Affirmed and Opinion filed August 23, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01348-CR

DAMIAN HOLLIER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 13
Harris County, Texas
Trial Court Cause No. 99-11391

O P I N I O N

Appellant, Damian Hollier, appeals his conviction for driving while intoxicated. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Late one night, Officer Craig Howard Bellamy observed appellant's vehicle speeding. He also saw the vehicle weave, change lanes without signaling, and make a wide right turn without stopping at a red light. During the traffic stop that followed, Officer Bellamy detected a strong odor of alcohol on appellant's breath, prompting the officer to administer four field sobriety tests. Appellant failed all of the tests.

On the Horizontal Gaze Nystagmus (HGN) test, appellant exhibited the maximum number of possible clues, six, where four clues indicates impairment. While performing the one-leg stand test, during which Officer Bellamy timed 30 seconds, appellant swayed several times, using his arms for balance, thereby exhibiting two of four indicators of intoxication, which indicates impairment. Appellant also failed the Rhomberg test; he estimated the passage of 30 seconds as 39 seconds and swayed one to two inches several times. Appellant also failed the walk-and-turn test by exhibiting four of eight possible clues for intoxication; he lost his balance and stepped off the line, used his arms during the walking phase, made an improper turn around, and started a third set of steps when Officer Bellamy had to tell him twice to stop.

Appellant was charged by information with the misdemeanor offense of driving while intoxicated (DWI). The charge was enhanced with one previous conviction for operating a motor vehicle while intoxicated. Appellant pled not guilty to the DWI offense. The jury found appellant guilty as charged, and appellant pled true to the enhancement provision. The trial court assessed appellant's punishment at 45 days' confinement in the Harris County Jail, a $2,000 fine, and suspension of his driver's license for one year. Appellant filed a motion for new trial, which the trial court denied. Appellant now challenges his DWI conviction, raising seven points of error.

II. ISSUES PRESENTED FOR REVIEW

In his first two points of error, appellant complains the trial court erred in admitting a videotape made the night of appellant's arrest because the State did not offer the tape in a physically admissible form, thereby inhibiting the jury's ability to view the evidence in the jury room. In his third point of error, appellant asserts the trial court erred in denying appellant's request for a mistrial where an officer correlated the number of clues exhibited on the HGN test with a blood alcohol concentration. In his fourth and fifth points of error, appellant complains the trial court erred in (1) allowing testimony that appellant "invoked" his constitutional rights and (2) refusing to instruct the jury not to

consider appellant's request for counsel as evidence of guilt. In his sixth point of error, appellant complains the trial court erred in overruling his objection to the State's closing argument reference to facts outside the record. In his seventh and final point of error, appellant claims the trial court erred in restricting his cross examination of a witness concerning the existence of a quota system within the DWI task force.

III. ADMISSION OF VIDEOTAPE

In his first and second points of error, appellant complains the trial court erred in admitting the videotape made after his arrest, where he allegedly invoked his rights to counsel and silence because (1) the videotape was not offered in a "physically admissible form," and (2) as a result, the jury was unable to examine the evidence in the jury deliberation room, as required by Texas Code of Criminal Procedure article 36.25. *See* TEX. CODE CRIM. PROC. ANN. art. 36.25 (Vernon 1981).

The trial court suppressed the audio portion of the videotape at the point where appellant stated that he did not want to attempt the motor skill exercises "without . . . [his] attorney present." After this ruling, defense counsel objected to the tape's admission as a whole, unless the State redacted it to exclude the "suppressed invocation of [his right to] counsel," because the videotape could not be taken back to the jury room for the jurors to view at their leisure. When the trial court played the videotape for the jury, the audio portion was turned off from the point appellant indicated he did not want to continue the test unless his attorney was present through the conclusion of the tape.

Appellant relies upon *Firo v. State*, 878 S.W.2d 254 (Tex. App.—Corpus Christi 1994, pet. ref'd), for the proposition that the State had a burden to redact the videotape before offering it into evidence. In *Firo*, the trial court ordered the State to redact a portion of a document before admitting it into evidence. *Id.* at 255. However, the document was admitted with the court-ordered redacted portions still intact. *Id.* Reversing the conviction, the court of appeals held that "the party offering the evidence has the burden to redact or sanitize a document to comply with the court's order before the document is

properly admissible." *Id.* at 256. However, *Firo* does not apply to this case. Unlike the trial court in *Firo*, the court below did not order the State to redact or sanitize the videotape. Thus, the State was not required to conform with any redaction order before offering the videotape into evidence. Consequently, the trial court did not err in admitting the unredacted videotape into evidence.

