In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00503-CR

DENNIS KAYE GOAINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 08-06-05477 CR

MEMORANDUM OPINION

Dennis Kaye Goains raises fourteen issues in this appeal from a felony conviction for driving while intoxicated. After finding Goains guilty and making an affirmative finding of the use or exhibition of a deadly weapon, the jury found the State's enhancement allegations to be "true" and assessed a life sentence.

In issue one, Goains contends that the trial court commented on the weight of the evidence during jury selection by telling the venire panel that "[t]rials in criminal cases proceed in two parts, and this is going to be a two-part trial[.]" Goains concedes that he

failed to preserve error by objecting to the comment. He argues that the trial court tainted the presumption of innocence, and committed a fundamental error of constitutional dimension that required no objection. *See Blue v. State*, 41 S.W.3d 129, 131 (Tex. Crim. App. 2000) (plurality op.). The trial court also told the jury that "if he is so in fact found guilty, then you will hear evidence about what the punishment should be." Goains argues this statement was insufficient to inform the jury of the presumption of innocence.

In *Blue*, the trial court apologized to the jury for a long delay in jury selection by stating that the defendant had been considering a plea bargain for a guilty plea and stated that "I prefer the defendant to plead because it gives us more time to get things done[.]" *Id.* at 130. The trial court's comments in *Blue* conveyed to the jury the trial court's opinion that Blue was guilty. *Id.* at 132 ("A juror who hears the judge say that he would have preferred that the defendant plead guilty might assume that the judge knows something about the guilt of the defendant that the juror does not.").

Here, the trial court was attempting to explain the bifurcated trial process and did not convey to the venire the trial court's personal opinion of the guilt or innocence of the accused. No fundamental error of constitutional dimension is presented. Goains failed to preserve error as to any lack of precision in the explanation. *See* Tex. R. App. P. 33.1. We overrule issue one.

In issue two, Goains challenges the sufficiency of the evidence to support the jury's "affirmative" deadly weapon finding. We must determine whether, viewing the

evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that Goains used or exhibited his motor vehicle as a deadly weapon when he was driving while intoxicated. *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009). "[F]irst, we evaluate the manner in which the defendant used the motor vehicle during the felony; and second, we consider whether, during the felony, the motor vehicle was capable of causing death or serious bodily injury." *Id.*

Officer Jeffrey Nichols testified that he observed Goains disregard a right-turn-only designation for Goains's lane of travel and proceed straight through the intersection by using the right shoulder of the roadway to pass several vehicles in heavy traffic. Goains then cut into the proper lane of traffic. In Nichols's opinion, Goains was "[a]bsolutely, without a question" driving dangerously. Nichols suspected Goains was trying to get away from him. Nichols activated his overhead lights and followed Goains. The other vehicles properly yielded to Nichols's vehicle, but Goains veered over towards one of the vehicles that had pulled over. Nichols testified that Goains's action was dangerous because Goains had ignored a traffic control device and the other drivers "had nowhere to go." According to Nichols, "there was a pretty close call with [another] vehicle[.]" Goains continued at a slow rate of speed until he eventually pulled over.

"A motor vehicle may become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury." *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). The danger must be actual. *Id.* at 799. Goains argues that the State

failed to prove that he placed pedestrians or other motorists in actual danger. Goains asserts he was driving slowly and simply merged into traffic from the unoccupied shoulder.

The jury heard evidence indicating Goains ignored the directional designations for travel, left the travel lane, passed several vehicles that were travelling in the travel lane by driving on the shoulder, moved his vehicle into the travel lane in heavy traffic, and veered towards a vehicle that was yielding to the pursuing officer. Although a motor vehicle accident did not occur, the manner in which Goains was driving while intoxicated posed a real danger because he was violating traffic laws in heavy traffic. "[A] deadly weapon finding is appropriate on a sufficient showing of actual danger, such as evidence that another motorist was on the highway at the same time and place as the defendant when the defendant drove in a dangerous manner." *Id.* We overrule issue two.

