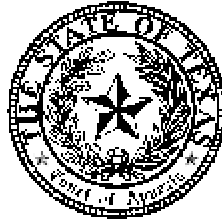
Affirmed and Opinion filed July 6, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01239-CR

ROLANDO ALFONSO GOMEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law no. 13
Harris County, Texas
Trial Court Cause No. 98-19940

O P I N I O N

Rolando Alfonso Gomez, appellant, was convicted by a jury of misdemeanor driving while intoxicated. The trial court sentenced appellant to 180 days in jail, probated for one year, and assessed a fine of $1,000. In five points of error appellant contests the factual sufficiency of the evidence and questions the judge's evidentiary rulings. We will affirm the judgment of the trial court.

SUFFICIENCY

In his first point of error appellant complains that the evidence was factually insufficient to support his conviction. This court has jurisdiction to review the factual sufficiency of the evidence. *Johnson v.*

State, no. 1915-98, 2000 WL 140257 (Tex. Crim. App. February 9, 2000). Our review begins with the presumption that the evidence is legally sufficient. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). We must look to all the evidence "without the prism of 'in the light most favorable to the verdict.'" *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). In our review, we must be careful not to intrude on the jury's role as the sole judge of the credibility of the witnesses or the weight to be given their testimony. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). We may set aside the verdict on factual sufficiency grounds only when that verdict is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 134-135.

Officer Joe Aldaco of the Houston Police Department testified at trial that he was working a radar checkpoint, along with officers Philip Kung and B. B. Nguyen, at about 9:15 p.m. on May 15, 1998. Aldaco was using the radar mounted in his patrol car to check vehicle speeds when he clocked a white GMC Tahoe travelling at 47 miles per hour in a 35 mile per hour zone. Aldaco told the other officers, who stepped into the roadway with flashlights and directed the Tahoe to pull over. Officer Aldaco also activated the emergency lights on his car. Instead of stopping, however, the Tahoe sought to make a U-turn and avoid the officers. Officer Kung cut off the Tahoe with his patrol car, and appellant emerged.

Kung testified that he noticed "a strong odor of alcoholic beverage" on his breath, and that "his speech was kind of slurred and bloodshot eyes." Kung also said appellant failed two field sobriety tests and then declined to perform any more tests, citing the advice of his attorney. Kung said that, in his opinion, appellant had lost his mental and physical capabilities and was intoxicated. Aldaco also saw appellant at this point and said he had bloodshot eyes and a strong odor of alcoholic beverage on his breath. Appellant was then placed under arrest.

Officer Craig Howard Bellamy gave appellant his statutory warnings and helped process appellant at the police station. Bellamy said appellant declined to take a breath test at the station or to perform any sobriety tests for the station's video camera. He also said that, in his opinion, appellant was intoxicated.

Appellant called several acquaintances to testify as to his condition that night. Julieta Lefler, a co-worker, said he was not intoxicated when she left the office at about 5:30 p.m. James Hattenberg also said

appellant was not intoxicated about 5:00 p.m. when he left work. William Pastor said he saw appellant at the restaurant about 8:00 p.m. and that appellant was not intoxicated at that time. Carla Sue Davis, a waitress at the restaurant, said she spoke with appellant about five times that night because he was a regular customer. She said he did not appear to be intoxicated at the restaurant. However, she was not his waitress and did not know what he had to eat or drink. Rob Robinson also testified he saw appellant about 8:30 p.m. at the restaurant and that he did not appear to be intoxicated.

Appellant took the stand and admitted to having two beers, one before and one after his dinner, at a restaurant earlier that evening. He attributed his failure on the horizontal gaze nystagmus test to eye surgery, and his failure to stand on one foot for thirty seconds to a bad knee and a bad back. He said he declined to walk a straight line because of loose gravel on the roadway, and that he declined to perform any further field sobriety tests because "my attorneys have always advised me against doing anything."

After reviewing the evidence we cannot say the jury's finding was so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We overrule appellant's first point of error.