Appellant correctly points out that the Texas Code of Criminal Procedure establishes the jury's right to have furnished, upon its request, any exhibits admitted into evidence in the case. *See* TEX. CODE CRIM. PROC. ANN. art. 36.25 (Vernon 1981) ("There shall be furnished to the jury *upon its request* any exhibits admitted as evidence in the case.") (emphasis added). Here, the jury did not request the videotape. Moreover, the trial court clearly contemplated that the jury might ask for the videotape and stated, in that event, the court would furnish the same copy of the videotape to the jury, noting: "[a]nd, of course, if the jury views this later, we will have to set it up in a way that it can be, also, produced the same way." In addition, appellant received the exact relief he requested during trial, i.e., muting of the audio portion of the videotape from the claimed invocation onward.[1]

Finally, the State argues, and we agree, that these points of error are moot because defense counsel later showed the entire videotape, with the audio portion playing, to the jury.[2] This action by the defense effectively negated any concern by the appellant for the jury's ability to reexamine the videotape, as originally played, with partial audio. Consequently, we find no merit in appellant's arguments that the trial court "precluded the jury from being able to examine the tape in the jury deliberation room," or that the jury

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[1] Before the trial court watched the video, defense counsel urged that "another thing that we're looking to have suppressed is the giving of the *Miranda* warnings and what happens thereafter when he invokes his rights." Further, in response to the trial court's attempt "to find specifically what everyone is urging," defense counsel stated "I think when he makes that statement that I would like to have a lawyer, *the sound should go down from then on.*" (emphasis added).

[2] Defense counsel offered the entire video, which allegedly indicated that appellant had invoked his rights, "to explain and counter the evidence from the State."

was "restrained from functioning properly."

Appellant's first and second points of error are overruled.

IV. INVOCATION OF RIGHTS

In appellant's fourth and fifth points of error, he complains the trial court erred in overruling his objection to, and in denying a requested instruction for the jury to disregard, a police officer's testimony that appellant "maintain[ed] his rights" on the videotape. Specifically, appellant complains about the following exchange between the prosecutor and Officer Preadom, who gave *Miranda* warnings to appellant on the post-arrest videotape:

State:	And on the tape do you personally read the defendant each of his rights?
Officer:	Yes, I did.
State:	And does the defendant waive his rights?
Officer:	No, he does maintain his rights.

Defense counsel made no immediate objection to the question. After the witness answered the question, the prosecutor offered an exhibit into evidence. It was not until that point that appellant's counsel objected to the above testimony, requested an instruction to disregard, and moved for a mistrial, arguing that the officer's statements violated the trial court's order suppressing evidence of appellant's invocation of his rights. The trial court overruled the objection. Appellant now complains that the prosecutor's question (1) directly commented on appellant's assertion of the right to remain silent by requesting counsel, as evidence of guilt, and therefore (2) violated the trial court's ruling suppressing the audio portion of appellant's alleged invocation of the right to counsel.

Audiotape evidence of a defendant invoking his right to counsel is not admissible as evidence of guilt. *Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App. 1991).

However, appellant's complaint on appeal assumes (1) that appellant's statement[3] was, in fact, an invocation of the rights to counsel and to remain silent,[4] and (2) that Officer Preadom's testimony that appellant "maintain[ed] his rights" indicated appellant had *invoked* his rights. Even making these assumptions, we find that appellant has waived his right to complain on appeal about Officer Preadom's testimony. With the exception of the right to trial by jury, a defendant can waive any trial error, including constitutional error, by failing to make a proper objection. TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 2001); *Little v. State*, 758 S.W.2d 551, 563 (Tex. Crim. App. 1988); *see Wheatfall*

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[3] The exchange made the subject of this testimony follows:

Officer:	The reason you are here is because you have been arrested for suspicion for driving while intoxicated. As part of that process, you have to be given a chance to demonstrate your sobriety. This videotape could be used at some late [sic] date for court purposes. So that serves this purpose now. My name is P.S.O. Preadom. I'll be showing a series of motor skill exercises and I'll permit you would have a chance to do each one just wait until you are instructed to before you start. Do you understand?
Appellant:	Yep.
Officer:	Okay, sir. Do you want to attempt the exercises?
Appellant:	No. Not without my attorney present.
Officer:	Okay. Just keep in mind that the video could still be used in court.
Appellant:	I understand that.
Officer:	Okay. I'll move on to the next part here – you will be advised of your rights. [Appellant's rights read to him]
Officer:	Do you understand those rights, sir?
Appellant:	Yes ma'am.
Officer:	Okay, sir – no interview will take place. This session will be terminated at this point.

