Affirmed and Opinion filed November 10, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-01011-CR

MARY MARSCHELL MCCOY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 761,840

O P I N I O N

Appellant, Mary Marschell McCoy, was charged by indictment with aggravated assault and impersonating a public servant. TEX. PEN. CODE ANN. § 22.02 and § 37.11 (Vernon 1994). Appellant pleaded not guilty and was tried before a jury. The jury acquitted her of aggravated assault and found her guilty of impersonating a public servant. The court assessed punishment at confinement for four years, probated for four years and a $1,000 fine. In six points of error, appellant contends that the evidence was legally and factually insufficient to support the conviction, that the trial court improperly excluded

evidence, that the State made several improper comments during closing argument, and that the trial court erred by denying appellant's proposed jury instruction. We affirm.

In her first and second points of error, appellant contends that the evidence was legally and factually insufficient. When reviewing a legal sufficiency challenge, we review all of the evidence in the light most favorable to the judgment to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App.1993). We will not reevaluate the weight and credibility of the evidence; instead, we act only to ensure the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App.1993).

When reviewing the factual sufficiency of the evidence, we consider all of the evidence without the prism of "in the light most favorable to the prosecution," 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. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). This review must be appropriately deferential so as to avoid substituting our judgment for that of the jury. *Id.* We must consider all of the evidence, both that which tends to prove or disprove a vital fact in evidence. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex.App.--El Paso 1996, no pet.).

The record shows that Daniel Duruzor was driving a taxi cab on the freeway. He noticed a white car weaving next to him. The white car was also maintaining an excessive speed. Both cars exited the freeway, and stopped at a traffic light on the service road. Duruzor rolled down his window and looked in the direction of the white car. Appellant was the driver of that car. Appellant then rolled her window down. Duruzor told appellant that her driving could have caused a wreck. According to Duruzor, appellant showed him a badge and told him that she was a police officer. Duruzor told appellant that it was not

"enough reason to drive the way you are doing." Duruzor then saw appellant point a gun in his direction and said, "mother f------, if you say anymore words I'll shoot you, I'll shoot you." Appellant drove away, and reported the incident to the police.

Three days later, appellant was arrested. Houston Police Officer Todd Janke searched appellant's car after the arrest. Officer Janke found a revolver on the floorboard near the driver's seat. He also found a small silver badge in appellant's purse along with a Houston Police identification card. Appellant had worked for the Houston Police Department, but had resigned earlier that year.

Appellant admitted to displaying the badge to Duruzor, but only so that he would leave her alone. Appellant said that while she was waiting at the traffic light, Duruzor began honking his horn. She saw Duruzor reach under his seat and thought he was retrieving some type of weapon. She then displayed her badge, but said nothing. She claimed that she did not have her gun with her at the time.

To establish a violation of TEX. PEN. CODE ANN. § 37.11 (Vernon 1994), there must be a false assumption or pretension by a person that she is a public servant and overt action in that capacity. *Tovar v. State*, 777 S.W.2d 481, 489 (Tex. App.–Corpus Christi 1989, pet. ref'd). Appellant's contention is that the evidence does not show an overt action. We disagree. The Texas Penal Code includes speech in its definition of the term "act." TEX. PEN. CODE ANN. § 1.07(a)(1) (Vernon 1994). Under these circumstances, Duruzor's testimony that appellant claimed that she was a police officer, coupled with her showing a badge, and then threatening to shoot Duruzor if he continued to speak, are sufficient to show that a false assumption of a public servant's role and an overt action in that capacity.

After considering all of the evidence before us, we hold that the evidence is legally and factually sufficient to support the conviction. We overrule appellant's first and second points of error.

In her third point of error, appellant contends that the trial court erred by excluding cross-examination testimony from Duruzor concerning his driving record. Appellant's counsel attempted to show that Duruzor had a suspended license and other traffic violations which caused him to be biased against police officers. The State claimed such evidence was not relevant or material. The trial court sustained the State's objection. We find that the trial court did not abuse its discretion in excluding this evidence.

On appellate review, the trial court's rulings on excluding evidence are subject to an abuse of discretion standard. *Rachal v. State*, 917 S.W.2d 799, 816 (Tex. Crim. App. 1996). Generally, specific instances of conduct of a witness, other than a conviction of a crime (felony or crime of moral turpitude), may not be inquired into on cross-examination. TEX. R. EVID. 608(b). Moreover, the record does not show Duruzor's bias against police officers. We hold that the trial court did not abuse its discretion by excluding Duruzor's license suspension and traffic violations. We overrule appellant's third point of error.

