

Affirmed and Opinion filed December 20, 2001.



In The
Fourteenth Court of Appeals

NO. 14-00-01234-CR

JACK MILTON HINOJOS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 0996040**

OPINION

Jack Milton Hinojos, appellant, was convicted of driving while intoxicated, and the trial court sentenced him to 180 days' confinement, probated for one year. In a single issue, appellant contends that the trial court erred in permitting testimony about the one leg stand, a field sobriety test, because it was not shown to be reliable. We affirm.

Background

Police observed appellant swerving over the outside line of his lane of traffic and pulled appellant over. They asked him to perform four field sobriety tests, the one leg stand,

horizontal gaze nystagmus, head tilt, and walk-and-turn. Appellant attempted the one leg stand three times, but finally told the police that he could not do it. The police testified that appellant also failed the other three field sobriety tests.

Harmless Error

In his sole issue, appellant challenges the admissibility of testimony about the one leg stand because the State failed to prove that the test is scientifically reliable. The State responds that assuming admission of testimony about the one leg stand was error, it was harmless error. We agree.

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) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). 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).

One of the police officers who arrested appellant, Officer Leon Waltman, testified that when appellant exited his car, he was unstable. He needed to touch the car to steady himself. Further, Officer Waltman testified he could smell alcohol on appellant's breath and appellant's speech was slurred. Officer Waltman administered several field sobriety tests, and appellant failed them all. In the horizontal gaze nystagmus test, appellant showed maximum "clues" in both eyes. During the head tilt test, he swayed and failed to hold the position for the requested thirty seconds. During the walk and turn test, appellant had to step to the side to balance himself. He completed only five or six steps of the requested nine, and in none did he walk heel-to-toe as instructed. The second arresting officer, Officer Konvicka, testified that he observed appellant swerve outside his lane of traffic while

driving. Additionally, in Officer Konvicka's opinion as a lay witness, appellant did not have the use of his normal mental or physical faculties. He believed that alcohol had caused appellant's intoxication. Assuming admission of testimony about the one leg stand was error, we hold that it did not affect appellant'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).

Accordingly, we overrule appellant's issue and affirm the judgment of the trial court.

/s/ Charles Seymore
Justice

Judgment rendered and Opinion filed December 20, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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