In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00225-CR

PAUL ROBERT WASSERLOOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 07-10-10091-CR

MEMORANDUM OPINION

A jury found Paul Robert Wasserloos guilty of the offense of driving while intoxicated. *See* TEX. PEN. CODE ANN. § 49.04(a), (b) (Vernon 2003), § 49(b)(2) (Vernon Supp. 2009). The trial court sentenced him to ten years in prison, suspended the imposition of the sentence, and placed him on community supervision for five years. Appellant raises five issues in the appeal of his conviction.

THE OFFENSE

A person commits the offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place. TEX. PEN. CODE ANN. § 49.04(a). In section 49.01(2), the Texas Penal Code defines "intoxicated" as follows:

> (A) 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; or
>
> (B) having an alcohol concentration of 0.08 or more.

TEX. PEN. CODE ANN. § 49.01(2) (Vernon 2003). The charge submitted to the jury was under the definition in section 49.01(2)(A).

BACKGROUND

At approximately 1:00 a.m., Trooper Cody Cullar stopped appellant for speeding. The trooper smelled alcohol on appellant's breath. Appellant's speech was slurred. Cullar administered field sobriety tests. The "clues" on the HGN, the walk-and-turn, and one-leg stand tests indicated appellant was intoxicated. Appellant's mouth was dry, consistent with intoxication; he was opening his mouth and licking his lips. The officer associated this conduct with alcohol-induced dehydration.

At trial, appellant stated he had three drinks of scotch and water that night. He attributed his slurred speech to auditory dyslexia and his performance on the field sobriety tests to physical disabilities. Appellant's expert witness (Lance Platt) testified appellant was not intoxicated that night, and the difficulties appellant experienced on the

field sobriety tests were the result of "obvious physical impairment" (leg problems, bunions, and knee problems). Platt concluded appellant has nystagmus all the time. Three of appellant's friends testified. They were aware of appellant's speech dyslexia, the slurring of his words, and his physical problems. Each one viewed the videotape and testified appellant looked and acted no differently on the videotape than he normally acted.

SUFFICIENCY OF THE EVIDENCE

Appellant challenges the legal and factual sufficiency of the evidence to support his conviction for felony DWI; he contends he was not intoxicated. In a legal sufficiency review, we consider the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Young v. State*, 283 S.W.3d 854, 861 (Tex. Crim. App. 2009), *cert. denied*, 130 S.Ct. 1015, 175 L.Ed.2d 622 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The factfinder resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. *Id.* "[I]n analyzing the legal sufficiency, we will determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence, both direct and circumstantial, when viewed in the light most favorable to the verdict." *Id.* at 861-62 (footnote omitted). We may not re-

evaluate the credibility and weight of the evidence and substitute our judgment for that of the fact finder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

In a factual sufficiency review, we consider the evidence in a neutral light rather than in the light most favorable to the verdict. *Young*, 283 S.W.3d. at 862. Evidence is factually insufficient in one of two ways: (1) when the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust, or (2) when the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust. *Id.*

The jury heard the testimony of the witnesses and viewed the traffic-stop videotape. The videotape did not contradict the officer's testimony. *See Carmouche v. State*, 10 S.W.3d 323, 331-33 (Tex. Crim. App. 2000). The jury was free to weigh the evidence, resolve any conflicts in the evidence, and draw reasonable inferences from the evidence. *See Young*, 283 S.W.3d at 862. Viewing the evidence in the light most favorable to the verdict, the jury could have found the essential elements of the offense beyond a reasonable doubt. Viewing the evidence in a neutral light, and recognizing the jury's function in weighing the evidence and resolving any conflicts, we conclude that the evidence supporting the verdict is not outweighed by the great weight and preponderance of the evidence, and not so weak as to render the verdict clearly wrong and manifestly unjust. *See id.* We overrule issue five.

