NUMBER 13-13-00066-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ERIC ROEL JIMENEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 357th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez

A jury found appellant Eric Roel Jimenez guilty of felony driving while intoxicated for which he received a five-year probated sentence. *See* TEX. PENAL CODE ANN. § 49.09(b)(2) (West, Westlaw through 2015 R.S.) (providing that a person operating a motor vehicle while intoxicated is guilty of a felony if he has two prior convictions for the same offense). By four issues, which we have reordered, Jimenez contends: (1) the evidence

was legally insufficient to prove that he operated a "motor vehicle" while intoxicated; (2) the trial court improperly commented on the weight of the evidence while overruling Jimenez's objection to the State's closing argument; (3) the definition of "intoxication" in the jury charge was incorrect; and (4) an instruction in the jury charge improperly commented on the weight of the evidence. We affirm.

I. Background

At trial, the jury heard evidence that during the afternoon of May 16, 2011, police officers responded to the scene of a one-car accident. Upon arriving to the scene, officers discovered that a vehicle had veered approximately thirty feet off the road and collided with a metal fence. The lead officer testified that he found Jimenez in the middle of the roadway exchanging words with some individuals who were performing gardening work inside the yard of a residence adjacent to the road. According to the officer, it appeared as though Jimenez was trying to start a fight with the gardeners. The officer testified that he smelled an odor of alcohol when he got closer to Jimenez and that Jimenez displayed signs of intoxication, such as slurred speech, bloodshot eyes, and unsteady balance. The officer further testified that Jimenez admitted to drinking alcohol before the accident. According to the officer, Jimenez refused to provide a breath specimen or perform a standard field sobriety test. Jimenez was charged with felony driving while intoxicated after the police investigation uncovered that Jimenez had been convicted of driving while intoxicated twice before.

At trial, Jimenez testified in his defense that he was not legally intoxicated when the accident occurred. After hearing evidence from both sides, the jury found Jimenez guilty of felony driving while intoxicated. This appeal followed.

II. Legal Sufficiency

By his third issue, Jimenez contends that the evidence was legally insufficient to prove that he operated a "motor vehicle" while intoxicated.

In conducting our legal sufficiency review, we view "the evidence in the light most favorable to the jury's verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Gross v. State*, 380 S.W.3d 181, 185 (Tex. Crim. App. 2012) (citing *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)). Relevant to Jimenez's third issue, "motor vehicle" means "a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks." *See* TEX. PENAL CODE ANN. § 32.34 (West, Westlaw through 2015 R.S.).

Jimenez asserts that the evidence at trial did not exclude the possibility that the vehicle he drove was a "device used exclusively on stationary rails or tracks." *Id*. (excluding from the definition of motor vehicle a "device used exclusively on stationary rails or tracks"). We disagree. The evidence showed that Jimenez drove a maroon, two-door Saturn Vue, which was described as a car, a vehicle, and a motor vehicle. The evidence further showed that the vehicle was driven on a roadway, which a rational jury could find was not a stationary rail or track. Additionally, photographs of Jimenez's vehicle and the roadway where the accident occurred were received into evidence as State's Exhibits 8 through 16. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could have found that Jimenez drove his vehicle on a roadway, not on a stationary rail or track. *See Jackson*, 443 U.S. at 326. We overrule Jimenez's third issue.

III. Trial Court's Comment While Ruling on Objection

By his first issue, Jimenez contends that the trial court commented on the weight of the evidence while ruling on his objection to the State's closing argument, which amounted to fundamental error requiring reversal. *See Blue v. State*, 41 S.W.3d 129, 132 (Tex. Crim. App. 2000) (plurality opinion) (observing that comments made from the bench, which taint the defendant's presumption of innocence, constitute fundamental error requiring reversal); *see also* TEX. CRIM. PROC. CODE ANN. art. 38.05 (West, Westlaw through 2015 R.S.) (providing that "[i]n ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the [evidence] or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall [the judge], at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.").

Jimenez asserts that the improper comment in this case occurred immediately before the trial court overruled Jimenez's objection to the following portion of the State's closing argument:

> State: [Jimenez] had the ability to take the [breath] test to definitively show if he was intoxicated, and he refused.
>
> Defense: Your Honor, I'm going to object to this line of argument, [the State] is now putting the burden on the defense[.]
>
> . . . .
>
> State: Your Honor, failure to take or refuse to take the breath test is a legal argument to show guilt.
>
> Trial Court: I mean, *it just tracks the evidence*, overruled.