Goains's third issue challenges the admissibility of Nichols's testimony regarding the horizontal gaze nystagmus ("HGN") test. Goains argues that the State failed to establish the reliability of the scientific evidence. "[T]he theory underlying the HGN test is sufficiently reliable pursuant to Texas Rule of [ ] Evidence 702." *Emerson v. State*, 880 S.W.2d 759, 768 (Tex. Crim. App. 1994); *see* Tex. R. Evid. 702. Likewise, the technique designed and promoted by the National Highway Traffic Safety Administration ("NHTSA") is reliable pursuant to Rule 702. *Emerson*, 880 S.W.2d at 768. The trial court did not err in taking judicial notice of the reliability of the theory underlying the HGN

test and its technique without conducting a gatekeeper hearing. *Hernandez v. State*, 116 S.W.3d 26, 29 (Tex. Crim. App. 2003); *Emerson*, 880 S.W.2d at 769; *see Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992).

On appeal, Goains argues Nichols was not qualified as an expert witness regarding the scientific reliability of HGN testing under *Kelly*. *See Kelly*, 824 S.W.2d at 573. For Nichols's expert opinion regarding the results of the HGN test to be admissible, the State was required to establish that the officer properly applied the technique. *See Emerson*, 880 S.W.2d at 763. Nichols testified that he is certified to give the HGN test. At the time of trial Nichols had been a certified peace officer for ten years. He had attended a thirty-two hour standardized field sobriety testing class.

At trial, Goains argued that Nichols's certification was out-of-date, but his brief on appeal does not argue that Nichols's certification did not meet the standard set forth in *Emerson. Compare id.* at 769 ("In the case of a police officer or other law enforcement official, this requirement will be satisfied by proof that the officer has received practitioner certification by the State of Texas to administer the HGN.") *with* 37 Tex. Admin. Code § 221.9 (2009) ("A SFST practitioner certificate will be valid for two (2) years from the date of issue. After that time period, the applicant must re-qualify."). Notwithstanding the lack of a valid certificate, an officer may qualify as an expert by reason of his training and experience. *Kerr v. State*, 921 S.W.2d 498, 502 (Tex. App.—

Fort Worth 1996, no pet.). Goains has not shown that the trial court abused its discretion in ruling that Nichols qualified as an expert on the HGN test. We overrule issue three.

In his fourth issue, Goains argues that Texas Rule of Evidence 201(b) requires the taking of judicial notice, and that the trial court's failure to take judicial notice of Chapter 37, Rule 221.9 of the Texas Administrative Code deprived Goains of his right to confrontation.[1] Judicial notice of the codified rules of agencies published in the Administrative Code is governed by Texas Rules of Evidence 204. *Compare* Tex. R. Evid. 201 *with* Tex. R. Evid. 204; *see* Tex. Gov't Code Ann. §§ 2002.022, 2002.054 (West 2008). Judicial notice of the law is taken outside of the presence of the jury. *Watts v. State*, 99 S.W.3d 604, 610-11 (Tex. Crim. App. 2003).

Nichols testified that he was certified to perform standardized field sobriety testing in 2001 and he had not attended recertification or renewal training on standardized field sobriety testing. Defense counsel asked the trial court to take judicial notice of Rule 221.9 before the jury. In response, the trial court conducted a hearing outside the jury's presence. Goains argued that Nichols could not be a certified practitioner because he had not acquired training or certification on standardized field sobriety testing since 2001.

[1]At the time of trial, Rule 221.9 provided for a standardized field sobriety testing practitioner certificate that would be valid for two years. *See* 32 Tex. Reg. 4231, *proposed* 32 Tex. Reg. 1842 (2007), *repealed by* 36 Tex. Reg. 3985, *proposed* 36 Tex. Reg. 1961 (2011) (former 37 Tex. Admin. Code § 221.9). The subsequent repeal of Rule 221.9 "removes a certificate that did not relate to a licensee's training to conduct Standardized Field Sobriety Tests as instruction is included in the Basic Peace Officer Course." 36 Tex. Reg. 3935.

The trial court explained that counsel could cross-examine Nichols on his qualifications and that "goes to the weight you give his testimony" but instructed counsel to refrain from reading Rule 221.9 to the jury. Counsel made a bill to show counsel's belief that Nichols would testify that he is unaware of the requirements of recertification in order to be considered a practitioner according to the Texas Commission on Law Enforcement Officers Standards and Education ("TCLEOSE"). When the trial continued before the jury, defense counsel cross-examined Nichols about his qualifications and his lack of knowledge about whether TCLEOSE requires additional training every twenty-four months to remain a "practitioner" of standardized field sobriety tests. Goains therefore cross-examined Nichols on the subject matter of Rule 221.9. The trial court's ruling on Goains's request to take judicial notice did not adversely affect his right of confrontation. We overrule issue four.

