Affirmed and Opinion filed December 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00754-CR

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DEAN RAY SHUTE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court At Law No. 3
Brazoria County, Texas
Trial Court Cause No. 92,308B

O P I N I O N

After a three day trial, appellant was convicted of driving while intoxicated. TEX. PEN. CODE ANN. § 49.04. He was assessed a $500.00 fine and given a 180-day jail sentence which was probated for twelve months. In two points of error, appellant claims that he was convicted on insufficient evidence and the trial court reversibly erred in admitting unreliable scientific testimony. Finding no reversible error, we affirm the judgment of the trial court.

Appellant was stopped for speeding in the early morning hours in Lake Jackson by Lake Jackson Police Officer Carol Galloway. As soon as he was pulled over, appellant exited his

car and walked rapidly toward Officer Galloway's vehicle. She told him to return to his vehicle and wait there for her. Appellant complied and, when he made it back to his vehicle, he sprawled backwards across the trunk, raising his arms above his head. Believing this behavior strange, Officer Galloway exited her vehicle, approached appellant, and engaged him in conversation.

When Officer Galloway told appellant that she had pulled him over for speeding, appellant became belligerent and began arguing with the officer. His speech was angry and slurred. Appellant's strange behavior and aggressive speech prompted Officer Galloway to fear for her safety, and she radioed dispatch to send another unit to the scene. This call was answered by Officer Keith McFadden, another Lake Jackson police officer.

Upon his arrival, Officer McFadden was told by Officer Galloway that she thought something was wrong with appellant, but she was not sure what it was. Officer McFadden suspected appellant of being intoxicated. He attempted to perform a horizontal gaze nystagmus (HGN) test, a field sobriety test which measures the eyes' involuntary jerking movements as they follow an object, such as a pen. Appellant, however, refused to comply with the test, following Officer McFadden's pen with his head rather than his eyes. Officer Galloway then performed several other field sobriety tests, all of which appellant failed. The officers arrested appellant and took him to the Lake Jackson police station. On the way to the station, appellant admitted to having taken the prescription drug Soma Comp.

When they arrived at the station, Officer Galloway gave appellant the choice between taking a breathalyzer test or a blood test. Appellant insisted on the blood test. The officers took appellant to a local hospital where blood was extracted. The blood was sent to the police lab for testing.

Upon appellant's return to the station, he was given a second battery of field sobriety tests. Appellant did substantially better on these tests, even correcting Oficer Galloway at one point in the test. Appellant, however, still failed the HGN test. Based on all of the

circumstances surrounding appellant's traffic stop, including the earlier poor performance on the field sobriety tests, appellant was arrested and charged with DWI. The charges were supported by the results of the blood test which showed that appellant had a combination of five drugs in his system at the time of the traffic stop. These results were consistent with appellant's having taken Soma Comp, as well as Valium.

At trial, appellant claimed that he was not intoxicated at the time of the traffic stop. He also denied that he was speeding. Rather, appellant's position was that his poor performance on the roadside field sobriety tests was due to the fact that he was mocking the officers by deliberately failing the tests. He claimed that he did better on the second field sobriety tests because he actually tried to pass these tests. He also claimed that he did not actually fail the roadside sobriety tests. Rather, he claimed the officers only perceived that he failed them. He further explained the results of the blood test by stating that the chemist who analyzed his blood could have been incompetent, although he admitted taking both drugs. Appellant testified that he had taken the Valium sometime earlier so that he could sleep.

LEGAL AND FACTUAL SUFFICIENCY

Appellant first challenges the sufficiency of the evidence supporting his conviction. In reviewing legal sufficiency challenges, we must view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all of the elements of the offense beyond a reasonable doubt. *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2871, 2789, 61 L.Ed. 560 (1979)).

