Opinion issued December 8, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00157-CR

CHRISTOPHER ANZURES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Court at Law No. 3
Galveston County, Texas
Trial Court Case No. MD-0380949

MEMORANDUM OPINION

A jury found appellant Christopher Anzures guilty of speeding[1] and assessed a fine of $200. In three issues, Anzures challenges the judgment against him, arguing that the trial court erred in (1) denying his motion for directed verdict because he

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1 *See* TEX. TRANSP. CODE § 545.351(a).

was unable to review a traffic engineering study used to establish the speed limit in the area where he was cited for speeding; (2) denying his motion for directed verdict complaining of the admission of the testimony of the citing police officer regarding radar evidence; and (3) submitting to the jury a charge that did not contain all of the facts and details alleged in the charging instrument. We affirm.

Background

On the evening of March 17, 2017, Officer G. Villareal cited Anzures for speeding. Anzures was charged as follows:

> Christopher Anzures, hereinafter called Defendant, within the corporate limits of the City of Jamaica Beach, Galveston County, Texas, at 16600 FM 3005, did then and there operate a motor vehicle upon a public street, at a speed which was greater than was reasonable and prudent under the circumstances then existing, to wit: at a speed of 59 miles per hour, at which time and place the lawful maximum prima facie reasonable and prudent speed indicated by an official sign then and there lawfully posted was 35 miles per hour. Against the peace and dignity of the State.

Anzures pleaded not guilty, and at trial, the State presented the testimony of Officer Villareal, who stated that he was monitoring traffic on FM 3005 when he stopped Anzures on a public roadway located in the City of Jamaica Beach, Galveston County, Texas. He testified that the speed limit in the area he was monitoring was 35 miles per hour and that the limit was posted on signs "throughout the city." Officer Villareal stated that he checked Anzures's speed with the radar device mounted in his patrol car, and the reading on the device showed that Anzures

was traveling 59 miles per hour. Anzures objected to this testimony, stating, "[I]mproper predicate for any type of testimony from this scientific device." The trial court overruled this objection. The State asked Officer Villareal whether he had an opinion "as to whether [Anzures] was traveling at a reasonable speed," and Villareal responded, "My opinion [is that] he was going over the posted speed limit."

Officer Villareal also testified that he was trained by the police department to use the radar, including how to calibrate it, and that he used the radar regularly. He further testified that he had calibrated the radar every day that he worked using a "prong, like a fork." On cross-examination, Anzures's counsel asked Officer Villareal whether he understood "the calculation that the radar gun makes whenever it's calculating [the] speed of a vehicle," and whether he understood "the theory behind the radar gun and the way it calculates speed." The State objected on relevance grounds, and Anzures argued that the testimony was relevant, stating, "I have a case, *Ochoa v. State*."[2] The trial court overruled the State's objection and Villareal responded that he did not know the theory or calculations behind how the radar worked.

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[2] *See Ochoa v. State*, 994 S.W.2d 283, 284 (Tex. App.—El Paso 1999, no pet.) (holding that radar evidence was "based on a scientific theory and therefore subject to proof of reliability and relevance" for introducing expert testimony).

The State rested after Officer Villareal's testimony, and Anzures then asserted a motion for directed verdict. He first argued, citing *Ochoa* and *Kelly v. State*,[3] that because Officer Villareal testified that he did not understand the theory or calculations behind the radar, and there was "no other evidence," the evidence was insufficient to convict him. The State responded that a motion for directed verdict was not the proper time to raise a *Kelly* objection, and it responded that Officer Villareal's testimony setting out the facts of the speeding offense was sufficient to deny the motion for directed verdict. The trial court denied a directed verdict on this ground. Anzures then asserted a second ground in his motion for directed verdict, arguing that the State "didn't get the ordinance submitted"—apparently referring to the ordinance by which the city set the 35-mile-per-hour speed limit for the road where Anzures was pulled over—which he asserted was required to prove the speeding offense. The trial court denied the motion on this ground as well.