[4] *See, e.g.*, *Mathieu v. State*, 992 S.W.2d 725,729 (Tex. App.— Houston [1st Dist.] 1999, no pet.) (finding that a police request to perform the sobriety tests and directions on how to do the tests do not constitute interrogation; neither do queries concerning a suspect's understanding of his rights).

v. State, 882 S.W.2d 829, 836 (Tex. Crim. App. 1994) (federal constitutional right to be free from comments on post-arrest silence waived by failure to object); *Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986) (state constitutional right to be free from comments on post-arrest silence may be waived by failure to object).

To preserve error in the admission of evidence, appellant must timely object, specifically stating the legal basis for the objection. *Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997); *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990). "An objection should be made as soon as the ground for objection becomes apparent. If a defendant fails to object until after an objectionable question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely and error is waived." *Lagrone*, 942 S.W.2d at 618. Here, appellant did not object until *after* the prosecutor had asked, and Officer Preadom had answered, the question. The record indicates that the only explanation offered for the tardy objection was that "it happened so quickly." The interval between the question/answer and the objection, while not lengthy, appears to have been longer than the time interval in *Lagrone*. *See id.* There, the defendant's counsel voiced an after-the-fact objection alleging that the prosecutor had asked an "improper reputation" question. *Id.* After the witness answered, the prosecutor was able to utter only four words – "We'll pass the witness" – before defense counsel objected to "those last two lines as being outside the scope of reputation testimony." *Id.* The court of criminal appeals found the objection untimely. *Id.* Here, the interval between the objection and the testimony was long enough to allow the prosecutor to thank the witness and then move on to offer an exhibit into evidence before defense counsel took any action to voice an objection to the testimony. There is no question that these events moved quickly. The question and answer format utilized in examination of witnesses at trial is, by its nature, fast-paced, often allowing very little time for reflection and objection between an answer and the next question. However, the fast-paced nature of the examination, without more, is "no legitimate reason to justify the delay" in assertion of the objection. *See id.* As illustrated by *Lagrone*, the standard set by our high court for the

timely assertion of objections is quite demanding and most unforgiving. *See id.* Applying this standard to the testimony and objection now before us, we must conclude that appellant failed to make a timely objection and thus failed to preserve error. *See* TEX. R. APP. P. 33.1; *Lagrone,* 942 S.W.2d at 618.

Appellant's fourth and fifth points of error are overruled.

V. CORRELATION OF HGN TEST AND BLOOD ALCOHOL CONTENT

In his third point of error, appellant claims the trial court erred in denying his request for a mistrial after Officer Bellamy violated the trial court's in limine order by testifying that "[f]our clues would indicate impairment or a level of .1 or higher." Officer Bellamy already had testified that appellant exhibited the maximum number of clues possible on the HGN test, six, when defense counsel objected to Officer Bellamy's correlation of HGN test results with a blood alcohol concentration of .1 or greater. The trial court instructed the jury to disregard testimony making that correlation.

Ordinarily, a prompt instruction to disregard will cure error from improperly admitted testimony. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). This is so "'except in extreme cases where it appears that the evidence is clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on their minds.'" *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000) (quoting *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987)). To determine whether this narrow exception applies, we examine "the peculiar facts and circumstances of each case." *Hernandez v. State*, 805 S.W.2d 409, 414 (Tex. Crim. App. 1990).

We presume the jury followed the trial court's instruction to disregard Officer Bellamy's testimony correlating HGN test results with blood-alcohol concentration. *See Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). We further note that (1) the indictment does not allege that appellant was intoxicated by having a blood-alcohol concentration in excess of .1; and (2) the State did not mention blood-alcohol

concentration during voir dire, during any other witness's testimony, or in closing argument. Under these circumstances, we find that any error in admitting the testimony is harmless. *See Webster v. State*, 26 S.W.3d 717, 724 (Tex. App.—Waco 2000, pet. ref'd) (finding court's instruction to disregard officer testimony correlating HGN test results with blood-alcohol concentration rendered admission of that testimony harmless where indictment did not allege that defendant was intoxicated by having a blood-alcohol concentration in excess of .1, and where the State did not mention blood-alcohol concentration during voir dire, during any other witness's testimony, or in closing argument) (citing *Ovalle v. State*, 13 S.W.3d 774, 783–84 (Tex. Crim. App. 2000)). Accordingly, the trial court did not abuse its discretion by denying appellant's motion for mistrial on these grounds.

Appellant's third point of error is overruled.

VI. MISSTATEMENT OF FACTS

In his sixth point of error, appellant asserts the trial court erred in overruling his objection to the State's jury argument as outside the record. In its closing argument, the State referred to Officer Bellamy's testimony that appellant's walk was "unsteady" when, in fact, the officer testified that appellant seemed to walk "pretty normal" and that his *balance* was unsteady. [5] In its appellate brief, the State concedes that it misstated Officer Bellamy's testimony.

