Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00415-CR
NO. 14-00-00416-CR

CYNTHIA ANN TORRES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law Number 2
Harris County, Texas
Trial Court Cause Nos. 99-42853 & 99-42852

O P I N I O N

In this consolidated appeal, appellant, Cynthia Ann Torres, challenges her convictions for driving while intoxicated and driving while license suspended.

I. FACTUAL BACKGROUND

At about 3:00 a.m. on September 30, 1999, Officer Neil Correia, a Houston Police officer assigned to the DWI task force, stopped appellant for speeding. The officer's radar equipment indicated appellant was driving 55 m.p.h. in a 40 m.p.h. zone. Officer Correia

noticed that appellant had slurred speech and smelled of alcohol. When he asked her to step out of her vehicle, she leaned against it for support. Appellant failed several sobriety tests: the walk-and-turn test, the HGN test, and the Rhomberg test. The officer discovered that appellant's driver's license was suspended. Officer Correia arrested appellant and transported her to the police station, where she refused to take the intoxilyzer breath test.

Appellant was charged by information with the misdemeanor offenses of driving while intoxicated (DWI) and driving while license suspended (DWLS). At trial, the parties stipulated to the admission of a redacted version of appellant's driving record from the Texas Department of Public Safety. This exhibit shows that appellant's license was suspended at the time of her arrest. Moreover, Rene Mendoza, a records custodian for the department, testified that (1) appellant's driver's license was suspended because she failed to maintain liability insurance; (2) a suspension notice was mailed to appellant on October 22, 1998; and (3) the suspension of appellant's license was still in place.

A jury found appellant guilty of both offenses. She now appeals, raising three points of error as to the DWI conviction and two points of error as to the DWLS conviction.

II. Issues Presented for Review

In her first point of error, in both the DWI case and the DWLS case, appellant complains that the trial court erred in denying her motion for mistrial after the prosecutor allegedly violated the court's order in limine. In her second and third points of error in the DWI case, appellant complains of legal and factual insufficiency of the evidence of her intoxication by alcohol. In her second and final point of error in the DWLS case, appellant complains that the trial court erred by denying appellant's motion for an instructed verdict on the DWLS charge.

III. Legal and Factual Sufficiency

Appellant contends the evidence is legally and factually insufficient to prove that she lost normal use of her mental and physical faculties by reason of the introduction of alcohol

into her body.

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and decide whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We accord great deference "'to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996) (quoting *Jackson*, 443 U.S. at 319). We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we defer to that resolution. *Id.* at n.13 (citing *Jackson*, 443 U.S. at 326). In our review, we determine only whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000) (citing *Jackson*, 443 U.S. at 319).

"A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." TEX. PEN. CODE ANN. § 49.04(a) (Vernon 1994 & Supp. 2001). Intoxication is "(A) not having the normal use of mental or physical faculties *by reason of the introduction of alcohol*, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (B) having an alcohol concentration of 0.08 or more." § 49.01(2)(a)-(b) (emphasis added).

In conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the prosecution. *Clewis*, 922 S.W.2d at 134. Instead, we consider all the evidence and set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* However, appellate courts "are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable." *Id.* at 135 (citations omitted). In other words, we will not substitute our judgment for that of the jury. *Id.* at 133. To find the evidence factually insufficient to support

a verdict, we must conclude that the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Id.* at 135.

Officer Correia concluded from his roadside investigation that appellant was physically and mentally impaired, prompting him to arrest her and transport her to the police station. There she refused to take the intoxilyzer breath test. Officer Kevin Rambo, the intoxilyzer operator, testified that appellant "didn't do that good" on the sobriety tests she performed at the station, that she "appeared to be intoxicated," and that she admitted to having one drink earlier.

The jury is the trier of fact, and the ultimate authority on the credibility of witnesses, and the weight to be given to their testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Burks v. State*, 876 S.W.2d 877, 909 (Tex. Crim. App. 1994). Any inconsistencies in the testimony should be resolved in favor of the jury's verdict in a legal sufficiency review. *Johnson v. State*, 815 S.W.2d 707, 712–13 (Tex. Crim. App. 1991) (citing *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App.1988)).