Anzures then presented the testimony of the City Manager for Jamaica Beach, S. Hutchinson. Hutchinson testified that the speed limit in effect at the time Anzures was ticketed was set by a 1989 city ordinance that was based on an engineering and traffic study that had been completed earlier that same year. Hutchinson brought to

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[3] *See Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) (establishing set of factors that proponent of expert testimony or evidence, based on scientific theory, must show by clear and convincing evidence before proposed evidence may be introduced).

court a traffic engineering study completed in April 2017 "that reaffirms the speed limit of 35 [miles per hour] referred to in the 1989 speed zone ordinance" and that served as the basis for the city's newer, May 2017 ordinance that again set the speed limit at 35 miles per hour. Hutchinson also provided certified copies of the 1989 ordinance and the May 2017 ordinance, which both provided for the 35-mile-per-hour speed limit. The 1989 ordinance—the one in effect at the time Anzures received the speeding citation—expressly stated that the 35-mile-per-hour limit was based on a traffic engineering study conducted by the city. Hutchinson testified that he was unable to provide the specific study referenced in the 1989 ordinance because it had been destroyed in a fire in 2011.

Anzures closed and re-urged his motion for directed verdict, arguing that based on *Ochoa*, there was insufficient evidence to find him guilty and arguing that, without the traffic engineering study that supported the 1989 ordinance, the ordinance was void, "the 35-mile-per-hour zone is also void, which would . . . make the ticket void." The trial court, again, denied the renewed motion for directed verdict.

The trial court charged the jury:

> If you find from the evidence beyond a reasonable doubt that in Galveston County, Texas, on or about the 17th day of March, 2017, the Defendant, Christopher Anzures did then and there operate a motor vehicle on a public street at a speed which was greater than was reasonable and prudent under the circumstances then you are to find the Defendant guilty as charged.

Anzures objected to this charge, arguing:

> The charge is flawed from the complaint. The complaint alleges—the complaint alleges that it occurred in Jamaica Beach. The charge does not say Jamaica Beach. The complaint alleges 59 in a 35 being the speed that was violated, and the charge does not even come close to tracking the complaint.

The trial court overruled the objection and submitted the charge to the jury. The jury found Anzures guilty of speeding and assessed a fine of $200 against him. This appeal followed.

Direct Verdict

In his first two issues, Anzures argues that the trial court erred in denying his motion for directed verdict.

A. Standard of Review

A challenge on appeal to the denial of a motion for directed verdict is a challenge to the legal sufficiency of the evidence and is reviewed under the same standard. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996); *Williams v. State*, 582 S.W.3d 692, 700 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd); *see Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 2003). Every criminal conviction must be supported by legally sufficient evidence as to each element of the offense that the State is required to prove beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011). To determine whether this standard has been met, we review all

of the evidence in the light most favorable to the verdict, and we decide whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010).

B. Traffic Study

In his first issue, Anzures argues that the trial court erred in denying his motion for directed verdict "because there wasn't a traffic and engineering study to authorize the 35 mile per hour speed zone established by the City of Jamaica Beach." We disagree that the trial court erred in denying Anzures's motion on this ground. *See Williams*, 582 S.W.3d at 700 (holding that appeal of denial of directed verdict challenges legal sufficiency of evidence and is reviewed under legal-sufficiency standard). The State presented sufficient evidence that Anzures committed the offense of speeding as set out in the Texas Transportation Code.

Transportation Code section 545.351(a) provides, "An operator [of a motor vehicle] may not drive at a speed greater than is reasonable and prudent under the circumstances then existing." TEX. TRANSP. CODE § 545.351(a); *Infante v. State*, 397 S.W.3d 731, 735 (Tex. App.—San Antonio 2013, no pet.); *Tollett v. State*, 219 S.W.3d 593, 601 (Tex. App.—Texarkana 2007, pet. ref'd). Transportation Code section 545.352(a) provides that driving at a speed in excess of established limits is prima facie evidence that the driver's speed was not reasonable and prudent and that

the speed was unlawful. TEX. TRANSP. CODE § 545.352(a); *Infante*, 397 S.W.3d at 735; *Tollett*, 219 S.W.3d at 601.

Office Villareal testified that the posted speed limit in the area where he stopped Anzures was 35 miles per hour. This testimony was corroborated by Hutchinson and the certified copy of the 1989 ordinance establishing the municipal speed limit. Officer Villareal further testified that, in his opinion, Anzures was driving in excess of the posted speed, and he testified that the radar device in his patrol vehicle indicated that Anzures was driving 59 miles per hour. This is evidence that Anzures was driving "at a speed greater than is reasonable and prudent under the circumstances then existing." *See* TEX. TRANSP. CODE §§ 545.351(a), .352(a); *Infante*, 397 S.W.3d at 735; *Tollett*, 219 S.W.3d at 601.