EVIDENCE POINTS

In his second point of error appellant contends the trial court erred in not granting his motion for a mistrial when the prosecutor allegedly struck at him over the shoulders of counsel. During closing argument, the prosecutor made numerous references to appellant's decision not to participate in field sobriety tests based on what lawyers had told him. The only error preserved by objection was in the following exchange:

[PROSECUTOR]: This is your opportunity to send a message. You can send a message to this defendant that planning ahead with your attorneys on how to beat a DWI - - [DEFENSE ATTORNEY]: Objection. That's a misstatement of the facts. There is no plan with an attorney.

[THE COURT]: Sustained.

The court then instructed the jury to disregard but denied a motion for mistrial.

Appellant argues on appeal that this constituted striking at appellant over shoulders of counsel, which would call for a reversal and remand for new trial. *See Orona v. State*, 791 S.W.2d 125 (Tex. Crim. App. 1992). However, as noted in *Orona*, the complained-of conduct must be uninvited and must not be supported by any evidence in the record. *Id.* at 129. Here appellant admitted to asking attorney friends about what to do if ever stopped for driving while intoxicated. The State's argument finds support in the record and therefore does not constitute striking appellant over the shoulders of counsel. Appellant's second point of error is overruled.

In his third point of error appellant argues the trial court erred in admitting testimony of officers that appellant's behavior that night was consistent with the driver of a stolen vehicle or an intoxicated driver. This testimony arose out of the the following exchange:

[THE STATE]: And how often have you had the experience where somebody wasn't seeing you activate your emergency equipment and would circle back - -

[APPELLANT]: I'm going to object, Your Honor. It's irrelevant. We're talking about other situations, not when he's there. That has nothing to do with this case, Your Honor.

[THE STATE]: Your Honor, it goes to show that it was an abnormal thing for somebody to circle back.

THE COURT: Overruled.

[THE STATE]: Go ahead and answer the question.

[OFFICER ALDACO]: Usually, the only time that this has happened is when we try to stop other people that have been intoxicated or the vehicle has been stolen; it's a stolen vehicle.

THE COURT: Just a second. That was not the question. The question was how many times. It had nothing to do with other people being intoxicated. That was far beyond what the question asked for. Find [sic] your answers to what – to the question asked.

[OFFICER ALDACO]: A few times.

[THE STATE]: So it's not normal for people to do that?

[OFFICER ALDACO]: No, sir.

The State first argues that because appellant did not object to the reply, he did not preserve error. We disagree. The trial court was plainly made aware of the basis of the complaint because the trial court jumped in first. To require appellant to object under these circumstances would serve no purpose. However, we do believe that appellant was required to ask for an instruction to disregard and to move for a mistrial in order to preserve error. *See Fuller v. State*, 827 S.W.2d 919, 926 (Tex. Crim. App. 1992)(appellant must pursue objection to the point of obtaining an adverse ruling in order to preserve error). We therefore find nothing is presented for our review and overrule appellant's third point.

In appellant's fourth point of error he contends the trial court erred in overruling his objection to Officer Bellamy's statement that a person in custody for DWI is required to take a breathalyzer test. He contends this is a misstatement of the law. We disagree. One definition of "require" is "to ask for authoritatively or imperatively." BLACK'S LAW DICTIONARY 904 (abridged 6th ed. 1991). Here the statute states that if a person suspected of driving while intoxicated refuses a peace officer's request to give a breath sample, the Department of Public Safety "shall" suspend his driver's license for 90 days. *See* TEX. TRANS. CODE ANN. § 724.035 (Vernon 1999). If the law compels an act under pain of penalty, it is not error to say that that conduct is "required." We overrule appellant's fourth point of error.

Finally, appellant argues that questions about the legal advice he received about what to do if stopped for investigation of DWI violated the attorney-client privilege. We disagree. The privilege is the client's, and if another claims the protection of the privilege, it must be on behalf of the client. TEX. R. EVID. 503. Here the client – appellant – waived any privilege by volunteering his answer from the stand without objection from counsel. We overrule appellant's fifth point of error and affirm the judgment of the trial court.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed July 6, 2000.

Panel consists of Justices Robertson, Sears , and Cannon.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Sam Robertson, Ross A. Sears, and Bill Canon sitting by assignment.