The jury was entitled to believe or disbelieve all or any part of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Although appellant has pointed out discrepancies with some testimony, those discrepancies are insufficient to demonstrate that the jury's finding is "manifestly unjust," a shock to the conscience, or a clear demonstration of bias. *Clewis*, 922 S.W.2d at 135. Further, mere contradiction of testimony made by a witness at trial will not suffice to overturn a conviction for factual sufficiency. *Turner v. State*, 4 S.W.3d 74, 83(Tex. App.— Waco 1999, no pet.). We must give due deference to the jury's assessment of the credibility of the witnesses and the weight given to their testimony. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Appellant also testified at trial. She explained that she had just left a restaurant and was eating a taco while on the way to pick up her sick child and take her to the hospital. She did not notice the police officer's siren at first because the music in her car was so loud. Appellant testified that she had two alcoholic drinks, the last one at about 10:00 that night, roughly five

hours before Officer Correia stopped her vehicle. Appellant admitted that her driver's license was suspended.

Viewing the evidence under our deferential standard, we conclude that a rational trier of fact could have found, beyond a reasonable doubt, that appellant committed the offense of DWI . Moreover, viewed as a whole, the evidence strongly supports the jury's finding that appellant was intoxicated from the introduction of alcohol into her system. Accordingly, we find the evidence in this case legally and factually sufficient to establish the offense charged. Appellant's second and third points of error in her DWI case are overruled.

IV. DENIAL OF MOTION FOR INSTRUCTED VERDICT - DWLS

In the second and final issue in her DWLS case, appellant argues that the trial court erred by denying her motion for an instructed verdict on the DWLS charge.

Appellant acknowledged that her license was, in fact, suspended when she was arrested for the charges at issue in this case. However, she argues that it was suspended for the failure to pay a $50 reinstatement fee, a violation of section 521.306 of the Texas Transportation Code. Appellant argues that her license suspension became effective in November of 1998, while her arrest for DWLS was nearly a year later on September 30, 1999. Appellant argues that her suspension for nonpayment of the reinstatement fee was temporary and that her license could not remain suspended beyond the statutory period *despite* nonpayment of the fee. *See Allen v. State*, 11 S.W.3d 474, 480 (Tex. App.—Houston [1st Dist.] 2000, pet. granted) (concluding that once a driver's license is suspended for 90 days for refusing to give a breath specimen, driver's failure to pay the statutorily required reinstatement fee did not extend driver's license suspension beyond period provided in statute). However, *Allen* is inapplicable to this case if there is legally sufficient evidence that appellant's license was suspended for failure to maintain liability insurance.

A challenge to the trial court's denial of a motion for directed verdict is a challenge to the legal sufficiency of the evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim.

App. 1996). Accordingly, we use the legal sufficiency standard of review discussed above.

The essential elements of the offense of DWLS are (1) a person; (2) drives or operates; (3) a motor vehicle; (4) in a public place; (5) while her driver's license was suspended. Appellant challenges only the proof that her driver's license was suspended.

The record reveals that the department mailed a suspension order to appellant on July 30, 1998, for "no liability insurance." Appellant was convicted of DWLS on December 3, 1998. Her driving record does not indicate that this suspension was lifted. On cross examination, appellant essentially admitted she did not obtain the insurance coverage that would have lifted her suspension as to DWLS: "I couldn't send off for my SR 22 because I couldn't afford it, because I had to pay that because they wanted three months of insurance in advance and I couldn't afford it."

Considering this evidence in the light most favorable to the verdict, we find a reasonable jury could have concluded that appellant's license remained suspended, as of the date of her arrest, due to failure to maintain proof of financial responsibility. Accordingly, appellant's second point of error in the DWLS case is overruled.

V. DENIAL OF MOTION FOR MISTRIAL

In both the DWI and DWLS cases, appellant claims the trial court erred by denying her motion for mistrial after the prosecutor allegedly violated the court's in limine order. Appellant complains about the following exchange between the prosecutor and State's witness, Rene Mendoza, a custodian of driving records with the Texas Department of Public Safety:

State:	Did something occur that caused that [driver's] license to be revoked by the Department of Public Safety?
Mendoza:	Yes, sir.
State:	Please explain to the jury what that was?
Mendoza:	She was stopped for apparently a breath test refusal at one time and either refused or failed the test.
Defense:	I object, Your Honor.
Court:	Sustained.

