In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00308-CR

RAYMOND DOUGLAS JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 13-286436

MEMORANDUM OPINION

Raymond Douglas Jones appeals his conviction for driving while intoxicated. In five issues, Jones (1) contends the officer lacked probable cause to arrest, (2) challenges the probable cause stated in the blood warrant, (3) argues the gas chromatography results should have been excluded from evidence, (4) complains that the trial court refused to give the jury a spoliation instruction, and (5) challenges the sufficiency of the evidence to sustain the conviction.

Probable Cause to Arrest

The trial court considered and denied Jones's challenge to the legality of the arrest during the trial. In his brief for the appeal, Jones argues the trial court erred in admitting any evidence gathered after the initial stop because there was no probable cause to arrest Jones.

> A trial court's ruling on a motion to suppress is reviewed on appeal for abuse of discretion. The trial court is given almost complete deference in its determination of historical facts, especially if those are based on an assessment of credibility and demeanor. The same deference is afforded the trial court with respect to its rulings on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor. However, for mixed questions of law and fact that do not fall within that category, a reviewing court may conduct a *de novo* review.

Crain v. State, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010) (footnotes omitted).

An officer has probable cause to make an arrest "if, at the moment the arrest is made, the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the person arrested had committed or was committing an offense." *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). "Probable cause deals with probabilities; it requires more than mere suspicion but far less evidence than that needed to support a conviction or even that needed to support a finding by a preponderance of the evidence." *Guzman v. State*, 955 S.W.2d 85, 87

(Tex. Crim. App. 1997). "[I]t is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

Corporal Esteban Martinez of the Texas Department of Public Safety stopped Jones at 12:30 a.m. for driving a motorcycle 49 miles per hour in a 30 mile per hour zone. Corporal Martinez admitted that he observed Jones's driving for one-half mile, including two stops, and aside from speeding, Jones appeared to have the use of his physical faculties. Jones displayed no difficulty steering or dismounting his motorcycle. His speech was not slurred. According to Corporal Martinez, Jones kept his voice quiet and his answers short, as though "he was trying to not breathe [on] me. Like he was trying to hide something from me." Jones smelled of alcohol, swayed to the side slightly, and his eyes were bloodshot. Jones admitted he had been drinking beer but said he could not recall how much beer he consumed, when he started drinking, when he stopped drinking, or whether he had anything to drink in the last hour. Jones briefly looked for his insurance card in the motorcycle's satchel before saying he did not have it. Jones consented to a search of his motorcycle but refused to perform standardized field sobriety tests and said, "Just take me to jail." Corporal Martinez located the insurance card when he searched the motorcycle.

Jones concedes that Corporal Martinez observed signs that were consistent with intoxication, but he argues those signs did not provide a reasonable basis for concluding that Jones had lost control of his mental or physical faculties. He compares his case to *State v. Mosely*, where the trial court granted a motion to suppress on evidence that the driver had alcohol on his breath, had bloodshot eyes, admitted to having a couple of alcoholic drinks, and was involved in an accident where he might be at fault. *See* 348 S.W.3d 435, 441 (Tex. App.—Austin 2011, pet. ref'd). *Mosely* was an appeal by the State from a pre-trial motion to suppress, and the appellate court held the State failed to "so thoroughly satisf[y] the State's burden of establishing that [the officer] had probable cause to arrest Mosely for DWI that the trial court's ruling to the contrary was an abuse of discretion." *Id.* Here, we must defer to the trial court on all questions of fact, including whether Corporal Martinez observed Jones swaying and whether Jones avoided allowing the officer to smell his breath. In addition to being unsteady on his feet, Jones was speeding, it was late at night, he smelled of alcohol, and admitted he had been drinking. Additionally, Jones was evasive when he was asked how much and how recently he had been drinking, and he refused to participate in field sobriety tests. These indicators weigh in favor of finding probable cause for driving while intoxicated. *See State v. Garrett*, 22 S.W.3d 650, 654–55 (Tex. App.—Austin 2000, no pet.). Based on the totality of the

evidence presented, including the objective signs of intoxication observed by Corporal Martinez that indicate impairment of Jones's mental and physical faculties, we conclude the trial court did not abuse its discretion by finding that Corporal Martinez had probable cause for an arrest. We overrule issue one.

Probable Cause for a Warrant

Jones challenged the search warrant that authorized the State to collect a blood sample on the ground that the search warrant affidavit was conclusory and failed to explain how the arresting officer concluded that Jones had lost control of his physical or mental faculties. In his appellate brief, Jones argues the evidence does not support the arresting officer's assertion that Jones had lost control of his physical and mental faculties.

To issue a search warrant, the magistrate must first find probable cause that a particular item will be found in a particular location. *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007). This process requires the magistrate to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him," including the "veracity" and "basis of knowledge" of persons supplying hearsay information, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238.

> As a reviewing court, we apply a highly deferential standard to the magistrate's determination because of the constitutional preference that

> searches be conducted pursuant to a warrant. Accordingly, our duty "is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed" based on the four corners of the affidavit and reasonable inferences therefrom.

