provide any case authority in support of his contention that the particular jury instructions in question were, in the first place, erroneous, much less that said instructions presented "egregious harm" to appellant. Appellant has waived this contention for review. TEX. R. APP. P. 38.1(h); *Bullard v. State,* 891 S.W.2d 14, 15 (Tex.App.-Beaumont 1994, no pet.). *See also, Vuong v. State,* 830 S.W.2d 929, 940 (Tex.Crim.App. 1991) *cert. denied,* 506 U.S. 997, 113 S.Ct. 595, 121 L.Ed.2d 533 (1992).

In any case, the evidence shows the court clerk testified that appellant did not appear for an earlier setting of a pretrial hearing in this case, that his bond was forfeited, and a warrant for his arrest was issued. There was no evidence as to whether appellant was ever charged with or convicted of bail jumping in connection with this warrant. However, this was evidence of extraneous bad conduct, and the charge given by the court was proper. *Barber v. State*, 511 S.W.2d 937, 941 (Tex.Crim.App. 1974) (the court may properly charge the jury that the testimony was admitted, not as proof of defendant's guilt of the crime charged, but only as it may affect his credibility as a witness, even though the defendant does not request such instruction). The charge given was not harmful, but beneficial to the appellant and was not a

comment on the weight of the evidence. *Fair v. State*, 465 S.W.2d 753, 754 (Tex.Crim.App.1971). We overrule appellant's point of error four.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed January 13, 2000.
Panel consists of Justices Cannon, Draughn, and Lee.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.