After suggesting the State ask its witness a leading question on this matter, outside the jury's presence, the court instructed the jury to "please disregard the last answer of this witness as being nonresponsive to the question asked." The trial court then denied appellant's motion for mistrial. We review a trial court's denial of a mistrial under an abuse of discretion standard. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999).

A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Id*. A mistrial is an extreme remedy for prejudicial events occurring during trial. *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). Even when a prosecutor intentionally elicits testimony or produces other evidence before a jury which is excludable at the defendant's option, the law favors continuation of the trial. *Id*. Therefore, mistrials should be granted only when an objectionable event is so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant. *Id*. Because curative instructions are presumed effective to withdraw from jury consideration almost any evidence or argument which is objectionable, trial conditions must be extreme before a mistrial is warranted. *Id.* at 700. This presumption may apply even where the instruction follows violation of an order in limine. *Janney v. State*, 938 S.W.2d 770, 773 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

In determining whether a jury instruction is sufficient to cure prejudice arising from an improper question, we examine the facts of the case. *Gonzales v. State*, 685 S.W.2d 47, 49 (Tex. Crim. App. 1985). We note that many courts have found an instruction to disregard sufficient to cure prejudice from all improper reference to the defendant's prior bad acts. *See, e.g., Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992) (finding a prosecutor's improper reference to extraneous offenses for which the accused was convicted was curable by an instruction to disregard); *Moody v. State*, 827 S.W.2d 875, 890 (Tex. Crim. App. 1992) (finding that any potential error which may have resulted from a police officer's testimony that he "pulled the [defendant's] arrest jacket" during her investigation, was cured by an instruction to disregard). *Barney v. State*, 698 S.W.2d 114, 124 (Tex. Crim. App. 1985) (finding

testimony that a victim did not like the defendant because "he was an ex-con" was cured by an instruction to disregard); *Aliff v. State*, 627 S.W.2d 166, 172 (Tex. Crim. App. 1982) (finding a jury instruction sufficient to cure error after the State's witness testified that he had "talked with [the defendant's] Houston County Probation Officer."). *Campos v. State*, 589 S.W.2d 424, 427–28 (Tex. Crim. App. 1979) (finding a witness's testimony that the accused was arrested and jailed for an extraneous offense was cured by a jury instruction)

In each of the above cases, the improper references to evidence was of greater prejudicial effect than the witness's nonresponsive answer in this case, and the instruction to disregard was sufficient to cure. In each of the above cases, the trial court instructed the jury to disregard evidence that the defendant was arrested, convicted, or even jailed for extraneous offenses. In *Janney v. State*, a prosecutor's inquiry as to whether appellant previously took an intoxilyzer test was not so extreme that an instruction to disregard could not cure the error or that a mistrial was necessary. 938 S.W.2d 770, 773 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (finding the trial court could have instructed the jury that the question was improperly phrased and to disregard the question along with any inferences arising therefrom). While Mendoza's testimony could have led the jury to infer that appellant had previously been arrested for driving while intoxicated, that possibility, alone, does not lead us to the unavoidable conclusion that a mistral was necessary. *See id.*

Our reading of the record does not indicate the prosecutor's question was calculated to elicit improper testimony. The prosecutor could have reasonably posed this question merely to elicit the fact that appellant's license was revoked because she, in fact, failed to comply with the Safety Responsibility Act, i.e., failed to produce proof of insurance. Thus, it appears that Mendoza's answer was simply non-responsive. We find the trial court properly instructed the jury to disregard Mendoza's answer as such. *See id.*; *Bauder*, 921 S.W.2d at 698 ("[O]ur system presumes that judicial admonishments to the jury are efficacious.").

After carefully examining the record, we find the trial conditions in the present case were not so "extreme" as to warrant a mistrial. *See Janney*, 938 S.W.2d at 773. Accordingly,

we find the trial court did not abuse its discretion in denying appellant's motion for mistrial. Appellant's first point of error in each of her cases is overruled.

All points in the DWI case and the DWLS case having been overruled, the judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 26, 2001.
Panel consists of Justices Edelman, Frost, and Murphy.*
Do Not Publish TEX. R. APP. P. 47.3(b).

* Senior Chief Justice Paul C. Murphy sitting by assignment.