Here, the only contested element of the offense is whether or not appellant was intoxicated at the time he was pulled over by Officer Galloway. "Intoxication" is defined as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body." TEX. PEN. CODE § 49.01(2)(B)

(Vernon 1994). The evidence elicited at trial showed that appellant had a combination of Soma and Valium in his system. The evidence also showed that appellant was belligerent, acted abnormally, and failed the field sobriety tests at the point where he was stopped, and failed the HGN given at the station. From this evidence a jury could rationally conclude that appellant was intoxicated at the time he was stopped by the Lake Jackson police officers. In reviewing factual sufficiency questions, the court of appeals must view all 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 or unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The court accomplishes this objective by viewing all of the evidence adduced at trial, using enough deference to keep the appellate court from substituting its own judgment for that of the fact finder. *Santellan*, 939 S.W.2d at 164. The appellate court will overrule the fact finder only when its finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Id.* at 165 (citing *Clewis*, 922 S.W.2d at 135).

Appellant contends that his conviction was based on his rude behavior rather than the fact that he was intoxicated. He supports this conclusion by stating that he did not smell of alcohol and did not have bloodshot eyes. He also claims that he could not have been intoxicated since he performed substantially better on the sobriety tests at the station than on the tests conducted at the scene. He also points out that the testimony about him failing the HGN at the station was given by Officer McFadden rather than the officer conducting the test, making this testimony unreliable. Even though Officer McFadden based his conclusion on the tape of appellant's performance at the station, appellant contends that the officer conducting the test should have testified. While appellant admits that his speech was slurred, he claims that the fact that his speech is always a slow drawl prevented the jury from concluding that he was intoxicated at the scene. Finally, appellant contends that the jury could not convict him based on the roadside tests because he was not seriously trying to perform them, only pretending to be intoxicated.

Here, while it is true that appellant performed substantially better on the sobriety tests the second time, the State presented evidence that he still failed the second HGN. The State also offered testimony that the better results on the sobriety tests given at the station could be explained by a concentrated effort on appellant's part to do better, coupled with the time delay between the two tests. The jury could rationally have concluded that the roadside tests were a better indicator of appellant's intoxication since they were closer in time to when appellant was driving. They could also have disbelieved his testimony about faking his intoxication. Further, both officers testified that they thought appellant was seriously trying to perform the tests at the roadside. Finally, appellant's testimony about the smell of alcohol is immaterial to this case since appellant was charged with intoxication due to ingestion of a combination of drugs. While the record discloses some evidence in favor of appellant's position, this evidence is not stacked overwhelmingly against his conviction. Accordingly, we do not find the jury's verdict to be manifestly unjust, biased, or shocking.

Appellant's final argument against the sufficiency of the evidence supporting his conviction centers on the fact that the State did not quantify the amount of drugs in the appellant's system. Appellant contends that the absence of tests showing how much of each drug was in appellant's system creates a reasonable doubt about his guilt. The State's toxicologist, however, testified that it is not common practice to quantify the amount of drugs in a person's system because the quantity of drugs in a person's system is not a reliable indicator of a person's intoxication. Rather, the best indicator, according to the toxicologist, is that person's behavior.

While a quantification of how much of a drug a person has ingested might provide evidence that the person was intoxicated, this is not the only method by which intoxication can be proven. Rather, the State can prove that drugs were introduced into the defendant's body and that the defendant was actually intoxicated. *See State v. Carter*, 810 S.W.2d 197, 199 (Tex. Crim. App. 1991). The exact quantity of an intoxicating substance present in the bloodstream need only be proven when the State alleges intoxication due to a blood alcohol content of .10

or more. Here, since the State alleged the "loss of mental or physical faculties" form of intoxication, the State had no reason to prove the quantity of drugs in appellant's system. The quantity of the drugs in appellant's system is irrelevant to his conviction.

We overrule appellant's first point of error.

CHALLENGES TO THE STATE'S EVIDENCE

Appellant bases his second point of error on several objections he lodged at trial against testimony from Mike Manes, the State's expert witness. Because appellant failed to properly preserve some of these complaints and others have no merit, we overrule appellant's second point of error.