In her fourth point of error, appellant argues that the trial court erred in overruling appellant's objection to the prosecutor's statement in closing argument. During closing argument, the prosecutor told the jury what facts were sufficient to establish the crime of impersonating a public servant:

> Now, she told you herself she wanted this person to think she was affiliated with a police department. She told you she wanted him to submit to a specific act, and that was to leave her alone. Ladies and gentlemen, that in and of itself fulfills the parameters of impersonating a police officer.

Defense counsel objected on the ground that the argument was an improper statement of the law. The trial judge overruled the objection. Appellant argues that the statement was improper because the prosecutor neglected to inform the jury that an overt act in the pretended capacity of a police officer was a necessary element of the offense.

To be permissible, jury argument must fall into one of four general categories: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answer to the argument of opposing counsel; and (4) plea for law enforcement. *Richardson v. State*, 879 S.W.2d 874, 881 (Tex. Crim. App. 1993); *Simpson v. State*, 886 S.W.2d 449, 453 (Tex.App.--Houston [1st Dist.] 1994, pet. ref'd). Counsel may draw all inferences from the facts in evidence that are "reasonable, fair, and legitimate," but he may not use jury argument, either directly or indirectly, to get evidence before the jury that is outside the record. *Sawyer v. State*, 877 S.W.2d 883, 887 (Tex.App.--Houston [1st Dist.] 1994, pet. ref'd). We hold that the prosecutor's statement was a proper summation of the evidence and that he did not misstate the law. We overrule appellant's fourth point of error.

In her fifth point of error, appellant contends that the State's closing argument was improper because the prosecutor argued outside the record and attempted to shift the burden of proof to the defense. We disagree.

Appellant cites five instances in which the prosecutor argued outside the record. Appellant's trial counsel objected in each instance, but failed to obtain a ruling on all but one of her objections. Error is preserved for review only when the defendant receives an adverse ruling on his objection. *See* TEX. R. APP. P. 33.1(a)(2); *Ramirez v. State*, 815 S.W.2d 636, 643 (Tex. Crim. App.1991). Therefore, we need only address the issues which appellant preserved.

First, appellant argues that the prosecutor argued outside the record. The prosecutor told the jury that the appellant had a command voice, which enabled her voice to be forceful. The record reflects that appellant was capable of speaking in a command voice. The fact that it was forceful is a reasonable deduction from this evidence. *Richardson*, 879 S.W.2d at 881. The trial court did not err by overruling appellant's objection to the prosecutor's comment.

Next, appellant argues that the State attempted to shift the burden of proof to the appellant. During closing argument, the prosecutor said, "if she [appellant] was so frightened that night and she told her family and her roommate everything, why didn't we hear it from them, what her state of mind was that night." This argument was proper because the State may comment on a defendant's failure to call competent and material witnesses. *Reynolds v. State*, 848 S.W.2d 785, 790 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd). The State may also argue that the reason for such failure is that the testimony would be unfavorable to the defense. *See e.g., O'Bryan v. State*, 591 S.W.2d 464, 479 (Tex. Crim. App.1979), *cert. denied*, 446 U.S. 988, 100 S.Ct. 2975, 64 L.Ed.2d 846 (1979); *Parker v. State*, 792 S.W.2d 795, 801-02 (Tex.App.--Houston [14th Dist.] 1990, pet. ref'd). Appellant's family members and her roommate could have testified to her state of mind after this altercation. Appellant does not complain that they were not available for trial. We hold that the trial court did not err by overruling appellant's objection. Appellant's fifth point of error is overruled.

In her sixth point of error, appellant argues that the trial court erred by denying appellant's lesser included offense of impersonating a peace officer in the jury charge. We hold that appellant failed to preserve error on this point.

In order to preserve error relating to the jury charge, the appellant must either object or request a charge. *Vasquez v. State*, 919 S.W.2d 433, 435 (Tex. Crim. App.1996). Objections and special requested instructions must be submitted in writing or dictated to the court reporter before the charge is read to the jury. TEX. CODE CRIM. PROC. ANN. Art. 36.14, 36.15 (Vernon Supp. 1999). After reviewing the record, we find that appellant did not submit a requested charge on the lesser included offense, either in writing or by dictating the proposed charge to the court reporter.

Furthermore, the harm standard for charge errors was not preserved. *See Posey v. State*, 966 S.W.2d 57, 60-64 (Tex. Crim. App.1998). An appellant can secure a reversal

for the omission of defensive instructions only where an objection or special requested instruction is submitted at trial. *See Id.* Having failed to preserve error, we overrule appellant's sixth point of error.

The judgment is affirmed.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed November 10, 1999.
Panel consists of Justices Sears, Cannon, and Draughn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.