IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0576-16

BURT LEE BURNETT, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS TAYLOR COUNTY

RICHARDSON, J., filed a concurring opinion.

CONCURRING OPINION

The issue presented to this Court for review is a narrow one—whether the court of appeals misapplied this Court's decision in *Ouellette v. State*[1] in determining that the inclusion of the full statutory definition of intoxication[2] in the jury charge constituted harmful

[1] 353 S.W.3d 868 (Tex. Crim. App. 2011).

[2] A full statutory intoxication charge instructs the jury that "intoxicated" means "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. PENAL CODE § 49.01(2)(A).

error. In *Ouellette*, we held that the jury charge, which included the full definition of "intoxication," was not erroneous because it "reflected the law as it applied to the evidence produced at trial."[3] In this case, the Court holds that the jury charge, which also included the full definition of "intoxication," was erroneous, agreeing with the court of appeals that *Ouellette* is distinguishable from this case even though the underlying facts are very similar.

In both this case and in *Ouellette*, the offense charged was driving while intoxicated due to the introduction of "alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of the substances, and any other substance into [the] body." In both cases, evidence was introduced at trial that the appellants had pills in their possession, both appellants admitted to possessing a prescription for medication, and in both cases, the jury charge tracked the charging instrument. However, despite these similarities, *Ouellette* is inapplicable here. The jury charge in *this* case erroneously included the full statutory definition of intoxication, and I write separately to explain why.

In *Ouellette*, this Court held that, "[a]lthough there was no direct evidence that the defendant consumed the drug, there was evidence from which a rational juror could have found that the defendant did so."[4] In *Ouellette*, there was testimony that the appellant appeared intoxicated after ingesting a central nervous system depressant and that alcohol and the prescription pills found in her possession are both central nervous system depressants,

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[3] *Ouellette*, 353 S.W.3d at 870.

[4] *Id.*

and that is why the jury charge in *Ouellette* correctly included the full definition of intoxication. Whereas in this case, there was no evidence as to what kind of drug hydrocodone is, whether it can cause intoxicating effects, and whether Appellant was showing signs of intoxication due to the hydrocodone.

More importantly, I point out that, in *Ouellette*, the appellant did not object to evidence of the pills, she did not object to her own identification of the pills as Soma—a prescription medication, and she did not object to the arresting officer testifying that Soma affects a person's central nervous system. Since this unobjected-to evidence[5] was before the jury, we held in *Ouellette* that it was not error to include the full definition of intoxication in the jury charge, despite the appellant's assertion that she had not taken any of the pills.

In this case, Appellant denied having had any alcohol, he neither confirmed nor denied having taken any pills, he did not identify the pills as hydrocodone, there was no expert testimony regarding the pills being hydrocodone, and the officer admitted that he was not qualified to testify regarding drug impairment. Therefore, the court of appeals correctly held that evidence of the pills was inadmissible. Even though the evidentiary issue is not before us, I do not believe its impact on the jury charge issue can be separated. Moreover, in this

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[5] As a general rule, if evidence is admitted without objection, that evidence enjoys a status equal to that of all other admissible evidence. *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) ("All but the most fundamental rights are thought to be forfeited if not insisted upon by the party to whom they belong."); *Armstrong v. State*, 718 S.W.2d 686 (Tex. Crim, App. 1985) (Without a timely and specific objection to the admission of evidence during trial, any error in admitting the evidence is waived); *Coble v. State*, 330 S.W.3d 253, (Tex. Crim. App. 2011) (Erroneously admitting evidence will not result in reversal when other such evidence was received without objection).

case, unlike in *Ouellette*, Appellant filed a motion to suppress evidence of the pills, he filed a motion in limine to prevent any reference to the pills, during trial he objected to any evidence of the pills coming in, and he objected to the officer's identification of the pills as hydrocodone. Had his objections been sustained and had evidence related to the pills been excluded, it is clear that the full intoxication charge would have been erroneous.[6] The trial court erred in admitting evidence related to the pills, and such error was both compounded by and created the error in the jury charge.[7] Without the evidentiary error there would have been no jury charge error, and *that* is what distinguishes this case from *Ouellette*.

Having found that the trial court erred by including the full statutory definition of intoxication in the jury charge, the court of appeals determined that Appellant suffered "some harm" under *Almanza v. State*[8] "[b]ecause the pills became an integral part of this case and

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[6] *Gray v. State*, 152 S.W.3d 125, 127-28 (Tex. Crim. App. 2004).

[7] Evidence of the pills was erroneously admitted. Appellant's possession of the pills did not constitute same transaction contextual evidence; there was no expert testimony that the pills were in fact hydrocodone; and there was no evidence that the pills had been ingested by Appellant. Once the court of appeals decided that evidence related to the pills was inadmissible, it logically concluded that the jury charge should have been limited by the evidence *properly* admitted:

> As we have discussed, in the case before us, there is no competent testimony upon which a rational juror could have found that Appellant consumed hydrocodone and that such consumption contributed to his intoxication. Because only a portion of the statutory definition is relevant to the facts of this case, we hold that the trial court erred when it included the whole definition of intoxication in both the definition section and application paragraph of the jury charge.

Burnett v. State, 488 S.W.3d 913, 923 (Tex. App.— Eastland 2016) (citations omitted).

[8] 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

because the jury was permitted to find Appellant guilty of intoxication based on the introduction of pills into his system."[9] I believe that this interrelated stairstep analysis performed by the court of appeals was necessary to arrive at the proper resolution of this appeal. Therefore, I agree with the Court's decision to affirm the judgment of the Court of Appeals.[10]

With these comments, respectfully, I concur.

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[9] *Burnett*, 488 S.W.3d at 925. With regard to harm, the majority concluded that, because we did not grant review of the lower court's harm analysis, the Court will not review it. While I am not sure I agree with *that* narrow an interpretation of the issue presented for review, I am in agreement with the ultimate outcome.

[10] The court of appeals's opinion is actually consistent with the sentiment expressed by Judge Meyers' dissent in *Ouellette*, wherein he takes issue with the Court's decision because it fails to address the admissibility of the pills in the first place. *See Ouellette v. State*, 353 S.W.3d 868, 871 (Tex. Crim. App. 2011) (Meyers, J., dissenting) ("Under a legal sufficiency standard of review, we consider all evidence properly admitted at trial," but "legal sufficiency is not the standard used to determine if a jury charge is correct."). However, since the appellant in *Ouellette* failed to object to the inclusion of the evidence of the pills, I believe the Court decided *Ouellette* correctly.