INEFFECTIVE ASSISTANCE

Appellant also contends, in issue one, that trial counsel rendered ineffective assistance. Appellant claims trial counsel failed to give the State proper notice of the filing of certain business records, including affidavits of experts. The trial court ruled the evidence was inadmissible.[1]

For a defendant to establish ineffective assistance, the appellant must show by a preponderance of the evidence that his counsel's representation fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We look to the totality of the representation and the particular circumstances in evaluating the standards of effectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). A strong presumption exists that counsel's conduct falls within a wide range of reasonable professional assistance, and the defendant must overcome that presumption. *Robertson v. State*, 187 S.W.3d 475, 482 (Tex. Crim. App. 2006). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. A defendant's failure to make a

[1]Although not admitted into evidence for the jury's review, the record contains the business records affidavit, a report from a certified speech and hearing therapist, and a physician's medical records.

showing under either prong of the Strickland test defeats a claim of ineffective assistance. *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005).

Even if the lack of notice given to the State resulted in the inadmissibility of the documents, we conclude the second prong of *Strickland* has not been met. The record does not show there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different.

The report from a certified educational diagnostician and speech therapist stated that appellant exhibited an "articulation disorder" and "a speech/language fluency disorder known as cluttering." He had "difficulty with rapid speech movements, multisyllabic words, consonant clusters, fricatives and affricatives, and glides and liquids[,]" and he had a "rapid speaking rate, erratic rhythm, and poor word usage." The speech therapist diagnosed appellant with dyslexia and cluttering. The medical records that appellant sought to admit into evidence described appellant's medical problems, including moderately severe bunions, hammertoe on each foot, fallen arches, mild arthritis in right knee, and a left knee replacement. The medical records stated the combination of "foot deformities" (bunions) and knee problems gave him a "mildly antalgic gait" and "some difficulty with walking." The x-rays of appellant's feet "demonstrated normal findings." Both feet had hammertoes. The medical records also indicated that appellant had "really not had any problems" with his left knee replacement, which had "good range of motion[,]" showed "no laxity or malalignment[,]" and

"appear[ed] to be near normal function." The right knee had "no swelling[,]" "good range of motion[,]" "no obvious effusion[,]" and slight crepitus along the medial side. There was "no instability."

Although the jury did not have these documents before it, the record before the jury is replete with evidence of appellant's physical problems relating to his left knee replacement, problems with his right knee, leg and back problems, bunions, and hammertoes. There is also evidence from three long-time friends that appellant had auditory dyslexia which caused him to slur his words. The jury saw appellant perform the field sobriety tests and heard appellant speak on the traffic-stop videotape. The jury also observed and heard appellant testify at trial. The record does not show a reasonable probability that, but for trial counsel's alleged ineffectiveness, the result of the trial would have been different. We overrule issue one.

EXCLUSION OF EVIDENCE

In issue two, appellant argues the trial court committed reversible error by refusing to admit the records of the speech therapist and the medical doctor who examined appellant. The trial court's admission or exclusion of evidence is subject to an abuse of discretion standard. *Sells v. State*, 121 S.W.3d 748, 766 (Tex. Crim. App. 2003). We do not disturb the trial court's ruling if it was "within the bounds of reasonable disagreement[.]" *Id.*

Rule 902(1) of the Texas Rules of Evidence provides that certain business records shall be admissible in evidence provided that, among other requirements, "the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit. . . . Notice shall be deemed to have been promptly given if it is served in the manner contemplated by [Rule 21a] fourteen days prior to commencement of trial in said cause." TEX. R. EVID. 902(10)(a). The business records do not contain a certificate of service, and the clerk's record does not contain any other document showing service of the documents on the State. At trial, Wasserloos's counsel stated he did not recall delivering copies of the records to the prosecutor. Counsel stated, "I thought I had given her copies." The prosecutor stated she had not seen the documents prior to trial and did not have copies of them. On this record, we conclude the trial court did not abuse its discretion in denying admission of the records. We overrule issue two.