Anzures nevertheless argues that the speed limit was void, and, thus, the ticket was void, because the State failed to produce a traffic engineering study supporting the city's posting of a 35-mile-per-hour limit. Transportation Code section 545.352 sets statutory speed limits, including a speed limit of 30 miles per hour in urban districts, 60 miles per hour on certain unnumbered highways, and 70 miles per hour on certain numbered highways and farm-to-market roads outside urban districts. *See id.* § 545.352(b). These statutory limits can be adjusted by municipalities pursuant to Transportation Code section 545.356, which states:

> The governing body of a municipality, for a highway or part of a highway in the municipality, including a highway of the state highway

> system, has the same authority to alter by ordinance prima facie speed limits [set out in section 545.352(b)] from the results of an engineering and traffic investigation as the Texas Transportation Commission on an officially designated or marked highway of the state highway system. . . .

Id. § 545.356(a); *see also id.* § 545.353(a) (providing that, "if the Texas Transportation Commission determines from the results of an engineering and traffic investigation that a prima facie speed limit in this subchapter is unreasonable or unsafe," it may declare new speed limit).

Based on these provisions, Anzures argues that the trial court should have granted a directed verdict because the State could not make the 1989 engineering and traffic study—which was destroyed in a fire in 2011—available for review at trial. The traffic study, however, is not an element of the offence.[4] *See* TEX. TRANSP. CODE § 545.351(a). Anzures has cited no authority, nor could we find any, indicating that the State was required to present the engineering and traffic study in order to

[4] A sister court has considered a similar argument in an unpublished opinion and concluded, as we do here, that an engineering or traffic survey used to alter the statutory speed limits "is not a necessary element of proof at a trial for speeding." *Marshall v. State*, No. 02-11-00416-CR, 2012 WL 2138341, at *5 (Tex. App.—Fort Worth June 14, 2012, pet. ref'd) (mem. op., not designated for publication). This Court, in the context of a motion to suppress, considered the language of an ordinance itself as evidence that a private institution of higher education had properly obtained authority to reduce speed limits on campus. *Gette v. State*, 209 S.W.3d 139, 143–44 (Tex. App.—Houston [1st Dist.] 2006, no pet.). We further note that Anzures does not otherwise challenge the constitutionality or validity of the underlying ordinance or statutory provisions by arguing, for example, that the city did not follow the statutory requirements in enacting the ordinance or that the speed limit set by the ordinance was unreasonable.

prove the speeding offense, nor has he provided any authority indicating that the city was required to maintain a copy of the study in order for the ordinance to remain valid.

Rather, the Transportation Code provides that a municipality, like the City of Jamaica Beach, may modify statutory speed limits after conducting an engineering and traffic investigation—as the evidence indicates occurred in this case. *See id.* § 545.356(a). The Transportation Code further provides that speed limits become effective when the municipality erects signs giving notice of the new limit. *See id.* § 545.353(c) (stating new prima facie limits established by Transportation Commission become effective when it erects signs giving notice); *id.* § 545.356(a), (c) (providing that municipalities have same authority to modify speed limits as Transportation Commission and that prima facie speed limits altered by municipality under certain subsections become effective when signs are erected). The State provided the testimony of Officer Villareal that the 35 mile-per-hour speed limit was posted, and this testimony was supported by the language of the 1989 ordinance that indicated the speed limit was set based on a traffic and engineering investigation as required by section 545.356.

Because the State presented sufficient evidence of Anzures's guilt, we conclude that the trial court did not err in denying his directed verdict on this ground.

See TEX. TRANSP. CODE §§ 545.351(a), .352(a); *Jackson*, 443 U.S. at 319; *Williams*, 937 S.W.2d at 482.

We overrule Anzures's first issue.

C. Radar Evidence

In his second issue, Anzures argues that the trial court erred in denying his motion for directed verdict and committed reversible error by admitting Officer Villareal's testimony regarding the radar readings of Anzures's speed.[5] He relies on *Ochoa v. State* in arguing that Officer Villareal's testimony about the reading on his radar equipment was inadmissible. *See* 994 S.W.2d 283, 284 (Tex. App.—El Paso 1999, no pet.). Anzures argues that Officer Villareal's testimony regarding the radar reading was unreliable because Villareal could not explain the theory behind the functioning of the radar device, nor could he explain or perform the calculations

[5] Anzures frames this as a ground on which the trial court should have granted a directed verdict, implicating the sufficiency of the evidence. *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996) (holding that challenge on appeal to denial of motion for directed verdict is challenge to legal sufficiency of evidence and is reviewed under same standard). We note, however, that we typically review complaints regarding the admission of evidence under an abuse-of-discretion standard, which defers to a trial court's admissibility determination if it falls within the zone of reasonable disagreement. *See Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). And even if we determine that the trial court erred, the erroneous admission of evidence requires reversal only if the error affects the appellant's substantial rights. *See Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018); *see also* TEX. R. APP. P. 44.2(b) (providing that non-constitutional error does not require reversal unless it affects appellant's substantial rights).

done by the radar equipment. Thus, according to Anzures, there was no evidence that he was speeding, and the trial court should have rendered a directed verdict.