According to Jimenez, the trial court's comment "it just tracks the evidence" gave the jury the impression that the trial court agreed with the State that Jimenez was intoxicated and therefore guilty because he refused to provide a breath specimen. We disagree.

The record shows that Jimenez objected on the basis that the State made an improper burden-shifting jury argument, to which the State responded that its argument was legally permissible because Jimenez refused to provide a breath sample. *See* TEX. TRANSP. CODE ANN. § 724.061 (West, Westlaw through 2015 R.S.) (providing that a defendant's refusal to take a breath test is admissible at trial). Before overruling Jimenez's objection, the trial court commented that "it [the argument] just tracks the evidence." When viewed in the context of Jimenez's initial objection and the State's subsequent response, the trial court's statement was not a comment on the weight of the evidence or an endorsement of the State's mode of proving guilt; rather, the comment related only to the permissibility of the State's jury argument based on the evidence adduced at trial. *See Grim v. State*, 923 S.W.2d 767, 769 (Tex. App.—Eastland 1996, no pet.) (holding that the trial court did not comment on weight of the evidence when it overruled objections to questions, stating "I think the law of transferred intent is involved in this case and I will overrule the objection").

Moreover, to the extent that the trial court's comment was improper in any way, the trial court remedied the error by including an instruction in the jury charge that the jury should not concern itself with any objections or rulings, that it should presume Jimenez's innocence, and that it should wholly disregard the rulings and comments of the judge. *See Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (observing that reviewing courts "generally presume the jury follows the trial court's instructions in the manner presented."); *see also Aschbacher v. State*, 61 S.W.3d 532, 539 (Tex. App.—

San Antonio 2001, pet. ref'd) (observing that an "instruction by the trial judge to the jury to disregard any comments made by him or her is generally sufficient to cure any error arising from his or her statements"); *Varela v. State*, No. 13-12-00251-CR, 2014 WL 69543, at *11 (Tex. App.—Corpus Christi Jan. 9, 2014, pet. ref'd) (mem. op., not designated for publication). Therefore, we conclude that the trial court did not make an improper comment meriting reversal in this case. We overrule Jimenez's first issue.

IV. Definition of Intoxication

By his second issue, Jimenez contends that the trial court erred in tracking the statutory definition of intoxication in the jury charge because the statutory definition itself is mathematically incorrect.[1] However, Jimenez does not dispute that a trial court must include a statutorily defined term in its charge to the jury. *See Murphy v. State*, 44 S.W.3d 656, 661 (Tex. App.—Austin 2001, no pet.). The trial court did so in this case by tracking the statutory definition of intoxication. Consequently, we need not address Jimenez's argument concerning the mathematical correctness of the statutory definition of intoxication because the trial court tracked the statutory definition as required by law. *See id*. There is no charge error here. We overrule Jimenez's second issue.

[1] Specifically, Jimenez contends that the portion of the statute defining intoxication as "having an alcohol concentration of 0.08 or more" technically should have a percentage sign immediately after 0.08, as did the former versions of the statute. *See* TEX. PENAL CODE ANN. § 49.01(2) (West, Westlaw through 2015 R.S.) (defining intoxicated, in relevant part, as "having an alcohol concentration of 0.08 or more"). According to Jimenez, "the figure '.08' is [mathematically] equivalent to 8%. A person with 8% alcohol in his blood would be dead." The State responds that "in light of the fact that the legislature now defines 'alcohol concentration' . . . as the number of grams of alcohol per 100 milliliters of blood, the calculations are correct. It is not the legislature that has miscalculated the proper alcohol concentration; instead, it is [Jimenez's] counsel that has failed to 'do the math' correctly."

V. One-Witness Instruction

By his fourth issue, Jimenez contends that the trial court improperly commented on the weight of the evidence in its charge to the jury. Specifically, in paragraph three of the jury charge, the trial court instructed the jury that:

> The law in our State provides that a person may be convicted on the testimony of one witness where guilt, each element of the criminal offense, is proven beyond a reasonable doubt.