Moreno v. State, 415 S.W.3d 284, 287 (Tex. Crim. App. 2013) (citations omitted).

The facts that can be derived from the four corners of the affidavit are: (1) Martinez, the affiant, is certified or trained in the detection of intoxicated drivers; (2) he has formed opinions on intoxication on many occasions and has had his suspicions confirmed by breath, blood, or urine samples; (3) at approximately 12:36 a.m., Jones was operating a motor vehicle on Sawdust Road; (4) the affiant observed Jones speeding at 49 miles per hour in a 30 mile per hour zone; (5) his observations of the suspect included a strong odor of alcohol, fair speech, cooperative and talkative attitude, and swaying balance and walking; (6) the suspect refused to perform the requested field sobriety tests, and this refusal indicated to the affiant that the suspect was attempting to hide intoxication evidence; (7) Jones admitted to drinking but did not state how much or what he had drunk; (8) Jones refused the affiant's request for a blood sample or a breath sample, indicating that the suspect was attempting to hide intoxication evidence; (9) based on his experience, training in intoxication-related offenses, and his observations of the suspect, the affiant believed that Jones was intoxicated by reason of the introduction of alcohol, a controlled substance, a dangerous drug, or a combination thereof, and that the

suspect lost the normal use of his mental or physical faculties by reason of introduction of alcohol, a controlled substance, a dangerous drug, or a combination thereof, into his body. The warrant issued at 2:10 a.m., one hour and thirty-four minutes after Jones was driving in a public place.

The magistrate's role was to determine whether there was substantial evidence to believe that an illegal concentration of blood alcohol would be found in Jones's blood. *See State v. Webre*, 347 S.W.3d 381, 386 (Tex. App.—Austin 2011, no pet.). The facts stated in the search warrant affidavit must provide a substantial basis upon which the magistrate may reasonably determine probable cause exists to believe that a specific offense has been committed, the item to be seized constitutes evidence of the offense or evidence that a particular person committed the offense, and the item is located on the person or place to be searched. *See* Tex. Code. Crim. Proc. Ann. § 18.01(c) (West Supp. 2016). Jones argues the affidavit fails to establish the required nexus between criminal activity and the evidence to be seized, because the activity described in the affidavit does not establish that criminal activity occurred. Corporal Martinez's affidavit established that less than two hours earlier Jones had been driving recklessly, had a strong odor of alcohol, swayed, admitted that he had been drinking, refused to participate in field sobriety tests, and he later refused to provide a breath or blood sample. The affidavit describes the suspect's

symptoms of intoxication contemporaneous with his act of driving in a public place, and his refusal to allow a test of his mental and physical faculties or of the amount of alcohol in his breath or blood. We conclude the affidavit provided the magistrate with a substantial basis for concluding that Jones's blood would constitute evidence of driving while intoxicated and that there was a fair probability that a sample of his blood would constitute evidence that he had committed the offense of driving while intoxicated. *See Gates*, 462 U.S. at 238–39. Accordingly, the trial court did not err in denying Jones's motion to suppress the evidence seized through the search warrant. We overrule issue two.

Gas Chromatography Results

In issue three, Jones contends that the State failed to establish by clear and convincing evidence that the technique of testing Jones's blood through gas chromatography was reliable and that a reliable technique was properly applied. An alcohol analysis report run approximately three and one-half months after the blood sample was collected stated the blood sample was normal but had "greenish-brown color." Jones objected during trial to the State's evidence and testimony concerning the gas chromatograph tests performed by two forensic scientists on the blood sample seized under the search warrant. The trial court conducted a hearing outside the presence of the jury and ultimately concluded that the jury would be allowed to

hear the evidence. In his appeal, Jones does not question the underlying scientific theory of gas chromatography. He argues that the technique was invalid and improperly applied because gas chromatography was not shown to be reliable for green blood samples.

An expert witness "may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Tex. R. Evid. 702. The proponent of scientific evidence must persuade the trial court through clear and convincing evidence that the proposed evidence is reliable, that is: "([1]) the underlying scientific theory must be valid; ([2]) the technique applying the theory must be valid; and ([3]) the technique must have been properly applied on the occasion in question." *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). In a criminal proceeding under Chapter 49 of the Texas Penal Code, gas chromatograph results are admissible if the proponent establishes "the use of properly compounded chemicals; the existence of periodic supervision over the machine used; operation by one who understands the scientific theory of the machine; and proof of the result of the test by a witness or witnesses qualified to translate and interpret such results." *Garcia v. State*, 112 S.W.3d 839, 848 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see also* Tex. Transp. Code Ann. §

724.064 (West 2011) ("On the trial of a criminal proceeding arising out of an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle[,] . . . evidence of the alcohol concentration . . . as shown by analysis of a specimen of the person's blood, . . . taken at the request or order of a peace officer is admissible."). The trial court's ruling is reviewed for abuse of discretion. *Blasdell v. State*, 470 S.W.3d 59, 62 (Tex. Crim. App. 2015). "In addition, the appellate court must review the trial court's ruling in light of what was before the trial court at the time the ruling was made." *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

A sample of Jones's blood was obtained through a search warrant on March 9, 2013, at 2:18 a.m. Haley Yaklin, a forensic scientist working primarily in the blood alcohol and controlled substance section of the Texas Department of Public Safety Crime Lab in Houston, pulled Jones's blood sample on June 21, 2013, and kept it in a locked refrigerator in her analysis area until she tested the sample using the headspace gas chromatography process.[1] The test Yaklin ran reported ethanol results of 0.143 grams per 100 milliliters.