In *Ochoa*, the El Paso Court of Appeals considered precedent of the Texas Court of Criminal Appeals in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), which established a set of factors that the proponent of expert testimony or evidence based on scientific theory must show by clear and convincing evidence before the proposed evidence may be introduced, and *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997), which held that the *Kelly* factors apply to all evidence based on a scientific theory and not just to evidence based on novel scientific theories. *See Ochoa*, 994 S.W.3d at 284; *see also Mills v. State*, 99 S.W.3d 200, 201–02 (Tex. App.—Fort Worth 2002, pet. ref'd) (discussing *Ochoa* in light of *Kelly* and *Hartman*). The court in *Ochoa* concluded that "although radar is a familiar concept, it is based on a scientific theory and therefore subject to proof of reliability and relevance under *Kelly*." *Ochoa*, 994 S.W.2d at 284.

The State challenges Anzure's assertions, arguing first that Anzures failed to preserve his complaint regarding Officer Villareal's qualification as an expert on radar devices. It further argues that *Ochoa* is inapplicable here. We agree with the State.

Assuming, without deciding, that Anzures's objections were sufficient to preserve this issue, several of our sister courts have rejected *Ochoa's* strict

application in circumstances like these. *See Mills*, 99 S.W.3d at 201–02; *Maysonet v. State*, 91 S.W.3d 365, 371 (Tex. App.—Texarkana 2002, pet. ref'd). The Fort Worth Court of Appeals in *Mills* refused to apply *Ochoa*, observing that "even under *Kelly*, the underlying scientific principles of radar are indisputable and valid as a matter of law," and stating:

> *Kelly's* framework provides courts flexibility to utilize past precedence and generally accepted principles of science to conclude its theoretical validity as a matter of law. To strictly construe *Kelly* otherwise would place a significant burden on judicial economy by requiring parties to bring to court experts in fields of science that no reasonable person would challenge as valid. . . .

Mills, 99 S.W.3d at 202 (quoting *Maysonet*, 91 S.W.3d at 371). The *Mills* court concluded that "the underlying scientific theory of radar is valid," and then looked to the evidence in the record regarding whether the officer applied a valid technique and whether it was correctly applied on the particular occasion in question. *See id.* (citing *Kelly*, 824 S.W.2d at 573, and *Maysonet*, 91 S.W.3d at 371).

Applying the same reasoning here, we conclude that it was not necessary for Officer Villareal to have the knowledge necessary to establish the underlying scientific theory of radar. *See id.* Anzures did not challenge the validity of radar generally, nor did he argue that Officer Villareal's radar device was defective or that Villareal misused the radar. And we agree with the courts in *Mills* and *Maysonet* that the underlying scientific theory of radar is valid. *See Mills*, 99 S.W.3d at 202; *Maysonet*, 91 S.W.3d at 371. Furthermore, the evidence at trial satisfied the

remaining requirements of *Kelly*: Officer Villareal testified that he had been trained in the use of the radar and that he had sufficient experience to operate his radar correctly. He further testified that he calibrated the radar and used it for its intended purpose in checking the speed of Anzures's vehicle. This evidence was sufficient for the trial court to determine that Officer Villareal's testimony regarding the radar reading was admissible. *See Mills*, 99 S.W.3d at 202; *see also Cromer v. State*, 374 S.W.2d 884, 887 (Tex. Crim. App. 1964) (explaining that officer's testimony that he had been trained to operate radar and test it for accuracy is sufficient predicate to support admission of radar evidence).

As stated above, the record contains sufficient evidence that Anzures was speeding. *See* TEX. TRANSP. CODE §§ 545.351(a), .352(a); *Jackson*, 443 U.S. at 319. Thus, the trial court did not err in denying the motion for directed verdict on this ground. *See Williams*, 937 S.W.2d at 482.

We overrule Anzures's second issue.

Jury Charge

In his third issue, Anzures argues that the trial court's jury charge was erroneous because it did not track the language of the complaint.

A. Standard of Review

We review complaints of jury-charge error under a two-step process. *See Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). First, we must determine

whether error exists in the trial court's charge. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013). Second, if there is error, the court must determine whether the error caused sufficient harm to require reversal of the conviction. *Id.* If, as here, the defendant preserved error by timely objecting to the charge, an appellate court will reverse if the defendant demonstrates that he suffered some harm as a result of the error. *See Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009).