Appellant's first point of contention centers around Manes' testimony regarding appellant's performance on the HGN. During the direct examination of Manes, the State asked him if an intoxicated person would be able to control his performance on the HGN. Appellant objected to this question because the State had failed to lay a proper foundation for it. The trial court sustained this objection and ordered the prosecutor to lay a proper predicate, which he did prior to reentering this line of questioning. Appellant made no further objections, apparently finding the State's predicate proper.

We find that the trial court committed no error by sustaining appellant's objection and find it strange that appellant would complain on appeal about a ruling given in his favor. If appellant was dissatisfied with the predicate laid by the State, he needed to object again to preserve error. Because he failed to do so, however, we find he has waived any error.

Appellant also complains that the trial court erred by admitting testimony from Manes over his objection. This testimony was elicited to explain how appellant's performances on the two field sobriety tests could be so different. Manes explained that the time differential could partially be responsible for the difference. He also began to opine that appellant's

performances could have differed due to a motivation to do better. As Manes made these statements, appellant objected as follows:

> "Objection, outside the realm of his expertise. He is now making himself a jury. He is talking about motivation, and he says 'I interpret.' There is no predicate that he has any more expertise than the ordinary human being in our society, and I object under *Daubert*."

Appellant attempted to clarify this objection by stating: "May I specifically object under *Daubert*–the Supreme Court ruling under *Daubert* in terms of that case ruling and the meaning of it surrounding what experts can testify to."

The State contends that this objection is not specific enough to preserve any error on appeal, citing *Williams v. State*, 930 S.W.2d 898 (Tex. App.–Houston [1st Dist.] 1996, pet. ref'd). In that case, the court was faced with several objections based on Rule 403, some specific (e.g. cumulative evidence) and some very general ("I object . . . [v]iolation of Rule 403"). *Id*. at 900-01. The *Williams* court held that the general Rule 403 objections were insufficient to preserve error, citing the wide array of objections that can be lodged under Rule 403, and addressed the specific objections. *Id.* at 901.

We believe the same logic is appropriate here. Appellant's *Daubert* objection was not specific enough to preserve error, especially since a *Daubert* objection can be based on factors such as 1) whether the theory or technique attested to can be or has been tested; 2) whether the theory or technique has been subject to peer review; 3) the known or potential rate of error; and 4) the general acceptance within the relevant scientific community. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-95. (1993). Further, *Daubert* has been interpreted by the Court of Criminal Appeals as requiring that the proffered evidence be both relevant and reliable. *See Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996). Appellant's objection failed to specify upon which prong of this test his challenge was based.

Thus, this general objection is insufficient to preserve error. *See* TEX. R. APP. P. 33.1(a)(1)(A).

Appellant's objection, however, was sufficiently specific to preserve his complaint that Manes was not qualified as an expert. This objection applied to Manes' testimony about the effects of Soma and Valium on appellant, as well as his testimony about how appellant might have appeared to be sober in the second tests. While this objection appears to encompass the reliability prong of a *Daubert*-type analysis, we disagree with appellant's claim and find that the State sufficiently established Manes' qualifications.

To qualify Manes as an expert witness, the State focused on his background as a chemist and a toxicologist, as well as his police experience. The State established that Manes was a former police officer with two degrees, including a Master's degree, in chemistry. The State also established that he had been a toxicologist and chemist for eighteen years, continuing his education during that time. The State further established that Manes belonged to several professional organizations. Finally, appellant's cross-examination of Manes established that he based his testimony not only on his scientific knowledge of the effects of drugs on people, but also on his observations of intoxicated persons while he was a police officer.

Based on these facts, we find that the trial court could have found that Manes had the knowledge, skill, education, and training sufficient to qualify him as an expert. The trial court could also have concluded that this specialized knowledge would assist the trier of fact. Thus, the trial court did not abuse its discretion by admitting this evidence.

Appellant's second point of error is overruled and the judgment of the trial court is affirmed.

/s/ Paul C. Murphy

Chief Justice

Judgment rendered and Opinion filed December 16, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).