Jimenez argues that this instruction constitutes a comment on the weight of the evidence, which "tipped the scales" in the State's favor by inviting the jury to convict as long as one witness testified to Jimenez's guilt.

A. Did the Trial Court Err?

The trial court's instruction correctly recites the so-called one-witness rule, which the State routinely converts to a question during jury selection to determine whether prospective jurors are challengeable for cause. *See Blackwell v. State*, 193 S.W.3d 1, 19 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (observing that "[i]t is proper for the State to ask during [jury selection] if jurors can convict on the testimony of one witness if the jurors believe that witness beyond a reasonable doubt on all of the necessary elements that establish an offense because a negative answer by a juror to the question makes the prospective juror challengeable for cause"); *see also Lee v. State*, 206 S.W.3d 620, 623 (Tex. Crim. App. 2006) (recognizing the continued vitality of the one-witness question during jury selection to determine whether prospective jurors are challengeable for cause). Although the trial court's instruction regarding the one-witness rule correctly recites the law in a general sense, we have found no legal authority that would allow the trial court to include it in the jury charge as part of the "law applicable to the case" pursuant to article 36.14 of the Texas Code of Criminal Procedure—and the State provides none.

See TEX. CODE CRIM. PROC. art. 36.14 (West, Westlaw through 2015 R.S.) (providing that the trial court has a duty to charge the jury regarding the "law applicable to the case" and should express no "opinion as to the weight of the evidence"). According to our independent research, reviewing courts have held that similarly worded jury instructions to the one given in this case constituted improper comments on the weight of the evidence—even where, as here, the instruction itself was technically a correct statement of the law. *See Lemasters v. State*, 297 S.W.2d 170, 171–72 (1956) (holding that the trial court improperly commented on the weight of the evidence by instructing the jury that a person may be convicted of keeping a policy game based on the uncorroborated testimony of an accomplice—even when a statute authorized the defendant's conviction based on such testimony, stating: "[the statute] was passed for the guidance of trial and appellate courts in passing upon the sufficiency of the evidence[,] but . . . the Legislature did not intend that the jury be instructed in accordance with the terms thereof"); *see also Wesbrooks v. State*, No. 05-09-00093-CR, 2010 WL 3222184, at *2 (Tex. App.—Dallas Aug. 17, 2010, pet. ref'd) (mem. op., not designated for publication) (citing *Lemasters* and holding that the trial court improperly commented on the weight of the evidence by instructing the jury that a person may be convicted of aggravated sexual assault of a child on the uncorroborated testimony of the child victim because, although a statute authorized the defendant's conviction based on such testimony, the instruction singled out the complaining witness's testimony); *Veteto v. State*, 8 S.W.3d 805, 816 (Tex. App.—Waco 2000, pet. ref'd) (same), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008). In view of the foregoing authorities, and for purposes of this memorandum opinion only, we will assume, without deciding, that the trial court commented on the weight of the evidence by instructing the jury that "a person may be

convicted on the testimony of one witness where guilt, each element of the criminal offense, is proven beyond a reasonable doubt." We now turn to our harm analysis.

B. Was the Error, if Any, Harmful?

Because Jimenez did not object to the one-witness instruction at trial, we may not order a new trial unless the error is considered "fundamental"—i.e., unless the one-witness instruction so egregiously harmed Jimenez that it deprived him of a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Egregious harm is shown when an error in the jury charge "affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Lovings v. State*, 376 S.W.3d 328, 337 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)). In determining whether the record demonstrates egregious harm, we review the entire record, including: (1) the jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the arguments of counsel, and (4) any other relevant factors revealed by the record. *See Hollander v. State*, 414 S.W.3d 746, 749–50 (Tex. Crim. App. 2013).