ALLEN CHARGE

In issue three, Wasserloos argued the trial court erred in denying his request for a mistrial and in giving a "Dynamite" or "*Allen*" charge to the jury over his objection. The Texas Court of Criminal Appeals has defined an *Allen* charge as "a supplemental charge sometimes given to a jury that declares itself deadlocked. It reminds the jury that if it is unable to reach a verdict, a mistrial will result, the case will still be pending, and there is no guarantee that a second jury would find the issue any easier to resolve." *Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006) (citing *Allen v. United States*,

164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896)). The United States Supreme Court and the Court of Criminal Appeals have found the *Allen* charge permissible, but cautioned that trial courts must be careful to administer it in a non-coercive manner. *See generally Lowenfield v. Phelps*, 484 U.S. 231, 237, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *see also Barnett*, 189 S.W.3d at 277 n.13; *Howard v. State*, 941 S.W.2d 102, 123-24 (Tex. Crim. App. 1996).

During deliberations, the jury notified the trial judge by written note that it was deadlocked. The note did not request help. The following exchange occurred:

> The Court: We have received a note from the jury that says that they are deadlocked and that they do not believe that they will reach a verdict. Basically, the jury is nine to three and it appears we will not resolve, especially in the case of one that has stated she will not change her mind.
>
> I am proposing that we send a dynamite charge or have them come out and I will read it to them to see if we can't resolve this. My thinking is they have not really been deliberating that long.
>
> So, I'm going to ask the State: What is your opinion on the Court's proposed procedure?
>
> Prosecutor: Good.
>
> The Court: [Defense counsel.]
>
> Defense Counsel: For the record, the defendant would move for a mistrial. Obviously, one juror does not want to change his or her mind and I think any continued deliberations would force that juror to compromise his or her verdict and it would be mere coercion. So, we would ask for a mistrial.
>
> The Court: Okay. I am going to deny that request, and I am going to have the jury come in. I'm going to go over -- I'm going to send them what we colloquially call the dynamite charge, and we will see what happens.
>
> Defense Counsel: One more objection, if I may, on the record, Your Honor.
>
> Your Honor, I would object to the dynamite charge. I would ask that the Court instruct the jury just to continue your deliberations, not the typical dynamite charge where they are coercing the jury to change their verdict. We would object to the dynamite charge.

The Court: All right. And your objection is overruled.

The trial court then gave an *Allen* charge to the jury.

On appeal, appellant relies on article 36.16 of the Texas Code of Criminal Procedure, which provides, in part, as follows:

> After the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion, permit the introduction of other testimony, and in the event of such further charge, the defendant or his counsel shall have the right to present objections in the same manner as is prescribed in Article 36.15.

TEX. CODE CRIM. PROC. ANN. art. 36.16 (Vernon 2006). Because the jury note did not request further instruction, appellant argues the trial court erred in giving the additional instruction.

Appellant did not raise article 36.16 grounds before the trial court: he did not object that the jury had not requested any further instruction from the trial court and that the trial court therefore lacked authority to given an *Allen* charge. Rather, he objected generally, and also asked that the jury be instructed "to continue your deliberations." This did not inform the trial court of his argument that article 36.16 prohibited any supplemental instruction. Appellant objected to the *Allen* charge on the basis that it would coerce the jury members to change their verdict. Appellant's objection below does not comport with the argument raised on appeal. Consequently, he did not preserve his article 36.16 complaint. *See* TEX. R. APP. P. 33.1(a); *see Loving v. State*, 947 S.W.2d 615, 618-19 (Tex. App.--Austin 1997, no pet.) (Objection that *Allen* charge was

"premature and coercive" did not implicate article 36.16, so the issue was not preserved); *see also Gallo v. State*, 239 S.W.3d 757, 768 (Tex. Crim. App. 2007) (Appellant's trial objection did not comport with his argument on appeal; therefore, he failed to preserve his complaint for review.). We overrule issue three.

MOTION FOR NEW TRIAL

In issue four, Wasserloos argues the trial court erred by denying his motion for new trial. He explains that his motion was supported by affidavits stating that an investigator from the district attorney's office had threatened the defendant's expert witness (Lance Platt), and had intimidated another defense witness (Natalie Sweeney). Appellant contends that the investigator's conduct caused Platt to be unavailable to defense counsel during the testimony of Barnhill (the expert for the State), and unavailable for rebuttal of that witness.