In his fifth issue, Goains contends he was denied his right of confrontation because the trial court failed to require the State to provide a copy of a writing Nichols used to refresh his recollection. *See* Tex. R. Evid. 612. The State tendered a copy of Nichols's offense report, but the trial court overruled Goains's request for a copy of a printout that had been provided to Nichols by the prosecutor a day earlier. Nichols admitted he read the printout which addressed the types of nystagmus. Nichols apparently read literature about nystagmus to improve his knowledge of the subject prior to providing an expert opinion, but did not use the printout to refresh his recollection about the specific facts of

the case. Rule 612 requires inspection of a document if it is used to refresh the witness's memory. *See Pondexter v. State*, 942 S.W.2d 577, 582 (Tex. Crim. App. 1996). The trial court could reasonably determine that Nichols did not use the printout for the purpose of refreshing his recollection about the facts of the case. Goains did not specifically request the disclosure of data underlying Nichols's expert opinion. *See* Tex. R. Evid. 705(a). Even if the document was used to refresh Nichols's recollection about his HGN training or should have been produced pursuant to Rule 705(a), we fail to see why the trial court's evidentiary ruling would permit a reversal of the judgment under these circumstances. *See* Tex. R. App. P. 44.2. Although Goains frames his issue in terms of the right to confrontation, Goains did not make a Sixth Amendment objection during the trial. *See* Tex. R. App. P. 33.1(a).

Goains also complains that the trial court failed to order the State to produce the printout for *in camera* inspection and appellate review. The party seeking appellate review must request the trial court to include the document as part of the record. *See Pondexter*, 942 S.W.2d at 582; Tex. R. App. P. 33.1. Goains has not shown that he requested production of the document for inclusion in the record after the trial court denied Goains's request for production and inspection. We overrule issue five.

Issue six complains that the trial court denied Goains's request to voir dire the State's fingerprint expert. "Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a

criminal case shall . . . be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based." Tex. R. Evid. 705(b). "This examination shall be conducted out of the hearing of the jury." *Id*.

Rule 705(b) provides an "opportunity to determine the foundation of the expert's opinion without fear of eliciting damaging hearsay or other inadmissible evidence in the jury's presence." *Alba v. State*, 905 S.W.2d 581, 588 (Tex. Crim. App. 1995). Fingerprint-comparison testimony is admissible pursuant to Texas Rule of Evidence 702. *Russeau v. State*, 171 S.W.3d 871, 883 (Tex. Crim. App. 2005). Goains does not contend that the jury heard inadmissible evidence as a result of the trial court's ruling. The trial court's error is harmless. *Jenkins v. State*, 912 S.W.2d 793, 814 (Tex. Crim. App. 1995) (op. on reh'g); *Alba*, 905 S.W.2d at 588. We overrule issue six.

In his seventh issue, Goains challenges the sufficiency of the evidence to establish that he is the person convicted in a December 15, 1988 offense used to elevate his DWI offense to a felony. "To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction." *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). "No specific document or mode of proof is required to prove these two elements." *Id.* For instance, the prior conviction may be established through documents that contain sufficient information to establish both the existence of a prior conviction and the defendant's identity as the person convicted. *Id.* at 922.

The record includes a certified copy of a December 15, 1988 judgment and docket sheet from Cause No. 0350764 out of Tarrant County Criminal Court No. 1. This judgment identifies the defendant as "Dennis K. Goins" and neither the defendant's fingerprint nor his signature appears on the face of the judgment. The signature "Goains Dennis" appears on the lower right hand side of the docket sheet.

The record also contains a certified copy of a June 10, 1998 judgment and docket sheet for Cause No. 0685122 out of the County Criminal Court No.3 of Tarrant County. The offense is identified as "DWI-MISD REPETITION" and identifies the defendant as "Dennis Kaye Goains." The signature "Dennis Goains" and a fingerprint appear on the bottom of the judgment. The bottom left corner of the docket sheet is marked "Defendant Signature," bears the signature "Dennis Goains," a thumbprint appears on the lower right corner below a handwritten notation "Dennis K. Goains w/m" and includes a date of birth. The defendant's signatures on the 1988 and 1998 documents are similar in appearance to each other and to the signature exemplar on Goains's fingerprint cards. A fingerprint examiner testified that the fingerprint on the docket sheet for Cause No. 0685122 belonged to Goains.

