Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00529-CR

ELIZABETH IGBINOVIA IHAZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 99-51039

O P I N I O N

A jury found appellant, Elizabeth Igbinovia Ihaza, guilty of the misdemeanor offense of selling alcohol to a minor. The trial court assessed punishment at thirty days confinement in the Harris County Jail and a $2,000.00 fine. In four points of error, appellant contends: (1) the evidence is legally and factually insufficient to sustain her conviction; (2) the trial court erred in overruling her objections to the State's jury strikes; and (3) the conviction should be reversed and remanded for a new trial due to the State's improper jury argument. We affirm.

Appellant was the proprietor of the Top Flight Nightclub in Houston. Appellant held an on-premise liquor license issued by the Texas Alcoholic Beverage Commission. On November 20, 1999, two Houston undercover police officers, Officer Dennis Bounds and

Officer Mike Douglas, conducted an investigation for liquor violations at appellant's establishment. Officer Douglas entered appellant's establishment at midnight accompanied by an underage female, Natasha Brandon. Upon entering the nightclub, Officer Douglas voluntarily presented his identification to one of appellant's employees at the door and paid a cover charge for himself and Ms. Brandon. At trial, Ms. Brandon testified that she was not asked to present any identification. Officer Bounds entered the nightclub separately, presented his identification, paid the cover charge, and observed Officer Douglas and Ms. Brandon inside the nightclub. Once inside, Officer Douglas asked Ms. Brandon to attempt to purchase beer from appellant. Ms. Brandon testified that she went to the bar, ordered a beer, and was served by appellant. Ms. Brandon testified that she returned to Officer Douglas after she purchased the beer. Officer Douglas testified that he poured some of the beer in a container to preserve it as evidence. Officer Douglas then arrested appellant for the misdemeanor offense of selling alcohol to a minor.

At trial, appellant testified that she utilized specific procedures to insure that minors were not served alcohol at her establishment. She testified that a doorman checked the identification of everyone who entered the club and provided pink wristbands only to those who were old enough to purchase alcohol. She further testified that on November 20, 1999, she did not serve anyone who was not wearing a pink wrist band. Two of appellant's employees testified that they worked at the door of appellant's establishment on November 20, 1999. They both testified that they checked the identification of everyone who entered the nightclub and gave wrist bands only to the those who presented identification that established they were old enough to purchase alcohol.

Appellant's first point of error challenges the legal and factual sufficiency of the evidence. Appellant argues that the trial court erred by receiving the jury's verdict when it was based on evidence that was legally and factually insufficient to support her conviction for selling an alcoholic beverage to a minor. Section 106.03 of the Texas Alcoholic Beverage Code states that a "person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor." TEX. ALCO. BEV. CODE ANN. § 106.03 (Vernon Supp. 2001). The focus of appellant's legal and factual sufficiency challenge is her assertion that the evidence does not

support the jury's finding of criminal negligence. Appellant contends that her testimony that she did not sell alcohol to anyone who was not wearing a pink wrist band, the testimony of her employees that they checked the identification of everyone who entered the club and gave wrist bands only to those who presented identification establishing that they were old enough to purchase alcohol, and the State's failure to present testimony that Ms. Brandon was not wearing a wrist band invalidates the jury's finding of criminal negligence.

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 320; *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App.1993). The evidence is examined in the light most favorable to the jury's verdict. *Johnson*, 871 S.W.2d at 186. When conducting a legal sufficiency review, we are required to defer to the jury's determinations on the credibility of witnesses and the weight to be given to their testimony. TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). It is for the jury as trier of fact to resolve any conflicts and inconsistencies in the evidence. *Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App.1982).

Our factual sufficiency review begins with the presumption that the evidence is legally sufficient. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App.1996). We must look to all the evidence "without the prism of 'in the light most favorable to the verdict.'" *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). We may set aside the verdict on factual sufficiency grounds only when that verdict is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Clewis*, 922 S.W.2d at 134-135. When conducting a factual sufficiency review, we must be careful not to intrude on the jury's role as the sole judge of the credibility of the witnesses or the weight to be given their testimony. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App.1997).

