Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01211-CR

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BENJAMIN ZACARIAS TORRES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Cause No. 96-55081

O P I N I O N

A jury found Benjamin Zacarias Torres guilty of driving while intoxicated. The court assessed appellant's punishment at 180 days in jail, probated for one year, and a fine of $500.00. In two points of error, appellant claims that the trial court erred in admitting the audio portion of a videotape taken at the police station. We affirm.

BACKGROUND

In the early morning hours of December 25, 1996, Houston Police Department Officer Rodney Jaime testified that his attention was drawn to appellant when appellant's vehicle skidded and almost slammed into the rear end of Officer Jaime's parked patrol car. Officer Jaime subsequently observed that appellant's face was flushed, his eyes were glassy, he had a moderate odor of alcohol on his breath, and he had an open can of beer inside his vehicle. After performing field sobriety tests, which were videotaped at the scene, the appellant was arrested for suspicion of driving while intoxicated (DWI). At the police station, after appellant refused to take a breath test, a videotape was made of appellant performing sobriety tests.

STANDARD OF REVIEW

We generally review a trial court's ruling on a motion to suppress for abuse of discretion. *See Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996); *State v. Derrow*, 981 S.W.2d 776, 778 (Tex. App.–Houston [1st Dist.] 1998, pet. ref'd). We afford almost total deference to the trial court's fact findings, as we view the evidence in the light most favorable to the court's ruling. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Trial courts have broad discretion in their evidentiary rulings as they are usually in the best position to make the call on whether certain evidence should be admitted or excluded. *See Id*. The trial court should be allowed the discretion to exclude or admit evidence before the jury and an appellate court should not set aside the trial court's rulings absent a showing in the record that the trial court has abused that discretion. *See Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990).

DISCUSSION

In points of error one and two, appellant contends that the trial court erred in failing to suppress the audio portion of the videotape taken at the police station. He contends that the admission of the audio portion of the tape in evidence violated his Fifth and Fourteenth Amendment rights under the United States Constitution and Article I §10 of the Texas Constitution.

Appellant filed two identical motions to suppress with the trial court prior to trial, neither of which specifically sought suppression of the audio portion of the videotape. The appellant's "DWI MOTION TO SUPPRESS" requests the trial court to suppress "any and all evidence seized or obtained as a result of illegal acts on behalf of the Government." Appellant's motions to suppress are couched in general terms; the words "videotape" or "audiotape" do not appear. During the trial, when the State sought to introduce the videotape (State's Exhibit 1 B) in evidence, the appellant made the following general objection:

> For the record I just like to reurge my objection that was made on the motion to suppress the video tape that Ben Torres terminates the videotape.

After the court overruled his objection, the appellant stated:

> I have need to be more specific with my objection. That's based on his constitutional right to remain silent, Texas Constitution and the United States Constitution.

The court again overruled the objection.

An objection to the admission of evidence must specify and identify the grounds of the objection, and where part of an exhibit is admissible and part is not, in order to complain on appeal, the appellant must have made a specific objection to the inadmissible part of the exhibit at trial. *See Hernandez v. State*, 599 S.W.2d 614, 617 (Tex. Crim. App. 1980). The appellant's general motions and general objections fail to specify the objectionable portions of the videotape. Thus, nothing is preserved for appellate review. *See Riley v. State,* 988 S.W.2d 895, 898 (Tex. App.–Houston [14th Dist.] 1999, no pet.). Further, since the audio portion of the videotape is largely inaudible and the record contains no written transcription of the tape, any error is not properly presented for review. The burden is on appellant to make sure that a sufficient record is presented to show error requiring reversal *See O'Neal v. State,* 826 S.W.2d 172, 173 (Tex. Crim. App. 1992*); Spradling v. State,* 880 S.W.2d 792, 793(Tex. App.–Houston [1st Dist.] 1994, no pet.). Moreover, even if appellant's grounds of error were properly preserved for review, we find no reversible error.

Our review of the videotape reveals that it is barely audible, even with the volume control set on the maximum level. After appellant performed a series of sobriety tests at the police station, the civilian officer conducting the tests appeared to read *Miranda* rights to appellant. When she asked if appellant wished to waive those rights, appellant lowered his head and uttered an unintelligible remark. Apparently, the officer understood this utterance to indicate appellant's desire to terminate the interview because she immediately escorted appellant to the door while announcing that the interview was terminated. It is unclear from the audio whether the interview was terminated at appellant's request or whether it had merely reached its natural conclusion.