The State also produced Goains's driving record. The driving record was linked to Goains through the driver's license he produced at the time of his arrest. The record states that a license was originally issued to Dennis Kaye Goains on December 5, 1997, that he is a male with blue eyes who was born on the same birth date that appears on the docket

sheet in Cause No. 0685122. The record lists the convictions for driving while intoxicated in Cause Nos. 0000350764 and 0000685122 out of Tarrant County with the same offense dates that appear on the docket sheets in the record.

Goains argues that the evidence is insufficient because the State cannot link him to the 1988 judgment through fingerprints or other identifying information. In *Flowers*, the Court of Criminal Appeals held that the State sufficiently linked the appellant to a prior conviction with a certified copy of the appellant's driver's license record. *Id*. at 920, 923. The record contained identifying information that matched a computer printout of a county conviction record, which included the appellant's name, date of birth, address, social security number, date of arrest, charged offense, finding of guilt, sentence, and the judicial case identification number. *Id.* at 920-21, 924-25. Here, fingerprint evidence confirmed Goains's identity as the person convicted in the 1998 judgment. The identifying information on the 1998 judgment matched the driving record. Goains was linked to the driving record through the license he produced. The date of offense, offense, changed county, date of conviction, and docket number on the driving record match the 1988 judgment. Although the spelling of the defendant's surname on the 1988 judgment and docket sheet differs from the driving record, the spelling of the name on the signature on the docket sheet matches the driving record. A rational jury could find that the 1988 conviction exists and that Goains is the person convicted. *Id.* at 922, 925. We overrule issue seven.

Goains's eighth issue challenges the sufficiency of the evidence supporting the validity of the December 1988 judgment on the ground that there is no affirmative waiver of a jury trial in the record. The judgment recites that Goains "waived trial by jury[.]" The requirement of a written jury waiver is statutory. *See Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002). Article 1.13 of the Texas Code of Criminal Procedure requires that a waiver of the right to a jury trial be waived in writing in open court. *See* Tex. Code Crim. Proc. Ann. art. 1.13(a) (West 2005). Until 1991, article 1.13 applied only to non-capital felony offenses. *See* Act of May 27, 1991, 72nd Leg., R.S., ch. 652, 1991 Tex. Gen. Laws 2394. Under the presumption of regularity of judgments, absent direct proof of its falsity we presume that the defendant waived trial by jury as recited in the judgment. *See Johnson*, 72 S.W.3d at 349. We overrule issue eight.

Goains's ninth issue challenges the sufficiency of the proof of a December 5, 1988 judgment used to enhance the punishment range for his current DWI offense. The State's fingerprint examiner testified that he compared Goains's exemplar fingerprints to the fingerprints contained in a penitentiary packet for the December 5, 1988 conviction and sentence for unauthorized use of a motor vehicle, and that in his opinion the fingerprints were made by the same individual.

Referring to a 1983 judgment revoking probation and imposing sentence on a conviction for forgery, Goains also argues that the lack of a written waiver of jury trial in the penitentiary packet somehow vitiates the judgment revoking Goains's probation. The

asserted violation of article 1.13 does not make the conviction void. *See Ex parte Douthit*, 232 S.W.3d 69, 70, 74-75 (Tex. Crim. App. 2007) (Where a defendant waived his right to a jury trial in a capital case prior to amendment of article 1.13 authorizing such a waiver, the conviction was not void and claim was not cognizable in habeas corpus.).

Goains suggests that the State failed to link the 1983 judgment revoking probation to him. The fingerprints in the penitentiary packet were of insufficient quality to be used to positively identify the defendant, but the name, date of birth, identifying marks, photographs, and other identifying information contained in the penitentiary packet matched the identifying information in the penitentiary packets that contained Goains's fingerprints. The State proved Goains's identity as to the 1983 conviction through photographs and identifying information that matched the photographs and identifying information in a penitentiary packet that was linked to Goains through fingerprint evidence. *Littles v. State*, 726 S.W.2d 26, 32 (Tex. Crim. App. 1987) (op. on reh'g). We overrule issue nine.

In issue ten, Goains contends the jury charge tainted the presumption of innocence because the first option on the verdict form was for guilt on the felony offense. Goains requested a verdict form that presented "not guilty" first, followed by forms for first offense driving while intoxicated, second offense driving while intoxicated, and third offense driving while intoxicated. Goains contends that article 38.03 of the Texas Code of Criminal Procedure requires his proposed submission. *See* Tex. Code. Crim. Proc.