We review a denial of a motion for new trial under an abuse of discretion standard. *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006). "A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling." *Id.* When reviewing the denial of a motion for new trial, "[w]e must view the evidence in the light most favorable to the trial court's ruling and presume that all reasonable factual findings that could have been made against the losing party were made against that losing party." *Charles v. State*, 146 S.W.3d 204,

208 (Tex. Crim. App. 2004) (*superseded in part on other grounds* by rule 21.8(b) as stated in *State v. Herndon*, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007)).

Appellant relies on Rule 21.3(e) of the Texas Rules of Appellate Procedure, which states as follows:

> 21.3. Grounds
>
> The defendant must be granted a new trial . . . for any of the following reasons:
>
> (e) when a material defense witness has been kept from court by force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld, thus preventing its production at trial[.]

TEX. R. APP. P. 21.3(e).

Three affidavits were attached to the motion for new trial. Lance Platt stated in his affidavit that after the prosecutor cross-examined him and he (Platt) left the witness stand, he commented to the prosecutor, "You sure are mean." Platt stated that out in the court hallway, a Montgomery County investigator told him he was unprofessional for making the comment, poked Platt in the chest with his right index finger, and raised his voice to Platt. Platt stated he left the courthouse immediately and returned to Bryan, Texas, because he was concerned about retaliation against him. Platt also related in his affidavit that one of appellant's witnesses told Platt she felt intimidated by the investigator's actions.

Appellant stated in his affidavit that he wanted his expert Platt to be present in the courtroom during Barnhill's testimony. Appellant indicated he refused to cooperate with

Barnhill's attempted courtroom administration of the HGN test, because appellant was aware that Platt was unavailable to observe the HGN test. For that reason, appellant stated, he did not take the HGN administered in court by the State's expert.

In the third affidavit, Natalie Sweeney stated she was waiting to testify at trial when the incident occurred. She described how the investigator shook and pointed his finger at Platt, told him he could be arrested, and spoke in "a very loud abusive manner accusing [Platt] of unprofessional conduct." She further stated, "As I was testifying [the investigator] was staring at me with a very angry look on his face which caused me to wonder what he was going to do to me when I finished testifying."

Appellant states in his motion for new trial that this incident "was brought to the attention of the court at the time it occurred." We find nothing in the record indicating any objection to the trial court or a request for a mistrial on this ground. Trial counsel was not refused the opportunity to rebut Barnhill's testimony. The following exchange occurred at the conclusion of Barnhill's testimony:

> The Court: Do you have any rebuttal rebuttal?
> Defense Counsel: No. We close.

Trial counsel did not attempt to call Platt back to the witness stand or object to Platt's absence. Under an abuse of discretion standard, the trial court was free to reflect upon the trial of the case, review the motion-for-new-trial affidavits, and conclude appellant chose to close his case without calling for or attempting a rebuttal of Barnhill's testimony. *See generally Charles*, 146 S.W.3d at 211-12.

As to Sweeney's affidavit, nowhere does she state she was kept from the trial court by force, threats, or fraud, or that the investigator's conduct inside or outside the courtroom in any way altered her testimony. The record reveals she testified at trial on defendant's behalf, and her testimony supports appellant's claim he had auditory dyslexia and various physical ailments that could affect the field sobriety tests.

The affidavits assert disturbing conduct. The issue apparently was presented to the trial court informally during trial, according to one of the affidavits. If appellant wished to preserve an issue for review, the appropriate time to make the objection on the record was when the alleged conduct occurred, or when the court asked if the defense had further rebuttal. The record does not reflect that any objection was made at that time. Under the circumstances, given appellant's failure to timely object before the jury returned a verdict, the trial court could reasonably conclude that counsel had waived the issue by not objecting to the incident or presenting further rebuttal evidence. We conclude the trial court did not abuse its discretion in denying the motion for new trial. We overrule issue four. We affirm the conviction.

AFFIRMED.

_____

DAVID GAULTNEY
Justice

Submitted on March 15, 2010
Opinion Delivered April 28, 2010
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.