Opinion issued December 21, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00941-CR

DUC-TRUNG ROBERT NGUYEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Brazoria County, Texas
Trial Court Case No. 222121

MEMORANDUM OPINION

After the City of Alvin Municipal Court convicted appellant Duc-Trung Robert Nguyen of speeding, he appealed his conviction to the county court at law. The county court held a trial de novo and, once again, Nguyen was convicted. The court assessed a $200 fine plus court costs. Nguyen now appeals his conviction to

this Court alleging that (1) the State failed to provide him sufficient notice of the charge against him; (2) the trial court erred by failing to instruct the jury on a statutory provision; and (3) the evidence was insufficient to support his conviction. We have jurisdiction under Texas Code of Criminal Procedure article 4.03 because the fine imposed in the county court exceeded $100. TEX. CODE CRIM. PROC. art. 4.03. We affirm.

Background

Following a bench trial, the City of Alvin Municipal Court convicted Nguyen of speeding and assessed a $195 fine. *See* TEX. TRANSP. CODE § 545.341. Nguyen filed a timely notice of appeal, requesting a trial de novo in the County Court at Law #4 and Probate Court of Brazoria County, Texas. The county court proceeded with the appeal and held a trial by jury.

At trial, Officer J. Cleere testified to the following facts. On December 5, 2015 at 5:12 a.m., Officer Cleere was on patrol in Alvin, Texas. He saw Nguyen driving at what he perceived to be a speed that was "a lot faster than the 45-mile-an-hour posted speed limit." Officer Cleere activated his radar, which he had tested before his shift to ensure proper functioning, and it recorded Nguyen's speed as 60 miles per hour. Officer Cleere then stopped Nguyen and ticketed him for speeding. The incident did not take place in a school or construction zone, and the traffic was light that morning.

The State submitted video recordings of the traffic stop from Officer Cleere's body camera and his dashboard camera. Those recordings show Nguyen driving his vehicle and Officer Cleere pulling him over and informing him that he was receiving a speeding ticket.

Nguyen admitted that he knew both that (1) the posted speed limit was 45 miles per hour and (2) he was traveling at 60 miles per hour. But he asserted that he believed his speed was nonetheless legal because it was a clear day, traffic was light, and he was not in a construction or school zone.

The jury found Nguyen guilty of speeding and the court assessed a $200 fine. Nguyen appealed.

Discussion

Nguyen raises arguments regarding (1) adequacy of notice, (2) the jury charge, and (3) sufficiency of the evidence. We address each in turn.

A. Adequacy of Notice

In his first issue, Nguyen contends that the State's criminal complaint did not provide him sufficient notice of the statute under which he was being charged. Nguyen waived this argument.

Article 45.019 of the Texas Code of Criminal Procedure provides that if a municipal court "defendant does not object to a defect, error, or irregularity of form or substance in a charging instrument before the date on which the trial on the merits

commences, the defendant waives and forfeits the right to object to the defect, error, or irregularity." *Id.* art. 45.019(f).

Here, the State charged Nguyen with speeding, and Nguyen did not move to quash the complaint before trial. Because Nguyen did not object before trial began, he waived his objection to an alleged defect, error, or irregularity in the complaint. *See* TEX. CODE CRIM. PROC. art. 45.019(f); *Mitchell v. State*, No. 14-00-01277-CR, 2000 WL 1862795, at *2 (Tex. App.—Houston [14th Dist.] Dec. 21, 2000, pet ref'd) (not designated for publication); *see also Ramirez v. State*, 105 S.W.3d 628, 629–30 (Tex. Crim. App. 2003); *Dennis v. State*, 647 S.W.2d 275, 278 (Tex. Crim. App. 1983).

We overrule Nguyen's first issue.

B. Jury Charge

In his second issue, Nguyen asserts that the trial court erred by not instructing the jury on section 545.351(b) of the Texas Transportation Code. Even if we were to assume—without deciding—that this constituted error, Nguyen fails to establish the requisite degree of resulting harm.

We note from the outset that Nguyen did not preserve this argument. He neither objected to the submitted jury instructions nor requested that the trial court include section 545.351(b) in the jury instructions. When charge error is not preserved, "the accused must claim that the error was 'fundamental,' [and] he will

obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'" *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *see Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013) (egregious harm "is a difficult standard to meet and requires a showing that the defendants were deprived of a fair and impartial trial"). Fundamental errors that result in egregious harm are those that affect "the very basis of the case," deprive the defendant of a "valuable right," or "vitally affect his defensive theory." *Almanza*, 686 S.W.2d at 172 (citations and quotations omitted).

Nguyen cannot show egregious harm here. Section 545.351(a) of the Texas Transportation Code provides that "[a]n operator may not drive at a speed greater than is reasonable and prudent under the circumstances then existing." TEX. TRANSP. CODE § 545.351(a). Section 545.351(b) states that "[a]n operator: (1) 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 "(2) 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 law and the duty of each person to use due care." *Id.* § 545.351(b).

Tracking the language of subsection (a) and the complaint in the case, the trial court instructed the jury that "[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." Even if the trial court had also included section 545.351(b) in its instructions, Nguyen would still have been required to establish that his speed was reasonable and prudent under the circumstances. The jury addressed this precise question and concluded that it was not. Thus, any alleged error in the trial court's failure to instruct the jury regarding the text of section 545.351(b) did not deprive Nguyen of a "valuable right," or "vitally affect his defensive theory" such that it resulted in egregious harm.

We overrule Nguyen's second issue.

C. Sufficiency of the Evidence

In his third issue, Nguyen contends that the evidence was insufficient to sustain his conviction. We disagree.

The question before us is whether, after considering the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 307; 99 S. Ct. 2781, 2783 (1979); *Brooks v. State*, 323 S.W.3d 893, 901–02 (Tex. Crim. App. 2010).

The Texas Transportation Commission may determine and declare "a reasonable and safe prima facie speed limit." TEX. TRANSP. CODE § 545.353(a)(1). The fact that a speed is in excess of the limit established "is prima facie evidence

that the speed is not reasonable and prudent and that the speed is unlawful." *Id.* § 545.352(a).

Here, Nguyen admitted that he was driving above the posted speed limit. Moreover, Officer Cleere testified that his radar clocked Nguyen's speed at 60 miles per hour, but Nguyen was driving in a 45 mile per hour zone. This constitutes sufficient evidence to support Nguyen's speeding conviction. Evidence also showed that the traffic was light, Nguyen did not collide with another vehicle, and he was not driving in a school or construction zone. But the jury was entitled to rely on the prima facie evidence that Nguyen's speed was not reasonable and prudent in light of the posted speed limit.

A rational trier of fact could have found beyond a reasonable doubt that Nguyen was driving at a speed greater than is reasonable and prudent and, therefore, was guilty of the offense of speeding. *See Tollett v. State*, 219 S.W.3d 593, 601–02 (Tex. App.—Texarkana 2007, pet ref'd) (sufficient evidence supported speeding conviction despite appellant's argument that there was no evidence to establish he endangered another vehicle or that his speed was unsafe; evidence established appellant drove in excess of posted speed limit).

We overrule Nguyen's third issue.

Conclusion

We affirm the judgment of the trial court.

Jennifer Caughey
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Caughey.

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