Turning to the jury charge, we note that, although the one-witness rule was included in this jury charge, the jury was given a correct statement of the law. *See Aschbacher v. State*, 61 S.W.3d 532, 538 (Tex. App.—San Antonio 2001, pet. ref'd) (observing that "[g]enerally, 'a correct statement of the law by the trial court, even during trial, is not reversible' as a comment on the weight of the evidence") (quoting *Powers v. State*, 737 S.W.2d 53, 54 (Tex. App.—San Antonio 1987, pet. ref'd)). We further note that the instruction was not included in the application portion of the jury charge—the section which authorizes the jury to act; instead, the instruction was included in the

abstract portion. *Compare Hutch v. State*, 922 S.W.2d 166, 172 (Tex. Crim. App. 1996) (observing that charge error appearing in the application portion of a jury charge is especially egregious because, in contrast to the abstract portion, the application portion of the jury charge is the section that actually authorizes the jury to act). Moreover, to the extent that the jury perceived the trial court's instruction as an open invitation to convict on the basis of one witness's testimony, the trial court correctly instructed the jury that they were not to abandon their role as the exclusive judges of witness credibility; this instruction ensured that the jury understood that Jimenez could not be convicted unless the State presented *credible* testimony, whether through one or more witnesses, establishing each and every element of the crime beyond a reasonable doubt.

Looking at the state of the evidence, we observe that the central trial issue was whether the State satisfied its burden to prove the intoxication element of driving while intoxicated. A gardener who encountered Jimenez immediately after the accident testified that Jimenez was "not all there" and appeared to have been "drinking." The lead officer testified that Jimenez admitted to drinking alcohol before the accident; that he refused to perform a field sobriety test; that he refused to provide a breath test; that he was rude and belligerent at the police station; and that he exhibited signs of intoxication, including slurred speech, bloodshot eyes, and unsteady balance. Based on these observations, the police officer testified that he believed Jimenez lost the normal use of his physical or mental faculties from the alcohol that he admitted to consuming before the accident. Jimenez testified in his own defense. Jimenez admitted that he drank alcohol before the accident but maintained that he was not legally intoxicated. Regarding the cause of the accident, Jimenez testified that a person suddenly appeared on the road as he was driving and that he swerved off the road to avoid hitting the person. Jimenez also

testified that he was willing to perform a field sobriety test but the officer never offered to re-administer the test after transporting him to the police station. Jimenez further testified that, although he refused to provide a breath specimen, the officer never entertained his request to provide a blood specimen. By returning a verdict of guilty, the jury apparently rejected Jimenez's testimony and instead chose to believe the testimony offered by the lead officer and the gardener that Jimenez was intoxicated. We find nothing in the one-witness instruction that could have influenced the jury to resolve the conflict in the evidence against Jimenez.

Considering the argument of counsel, we note that the State did reference the one-witness instruction while discussing the relevant sections of the jury charge during closing argument. However, the State referenced the one-witness instruction only to point out that the evidence supporting Jimenez's intoxication came from not one but two witnesses—the lead officer and the gardener. Thus, the State downplayed rather than emphasized the applicability of the one-witness rule as it related to this case. *See Rich v. State*, 160 S.W.3d 575, 577–78 (Tex. Crim. App. 2005) (noting that a harm analysis properly considers whether the State emphasized the error).

After considering the harm factors, we conclude that any error stemming from the one-witness instruction did not egregiously harm Jimenez to such extent that it deprived him of a fair and impartial trial. *See Almanza*, 686 S.W.2d at 171. We overrule Jimenez's fourth issue.[2]

[2] To the extent that Jimenez argues that the one-witness instruction in the jury charge amounted to fundamental error of constitutional dimension under *Blue*, we disagree. *See Blue v. State*, 41 S.W.3d 129, 132 (Tex. Crim. App. 2000). In *Blue*, the Texas Court of Criminal Appeals held that the trial court's comment to the venire—that the defendant was considering entering into a plea agreement and that the judge would have preferred that he plead guilty—tainted the defendant's presumption of innocence and vitiated the impartiality of the jury. The trial judge's remarks in *Blue* were an expression of exasperation and impatience with the defendant and essentially faulted the defendant for exercising his right to a jury trial. *See id*. To the extent that the one-witness instruction in the jury charge could be construed as a

VI. Conclusion

We affirm the judgment of the trial court.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

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

Delivered and filed the
17th day of November, 2016.

comment on the weight of the evidence, we conclude that it did no harm to Jimenez's presumption of innocence or vitiate the impartiality of the jury. Unlike the trial court's comments in *Blue*, nothing in the one-witness instruction expressed or otherwise implied the trial court's views regarding Jimenez's guilt or innocence. *See id*.