Ann. art. 38.03 (West Supp. 2010) ("All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.").

"When a jury is told of the presumption [of innocence], it is told, in effect, to judge an accused's guilt or innocence solely on the basis of the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody." *Miles v. State*, 204 S.W.3d 822, 825 (Tex. Crim. App. 2006). The jury charge included an instruction on the presumption of innocence. We presume the jury followed the instructions. *Renteria v. State*, 206 S.W.3d 689, 707 (Tex. Crim. App. 2006) (mitigation issue); *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (parole law instruction). We overrule issue ten.

In issue eleven, Goains cites article 38 for the proposition that the punishment charge tainted the presumption of innocence by allowing the choice of "true" to appear as the first option on the punishment form. As to each of the four enhancement paragraphs, the charge instructed the jury to find that the allegations in "Enhancement Paragraph [] are _____ (True/Untrue)[.]" There is no presumption of innocence in the punishment phase of a trial. *See Marquez v. State*, 725 S.W.2d 217, 227 (Tex. Crim. App. 1987) ("Appellant's right to a presumption of innocence terminated after he was found guilty of

capital murder. Thus, at the time appellant was shackled he had no right to a presumption of innocence."). We overrule issue eleven.

In his twelfth issue, Goains contends that, on two occasions, the State committed fundamental error by arguing facts outside the record. First, Goains complains of an argument by the prosecutor that "Officer Nichols has ten years experience, he is certified and trained to administer the standardized field sobriety test and they haven't changed in eight years." Goains objected that the statement "is outside the evidence before this jury[.]" Officer Nichols testified that he has been a certified peace officer "[f]or ten years[,]" that he is certified to give standardized field sobriety tests, and that "[t]he tests have not changed." The prosecutor's argument was not outside the record.

Second, Goains complains that the prosecutor argued that the docket sheet on the 1988 judgment "has Dennis Goains' signature on it." Goains objected that "[t]here has been no testimony in this case as to the defendant's signature or to the handwriting exemplar." The prosecutor referred the jury to the signature on the docket sheet and to the other signatures that appeared on other documents in the record, invited the jury to compare them, and argued that all of the signatures were made by the same person and that person was the defendant.[2] The argument was based on the evidence. *See Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). We overrule issue twelve.

[2] Goains did not deny his signature under oath. *See* Tex. Code Crim. Proc. Ann. art. 38.27 (West 2005). The jury could compare the signatures. *Id.*

Issue thirteen claims the State committed fundamental error by submitting incorrect definitions of "deadly weapon" and "normal use." During the charge conference, defense counsel requested the following definition of "deadly weapon": "anything that is manifestly designed or made or adapted for the purpose of inflicting death or bodily . . . injury, which was used or exhibited during a transaction from which a felony conviction is obtained and that the use of the object or weapon could put other people in actual not hypothetical danger." The trial court submitted the statutory definition of deadly weapon to the jury. *See* Tex. Penal Code Ann. § 1.07(a)(17)(B) (West 2011) ("deadly weapon" means "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury."). The trial court included the statutory definitions as the law applicable to the case. *Arline v. State*, 721 S.W.2d 348, 352, n.4 (Tex. Crim. App. 1986).

Goains submitted a proposed jury charge that defined "normal use" as "the manner in which the Defendant would normally use his mental or physical faculties." The charge instructed the jury that "'[n]ormal use' as used herein means the manner in which a normal non-intoxicated person would be able to use his or her mental or physical faculties." *See Ford v. State*, 129 S.W.3d 541, 545-46 (Tex. App.—Dallas 2003, pet. ref'd). Goains has not shown that the charge incorrectly defined "deadly weapon" and "normal use." We overrule issue thirteen.

Goains's final issue states that this Court has the power to address unassigned error whether at the trial or appellate level. Appellate courts may review properly preserved but unassigned error by ordering briefing by both parties. *Pena v. State*, 191 S.W.3d 133, 136 (Tex. Crim. App. 2006). We have not ordered additional briefing in this case. Goains has not presented any argument or authority to establish that this Court has erred in failing to request additional briefing from the parties. The stated issue presents no error for appellate review. *See* Tex. R. App. P. 38.1(f). We overrule issue fourteen and affirm the trial court's judgment.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on June 1, 2011
Opinion Delivered September 28, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Kreger, JJ.