Affirmed and Opinion filed July 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01418-CR

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REBA EDMONS THOMASSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Court at Law No. 3
Fort Bend County, Texas
Trial Court Cause No. 65658-B

O P I N I O N

Reba Edmons Thomasson appeals a conviction for misdemeanor driving while intoxicated ("DWI") on the grounds that the trial court erred in: (1) charging the jury, over her objection, on intoxication resulting from a controlled substance or drug because there was no evidence of either in this case; and (2) denying her motion for continuance and proceeding with trial in her absence. We affirm.

Jury Charge

Appellant's first two points of error contend that the trial court erred in overruling her objections to the jury charge definition of intoxication including a reference to a controlled

substance, a drug, or combination of those substances. Appellant asserted that the definition should mention only alcohol because there was no evidence of any controlled substance or drug.[1] Appellant made the same argument concerning the application paragraph and reasserts those arguments on appeal. Appellant does not challenge the sufficiency of the evidence to prove that she was intoxicated[2] but asserts that the references in the charge to controlled substances and drugs confused the jury about the State's ultimate burden of proof.

The purpose of the jury charge is to inform the jurors of the applicable law and guide them in its application to the case. *See Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). Although it is proper for the indictment to allege all different ways the offense may have been committed,[3] the State must particularize its allegations in the jury charge to only those supported by the evidence presented at trial. *See Nickerson v. State*, 782 S.W.2d 887, 891 (Tex. Crim. App. 1990).

In this case, the court's charge stated:

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[1] *See, e.g., Erickson v. State*, 13 S.W.3d 850, 851-52 (Tex. App.–Austin 2000, pet. ref'd)(holding that any error from inclusion of "controlled substance, a drug, or a combination . . . ." where not supported by any evidence was not harmful because no such intoxicant was specifically named and prosecutor's closing argument acknowledged that intoxication was due only to alcohol).

[2] After observing appellant drive erratically, Fort Bend County Sheriff's Deputy David Schultz pulled her over. Schultz testified that appellant's speech was slurred, she smelled of alcohol, and she was unsteady on her feet and needed to use her car for balance as she walked. He also observed a half empty beer bottle standing upright on the passenger side floorboard. Responding to Schultz's questioning, appellant admitted that she had drunk two beers. Schultz performed several field sobriety tests, which indicated appellant was intoxicated. Deborah Walger, a jail employee riding with Schultz, testified similarly and shared Schultz's opinion that appellant was intoxicated. After being arrested for suspicion of DWI and taken to jail, appellant refused to take a breath test and further field sobriety tests.

[3] The information in this case alleged that:

> [Appellant] . . . did . . . while intoxicated, namely not having the normal use of her mental and physical faculties by the reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into her body, drive and operate a motor vehicle in a public place. . . .

> [Appellant] . . . stands charged by information with the offense of operating a motor vehicle in a public place while intoxicated [4] . . . .
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> * * * *
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> "Intoxicated" means not having the normal use of mental or physical faculties by reason of the introduction of alcohol, *a controlled substance, a drug, or a combination of two or more of those substances* into the body.[5]
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> * * * *
>
> Therefore, if you believe from the evidence beyond a reasonable doubt that [appellant] . . . did while intoxicated, namely, not having the normal use of [appellant's] mental or physical faculties by reason of the introduction of alcohol, *a controlled substance, a drug, or a combination of two or more of those substances* into [appellant's] body, drive or operate a motor vehicle in a public place, you will find [appellant] guilty.

(emphasis added). The jury charge did not define "controlled substance" or "drug"[6] and appellant did not object to the omission of those definitions.

The evidence of appellant's use of a controlled substance or a drug consisted of: (1) the testimony of Schultz and the booking room deputy that three bottles of prescription antidepressants were found in appellant's purse; and (2) Schultz's testimony, without objection, that he believed appellant was intoxicated from alcohol, a controlled substance, a drug, or a combination thereof. In light of this evidence, a charge referring only to alcohol would have forced the jury to make a determination that was not possible to make under these facts, *i.e.* that the intoxication was due entirely to alcohol and in no part to the prescription drugs. Under these circumstances, appellant has not demonstrated that the trial court erred in overruling her objection to the charge. In addition, in light of the uncontroverted evidence that appellant was

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4 *See* TEX. PEN. CODE ANN. § 49.04(a) (Vernon Supp. 2000).

