Affirmed and Opinion filed January 31, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01318-CR

MICHAEL DENNIS HUNT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Court at Law No. 2
Fort Bend County, Texas
Trial Court Cause No. 86726

O P I N I O N

Appellant Michael Dennis Hunt appeals his conviction for driving while intoxicated in the following two issues: (1) the trial court erred in admitting evidence of the horizontal gaze nystagmus (HGN) test because it was unreliable as administered and (2) the trial court erred in failing to instruct the jury that it could disregard the HGN test if it found the test was incorrectly administered. We affirm.

Background

Fort Bend County Deputy Jeff Hodges observed Hunt speed and fail to stop for a stop sign at an intersection when other traffic was present. In belatedly braking for the stop sign, Hunt skidded into the intersection and slid sideways. When the deputy approached Hunt, he

noticed that Hunt's eyes were glassy and that he strongly smelled of alcohol. Further, Hunt's speech was slightly slurred. When the deputy began administering the HGN test, he noticed lack of "smooth pursuit" in Hunt's eyes on the first few passes. At jail, Hunt performed poorly on the HGN test and two other field sobriety tests.

Reliability of HGN Test

In his first issue, Hunt contends the HGN test, as administered, was unreliable and thus inadmissible, irrelevant, and (if relevant) more prejudicial than probative. Specifically, he complains that Deputy Hodges (1) held the pen in front of Hunt's eyes at a distance of fifteen to eighteen inches, instead of twelve to fifteen inches; (2) could not distinguish between end-point nystagmus, which many people have even when sober, and distinct nystagmus; (3) failed to pass the pen before Hunt's eyes the minimum number of times; and (4) failed to check each eye twice.

As a preliminary issue, the State argues that Hunt failed to preserve error. We disagree. Appellate Rule 33.1(a)(1)(A) provides that error is preserved if the "complaint was made to the trial court by a timely request, objection, or motion" that states the grounds "with sufficient specificity to make the trial court aware of the complaint." Before trial, Hunt filed a motion to exclude the officer's testimony as unreliable.[1] He argued to the trial court that if the HGN test is not administered exactly as delineated by the National Highway Transportation Safety Association manual, the test results are scientifically invalid. He alerted the trial court that the officer had conducted the test incorrectly in the videotaped portion of the field sobriety tests. The trial court overruled his pretrial motion. We conclude that Hunt timely informed the trial court of his grounds with sufficient specificity and,

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[1] His motion is entitled, "Motion to Prohibit Police Officer Opinion Testimony on Reliability, Accuracy, and Results of Standardized Field Sobriety Tests Under R. 702, Tex. R. Evid." The State likens this to a motion in limine, which does not preserve error in the admission of evidence. *Willis v. State*, 785 S.W.2d 378, 384 (Tex. Crim. App. 1989); *Hatchett v. State*, 930 S.W.2d 844, 849 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). However, we see the motion as more akin to a motion to suppress, which preserves error without further objection when the same evidence is offered at trial. *Peake v. State*, 792 S.W.2d 456, 458-59 (Tex. Crim. App. 1990).

therefore, that he preserved error. *Mata v. State*, 46 S.W.3d 902, 907-08 (Tex. Crim. App. 2001).

Next, the State contends Hunt conceded that the State established a proper predicate for admission of the HGN test. However, the State's record citations in support of this argument do not reflect such a concession.

Hunt argues that because the deputy administered the HGN test incorrectly, the test result was unreliable and should not have been admitted in evidence. To be considered reliable, evidence based on a scientific theory must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Hartman v. State*, 946 S.W.2d 60, 62 (Tex. Crim. App. 1997). Under Texas Rule of Evidence 104(a) and (c) and Rule 702, the proponent must establish all three criteria outside the presence of the jury, before the trial court may admit the evidence. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992).

Regardless of whether the trial court erred in allowing Deputy Hodges to testify about the HGN tests administered to Hunt, we hold that admission of the evidence was harmless. A reviewing court is to disregard nonconstitutional error that does not affect the substantial rights of the defendant. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). A criminal conviction should not be overturned for nonconstitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

The evidence shows that Hunt was driving fifty-two miles per hour in a thirty-five-mile-per-hour zone. He ran a stop sign and skidded into an intersection, turning his car sideways in the process. Hunt smelled of alcohol and had glassy, bloodshot eyes. Deputy Hodges observed that Hunt's speech was slightly slurred. Further, Hunt could not follow instructions for completion of the HGN test and went into a dead stare. He began to sway

and lose his balance so that Deputy Hodges had to steady him. At jail, while attempting the walk-and-turn test, Hunt was unable to stand during the instruction phase and stepped off the line twice. He also failed to walk heel-to-toe as instructed. During the one-leg stand, Hunt swayed, hopped on his foot, raised his arms for balance, and placed his raised foot down. Assuming admission of testimony about the HGN test was error, we hold that it did not affect Hunt's substantial rights and was "harmless in light of other properly admitted testimony." *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999). We overrule issue one.

Jury Instruction

In his second issue, Hunt contends the trial court erred in refusing to instruct the jury that it could disregard evidence about the HGN test if it found Deputy Hodges incorrectly administered the test. In support of this argument, Hunt cites only *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994). Although *Emerson* addresses scientific reliability and the HGN test, it does not address jury instructions. To support his appeal, Hunt has a duty to cite specific legal authority and provide legal argument based upon that authority. TEX. R. APP. P. 38.1(h); *Rhoades v. State*, 934 S.W.2d 113, 119 (Tex. Crim. App. 1996). "This is especially important where, as in the case at bar, the relevant area of law is not well defined." *Nejnaoui v. State*, 44 S.W.3d 111, 116 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Without appellant providing specific argument based on proper legal authority, we have nothing to review. We overrule Hunt's second issue.

Having overruled both of Hunt's issues, we affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed January 31, 2002.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).