The right to terminate questioning is one of the procedural safeguards established by *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S.Ct. 1602, 1628, 16L.Ed.2d 694 (1966). As the Supreme Court stated in *Miranda*, "it is impermissible to penalize a person for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id*. Thus, evidence of an accused invoking the right to terminate an interview is inadmissible as evidence of guilt. *See Cooper v. State*, 961 S.W.2d 222, 226 (Tex. App.–Houston [1st Dist] 1997, pet. ref'd) (citing *Hardie v. State*, 807 S.W.2d 319, 322(Tex. Crim. App. 1991)).

The impression left by the videotape in the present case is unclear. The tape does not contain a clear verbal statement by appellant that he wants to exercise his constitutional right to remain silent, and his actions cannot definitely be construed to constitute an invocation of this right. *See Raffaeli v. State*, 881 S.W.2d 714, 717 (Tex. App.–Texarkana 1994, pet. ref'd). A DWI videotape should not be suppressed unless the police seek to elicit a testimonial response not normally incident to arrest or custody, or the police conduct is reasonably likely to elicit such a response. *See Mathieu v. State*, 992 S.W.2d 725, 729 (Tex. App.–Houston [14th Dist.] 1999, no pet.). The police request to perform sobriety tests and directions on how to do so do not constitute interrogation, nor do queries concerning a suspect's understanding of his rights. *Id*. (citing *Jones v. State*, 795 S.W.2d at 176). Because the jury in the instant case would not necessarily have been led to the conclusion that appellant exercised his constitutional right to remain silent, we cannot say that the jury improperly considered evidence of appellant invoking a constitutional right as an inference of guilt. *See Mathieu v. State*, 992 S.W.2d at 729. *Compare*

Dumas v. State, 812 S.W.2d 611, 615 (Tex. App.–Dallas 1991, pet. ref'd). The trial court did not abuse its discretion in failing to grant appellant's motion to suppress.

Even if we consider the admission of the contested audio portion of the tape to be error, from the point appellant apparently invoked his right to terminate the interview until the end of the tape a few seconds later, an analysis in accordance with TEX. R. APP. P. 44.2(a) shows any error to be harmless.[1] A Rule 44.2(a) analysis is necessary because the standard of review for errors of constitutional dimension is different from the standard for other errors. *See Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998). In this case, we determine beyond a reasonable doubt that the error, if any, did not contribute to appellant's conviction or punishment.

The following factors must be examined in evaluating harm under Rule 44.2(a) in cases such as the one before us: (1) the source of the error; (2) the nature of the error; (3) the State's emphasis of the error; (4) its probable collateral implications; (5) how much weight a judge or juror would probably place on the error; and (6) whether declaring the error harmless would encourage the State to repeat it with impunity. *See Gray v. State*, 986 S.W.2d 814 (Tex. App.–Beaumont 1999, no pet.) (citing *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989)); *Bhakta v. State*, 981 S.W.2d 293, 296-97 (Tex. App.–San Antonio 1998, pet. ref'd). Here, the source of the error was the admission into evidence of the audiotape in which the appellant apparently invoked his right to terminate the interview. The nature of the error was not egregious and had minimal collateral implications. This was not an instance in which a suspect repeatedly demanded his rights, exhibited a defiant attitude toward the police officer, or faced many harmful questions by the police after the invocation such that it was implied to the jury that appellant was guilty because of his repeated requests, attitude or answers to interrogation shown on the tape. The State never referred in any manner to appellant's invocation of a right and in no way emphasized the error. Further, there is no indication in the record that the jury relied on the inadmissible portion of the videotape. In fact, as noted above, the audio portion of the tape is largely inaudible. We do not believe that a conclusion that

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[1] Rule 44.2(a) provides: "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a).

the error is harmless would encourage the State to offer this kind of questionable evidence in the future. We therefore conclude that the error, if any, in this case is harmless.

Accordingly, we overrule appellant's points of error and affirm the trial court's judgment.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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