Criminal negligence is the lowest degree of culpability defined by the Texas Penal

Code. TEX. PEN. CODE ANN. § 6.02(d)(4) (Vernon 1994). The Penal Code defines criminal negligence as:

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

TEX. PEN. CODE ANN. § 6.03(d) (Vernon 1994). The Texas Alcohol and Beverage Code expressly incorporates the Penal Code's definition of criminal negligence. TEX. ALCO. BEV. CODE ANN. § 1.08 (Vernon 1995). A person is criminally negligent if he should have been aware of the risk surrounding his conduct, but failed to perceive it. *Ford v. State*, 14 S.W.3d 382, 387 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

After conducting a careful review of the record and applying the appropriate standards of review, we find the evidence is both legally and factually sufficient to support the jury's verdict. Ms. Brandon testified for the State and said she was nineteen years old on November 20, 1999, that she purchased alcohol from the appellant, and that she did not proffer any false identification or lie about her age when she entered appellant's establishment or when she purchased the alcohol. Officer Douglas testified that Ms. Brandon was not asked to produce identification when she entered appellant's establishment. Furthermore, Officer Douglas testified that he observed Ms. Brandon approach appellant and purchase a beer from her. It is the sole responsibility of the person selling alcoholic beverages to check the identification of persons attempting to purchase alcohol. *Id*. at 388. Appellant can not absolve herself of culpability simply because she employed a scheme of prophylactic measures to expedite her ability to sell alcohol without checking the identification of the purchaser prior to every sale. Whether Ms. Brandon was mistakenly given a pink wrist band by appellant's employees is not relevant to the jury's determination that appellant acted with criminal negligence when she sold alcohol to Ms. Brandon. To allow sellers of alcohol to escape criminal liability for selling alcohol to minors based on testimony that measures were generally employed to limit a

minor's access to the alcohol would render the statute meaningless. *Id*. Accordingly, we overrule appellant's first point of error.

Appellant's second and third points of error maintain that the State improperly used its peremptory challenges to exclude veniremembers 10 and 11 based upon their race and that the trial court erred in overruling appellant's objections to the State's jury strikes. Appellant's counsel challenged the State's peremptory strikes, asserting that the challenges were based on the race of the veniremembers, prior to the trial court's impaneling the jury. Excluding a person from jury service because of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. U.S. CONST. amend. XIV; *Batson v. Kentucky*, 476 U.S. 79 (1986); TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989). A party challenging an opposing party's exercise of peremptory strikes on racial grounds bears the ultimate burden to persuade the trial court regarding racial motivation. *Ford v. State*, 1 S.W.3d 691, 693 (Tex. Crim. App. 1999). The same party bears the initial burden of production to establish a *prima facie* case of racial discrimination by the State against an eligible veniremember. *Id*. However, the trial court, in response to appellant's objection, asked the State to articulate its reasons for the strikes. Consequently, we need not consider the preliminary issue of whether appellant made a *prima facie* showing of racial discrimination. *Hill v. State*, 827 S.W.2d 860, 865 (Tex. Crim. App. 1992).

In response to appellant's objection and the trial court's request, the State was required to articulate a clear and reasonably specific explanation of legitimate reasons for its challenged strikes. *Sloan v. State*, 809 S.W.2d 224, 226 (Tex. Crim. App. 1991). The State's reply to appellant's objection was that the veniremembers were struck because they responded affirmatively when the State asked the venire if anyone felt you should not have to be 21 years old to purchase alcohol. Appellant then had the burden of persuading the trial court that the State's race-neutral explanation was pretextual and the strikes were in fact racially motivated. *Ford*, 1 S.W.3d at 693-94. However, appellant's counsel failed to question the State about its race-neutral explanation or present any evidence establishing the illegitimacy of its explanation. We will not overturn a trial court's finding that the State's race-neutral explanation was valid unless the record establishes that the finding is clearly erroneous.

Williams v. State, 804 S.W.2d 95, 101 (Tex. Crim. App. 1991). Accordingly, we overrule appellant's second and third points of error.

In her fourth point of error, appellant contends her conviction should be reversed because the State argued matters outside of the record during closing argument. However, appellant failed to make a timely and specific objection to the State's allegedly improper jury argument and, thus, forfeited her right to complain about the argument on appeal. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). Appellant's fourth point of error is overruled and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed July 26, 2001.
Panel consists of Justices Hudson and Seymore, and Senior Chief Justice Murphy.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Chief Justice Paul Murphy sitting by assignment.