B. Charge Error

Anzures objected that the charge was erroneous because it did not require the State to prove that the offense occurred in the City of Jamaica Beach, nor did it require the State to prove the specific facts stated in the complaint—i.e., that the posted speed limit was 35 miles per hour and that Anzures was traveling at 59 miles per hour.

"As a general rule, the [jury] instructions must . . . conform to allegations in the indictment." *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012). A jury charge may not enlarge the offense alleged or authorize the jury to convict a defendant on a basis or theory permitted by the jury charge but not alleged in the indictment. *See Reed v. State*, 117 S.W.3d 260, 265 (Tex. Crim. App. 2003); *see also Gollihar v. State*, 46 S.W.3d 243, 254 (Tex. Crim. App. 2001) ("[T]he indictment [is] the basis for the allegations which must be proved and . . . the hypothetically correct jury charge for the case must be authorized by the indictment.") (internal

quotations omitted)). The law as "authorized by the indictment" includes "the statutory elements of the offense as modified by the charging instrument." *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

The trial court's charge tracked the language of the charging instrument and the applicable statute. The complaint alleged that Anzures, "within the corporate limits of the City of Jamaica Beach, Galveston County, Texas, at 16600 FM 3005, did then and there operate a motor vehicle upon a public street, at a speed which was greater than was reasonable and prudent under the circumstances then existing. . . ." The jury charge tracked these allegations and Transportation Code section 545.351(a), instructing the jury that it should find Anzures guilty if it found beyond a reasonable doubt that "in Galveston County, Texas, on or about the 17th day of March, 2017, the Defendant, Christopher Anzures did then and there operate a motor vehicle on a public street at a speed which was greater than was reasonable and prudent under the circumstances." Thus, although the jury charge did not repeat every factual allegation contained in the complaint, it nevertheless conformed to the language in the complaint and set out the allegations that the State was required to prove based on the statutory elements of the offense as modified by the charging instrument. *See Sanchez*, 376 S.W.3d at 773; *Curry*, 30 S.W.3d at 404. The trial court's jury charge did not enlarge the offense alleged or authorize the jury to convict Anzures on a theory not alleged in the complaint. *See Reed*, 117 S.W.3d at 265.

Anzures argues that the jury charge erroneously allowed the jury to convict him if it found that he operated a motor vehicle on a public street at a speed which was greater than was reasonable and prudent under the circumstances, rather than requiring the State to prove that he drove 59 miles per hour in a 35-mile-per-hour zone. But the absence of the specific facts alleged in the complaint does not constitute a variance or "discrepancy" between the complaint and the jury charge, *see Gollihar*, 46 S.W.3d at 246 (holding that "variance" occurs when there is discrepancy between allegations in charging instrument and proof at trial), and even if it did, it would not be a material variance that prejudiced Anzures's substantial rights, *see id.* at 248, 257 (holding that variance that is not prejudicial to defendant's substantial rights is immaterial and that we may determine whether substantial rights have been affected by considering whether charging instrument, as written, informs defendant of charge against him sufficiently to allow him to prepare his defense for trial and whether prosecution under charging instrument would subject him to risk of subsequently being prosecuted for same crime).

Anzures complains that the trial court's statement of venue within the jury charge—i.e., that the offense occurred generally in Galveston County rather than in the more specific location of the City of Jamaica Beach—was erroneous. "Venue is not a constituent element of an offense that must be proven beyond a reasonable doubt." *Briggs v. State*, 455 S.W.3d 711, 713 (Tex. App.—Houston [1st Dist.] 2014,

no pet.); *see* TEX. R. APP. P. 44.2(c)(1) (providing presumption that, "[u]nless the [matter was] disputed in the trial court, or unless the record affirmatively shows the contrary, the court of appeals must presume . . . that venue was proved in the trial court"). Thus, to the extent that the trial court's description of the venue in the jury charge as being "Galveston County, Texas," rather than "the City of Jamaica Beach, Galveston County, Texas" constituted a variance, it was not material and does not enlarge the offense alleged or authorize the jury to convict Anzures on a theory not alleged in the indictment. *See Reed*, 117 S.W.3d at 265; *Gollihar*, 46 S.W.3d at 246–47.

We overrule Anzures's third issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Chief Justice Radack and Justices Hightower and Adams.

Do not publish. TEX. R. APP. P. 47.2(b).