Our review of the record does not indicate that the trial court, in fact, overruled appellant's objection. Instead, the court promptly instructed the jury:

> Alright. Now, jurors, I told you about this in voir dire. You are going to have to remember what the evidence actually was. Do your best to stay within the record and you all will have to remember what the evidence actually was. You can even review, if you need, to later. Please proceed.

[5] Officer Bellamy opined at trial that appellant had lost control of his mental and physical faculties through the introduction of alcohol into his body. However, the officer acknowledged in his testimony that while walking straight and not performing any tests, appellant appeared to walk "pretty normal."

The trial court's immediate instruction to the jury was sufficient to cure any error. *See Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999) (instructing "The [j]ury heard the testimony of the witnesses that were presented. What the lawyers say is not evidence. The Jury will be governed by the testimony you remembered having heard . . . . What the lawyers say is not evidence . . . . Ladies and gentlemen, disregard any comments that were made that were not raised by the evidence."). Furthermore, appellant has not shown that the misstatement probably affected the outcome of the proceeding. Thus, even if there were error, it would be deemed harmless. *See, e.g., Sanford v. State*, 21 S.W.3d 337, 345 (Tex. App.—El Paso 2000, no pet.) (citing TEX. R. APP. P. 44.2(b) and stating that if the reviewing court determines that the error did not influence the jury, or had but very slight effect, the verdict must stand).

Appellant's sixth point of error is overruled.

VII. EVIDENCE OF DWI QUOTA SYSTEM

In his seventh point of error, appellant complains the trial court improperly restricted cross examination of Officer Miller, thus excluding relevant evidence of the existence of a quota or production standard in the DWI Task Force and violating appellant's constitutional rights to confrontation and cross examination of witnesses against him. Specifically, appellant asserts the trial court erred in prohibiting appellant from offering testimony from Officer Miller, which "would have shown that at the time of Appellant's arrest, the task force . . . was governed by a quota or productivity standard that had been established by the sergeant of the task force." Appellant contends that evidence of the existence of a quota system in the DWI task force was relevant to show Officer Bellamy's predisposition to cite appellant for DWI.

Outside the jury's presence, appellant developed testimony from Officer Miller indicating that the supervisor of the task force, of which Officer Bellamy was a part, issued a memo describing a quota or productivity standard for DWI enforcement. However, appellant could not establish the relevance of the existence of this productivity standard

because he did not establish that Officer Bellamy was operating under any quota standard or had received a directive to follow any quota system. The trial court even suggested how trial counsel might establish this relevance, stating: "You would have to establish the times, was the supposed policy in effect during the time this arrest occurred, et cetera, et cetera."

The right of the defendant to cross-examine the witness is limited by "the trial court's authority to preclude, among other things, confusion of the issues, harassment, endangerment to the witness, needless delay, and the admissibility of highly prejudicial, repetitive *and irrelevant or marginally relevant evidence*." *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996) (emphasis added). Although a defendant is allowed great latitude in showing bias of a witness or motive of a witness to falsely testify, the trial court has considerable discretion as to how and when bias may be proved and what collateral evidence is material for that purpose. *Owens v. State*, 795 S.W.2d 822 (Tex. App.—Texarkana 1990), *aff'd*, 827 S.W.2d 911 (Tex. Crim. App. 1992). In reviewing the trial court's determination that evidence is irrelevant, we must uphold the ruling absent an abuse of discretion. *See Montgomery v. State*, 810 S.W.2d 372, 390–91 (Tex. Crim. App. 1990).

Citing *Alexander v. State*, appellant asserts that "evidence of a quota is admissible to demonstrate bias and prejudice." *See Alexander v. State* 949 S.W.2d 772 (Tex. App.—Dallas 1997, pet. ref'd). However, in *Alexander*, unlike the case now before us, defense counsel's offer of proof, outside the jury's presence, revealed that there was a quota system in effect at the time of the arrest and that the arresting officer's sergeant had issued a directive regarding quotas to all members of the task force. Here, appellant's offer of proof as to Officer Miller's anticipated testimony did not establish *when* the alleged quota system was in effect, despite the trial court's suggestion that this information was necessary to establish relevancy of the existence of a quota system. Although he had the opportunity to establish that a quota directive had been issued to the arresting officer, appellant failed to do so. Under these circumstances, the trial court did not abuse its

discretion in excluding as irrelevant, a non-arresting officer's testimony regarding the existence of a DWI quota system. Appellant's seventh point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 23, 2001.
Panel consists of Justices Edelman, Frost, and Murphy.[6]
Do Not Publish TEX. R. APP. P. 47.3(b).

[6] Senior Chief Justice Paul C. Murphy sitting by assignment.