5 *See id.* § 49.01(2)(A).

6 *See* TEX. PEN. CODE ANN. § 1.07(a)(12), (18) (Vernon 1994); TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(5), (16), 481.031-.033, 481.102-.105 (Vernon Supp. 2000). Although the record does not reflect the type of antidepressant medication appellant possessed, the definition of "drug" includes substances used for medical treatment, and the definition of "controlled substance" includes a variety of drugs and other substances which have either a stimulant or depressant effect on the central nervous system. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.032 (Vernon Supp. 2000).

intoxicated and had consumed alcohol, it is not apparent how the jury could have been confused or appellant could have been harmed by inclusion of the language concerning other substances. Accordingly, we overrule appellant's first and second points of error.

Appellant's Absence from Trial

Appellant's third point of error challenges the trial court's denial of her motion for continuance filed on the second morning of trial when appellant failed to appear. Appellant argues that defense counsel's representation to the trial court of an unverified telephone message indicating that appellant had been involved in an automobile accident constituted some evidence that her absence from trial was not voluntary, satisfying the requirements of Article 33.03 of the Texas Code of Criminal Procedure. Appellant further asserts that her defense was compromised by the absence of her testimony at trial.

Article 33.03 provides that a defendant must be personally present at his trial unless he voluntarily absents himself after the proceedings have begun, in which case the trial may proceed to its conclusion in his absence. *See* TEX. CODE CRIM. PROC. ANN. art. 33.03 (Vernon 1989). A trial court's decision to deny a motion for a continuance and proceed with trial in a defendant's absence is reviewed for abuse of discretion. *See Moore v. State*, 670 S.W.2d 259, 261 (Tex. Crim. App. 1984). If a trial court can reasonably infer from the evidence before it, and evidence presented subsequently, that a defendant voluntarily absented himself, then continuing with the trial in his absence is not an abuse of discretion. *See id*. Absent any evidence to refute the trial court's determination that appellant's absence was voluntary, we will not disturb the trial court's decision. *See id*.

In this case, the record reflects that prior to the beginning of trial, appellant's bond had repeatedly been forfeited for failure to appear and then reinstated. Although appellant was present for the first two days of trial, the record reflects that she did not appear when called on the third day. Defense counsel advised the court that an individual named "Rick" had left a message on his recorder stating that appellant had "had a wreck" the previous day. It was also reported that the "bonds people" had been unable to find appellant, and that "everybody's

looking for her." When the trial court then proposed proceeding with the trial, defense counsel requested to "continue it" another thirty minutes and also requested a mistrial due to appellant's absence. The State responded that the people contacted by the bondsmen were not aware of any accident. The court gave defense counsel an additional twenty minutes to call local hospitals and attempt to locate appellant, but he was unsuccessful, and the State moved for a bond forfeiture, which was granted.

Appellant did not return to court and, in her absence, was found guilty of driving while intoxicated and sentenced to seventy-five days in jail. Although a motion for new trial was filed, it failed to provide any reasons for appellant's absence and was denied with the notation that neither appellant nor her counsel appeared for the scheduled hearing.

Based on this record, the trial court had some evidence from which it could infer that appellant's absence from trial was voluntary,[7] and appellant has presented no evidence to the contrary. Therefore, she has failed to demonstrate that the trial court erred in denying a continuance and proceeding to trial in her absence. Accordingly, appellant's third point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed July 27, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
Do not publish — TEX. R. APP. P. 47.3(b).

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[7] *See, e.g., Heard v. State*, 887 S.W.2d 94, 99 (Tex. App.– Texarkana 1994, pet. ref'd) (affirming the trial court's denial of the defendant's motion for continuance because there was some evidence the defendant had voluntarily absented himself); *Sanchez v. State*, 842 S.W.2d 732, 733 (Tex. App.– San Antonio 1992, no pet.); *Nauls v. State*, 762 S.W.2d 336, 338 (Tex. App.– San Antonio 1988, no pet.).