[1] In this opinion, we do not describe the process explained by Yaklin because the science of headspace gas chromatography is not at issue here, and Jones does not identify any particular step in her methodology that he contends was improperly performed.

Brian Nacu, a forensic scientist with the Texas Department of Public Safety Crime Lab in Houston, tested Jones's blood sample on October 7, 2014.[2] His test run reported 0.134 grams of alcohol per 100 milliliters of blood. According to Nacu, the laboratory is accredited and has a validation study for testing whole blood, plasma, and serum. Nacu could not certify why Jones's blood changed color.[3] Nacu had some limited training on the effect of oxidation of blood. When asked whether he knew of anything that can show that green blood is not oxidized to the point that it does not have the same value as unoxidized blood, Nacu replied that nothing in his training or experience says green blood has any effect on alcohol concentration. He stated that no scientific studies state that the color of the blood has any effect on the ethanol concentration. Nacu added that he has seen green blood fairly frequently, including ninety training samples that he reanalyzed from cases that were analyzed by a previous analyst. The blood was green in every one of those samples. Nacu explained that blood turns green when it is not refrigerated, that studies show that lack of refrigeration results in decreased ethanol concentration. Nacu could not identify a particular study but stated that from his training and experience and the

[2] Jones does not identify any step in the process that he argues Nacu performed incorrectly. Therefore, we do not describe Nacu's description of his methodology.

[3] Throughout the hearing and in this appeal, appellant refers to "green blood" but the record states the blood sample was "greenish-brown." References in this opinion to "green blood" should be understood to describe a "greenish-brown" hue.

training samples he mentioned, the ethanol levels for the samples decreased after they were stored and not refrigerated. Nacu explained that gray-topped vials were used for blood alcohol analysis, and they contained preservatives to inhibit endogenous ethanol growth and an anticoagulant to prevent the blood from clotting. In those cases where Nacu re-tested whole blood stored in gray-topped sample tubes, the blood alcohol concentration decreased. Nacu testified that it was also true when the blood was still red when it was re-tested; ethanol decreased by .01 or .02 after a year to eighteen months irrespective of whether the blood was still red or had turned green. On re-testing, the ethanol reading on the sample of Jones's blood decreased by .009. Nacu stated the re-testing is not performed very often, and he sees green blood in approximately one in ninety cases. Nacu believed the main reason blood turned green is decomposition of the blood. Additionally, certain medications and diseases can cause blood to turn green faster in a gray-topped tube.

Dr. Jimmy Valentine, a pharmacologist with a PhD in medicinal chemistry and experience directing forensic laboratories, testified for the defense in the hearing. According to Valentine, a sample will turn green either due to oxidation of the iron in the hemoglobin in the blood or because a person has taken sulphamethoxadole, commonly called sulpha drugs. He found no drugs in Jones's pharmacy records that would cause this condition. Valentine stated oxidation is a

simple state where a chemical change occurs due to oxygen in the air. Valentine was not aware of any validation study that says green blood can be analyzed and interpreted the same as red blood for forensic purposes. Valentine stated:

> For drugs I can tell you what it does. It causes drugs to oxidize so you won't get as much of a concentration of drugs. Alcohol is not known. I don't know of any studies I can go to, to tell me what would happen to alcohol. But we know alcohol can oxidize, too. So the state could form either less alcohol and go over to acetaldehyde, which is a metabolite and then go to acetic acid so I don't know. The studies haven't been done.

Valentine stated that the sample should have been refused for analysis because "[i]t's not in the state that we would expect it to come from the body of a living person[.]" In his opinion, the tests performed in this case were not valid.

Jones contends "testing green blood is a completely different technique in blood alcohol testing." He argues that the technique of testing green blood can never be properly applied without knowing the cause of the change in color. In this case, the scientific theory is Henry's Law, which Nacu described as "the concentration of a volatile in the air above a liquid in a sealed system . . . is going to be proportional to the concentration inside of the liquid." The technique is headspace gas chromatography. "Headspace gas chromatography is considered a reliable method for testing blood alcohol concentration levels and is generally accepted in the scientific community." *Dromgoole v. State*, 470 S.W.3d 204, 222 (Tex. App.—

Houston [1st Dist.] 2015, pet. ref'd). Regarding the application of the technique, Yaklin and Nacu described the gas chromatography protocols and testified that the protocols were followed. The experts agreed that oxidation could decrease rather than increase the amount of ethanol detected through gas chromatography. Because the State carried its burden of establishing the evidence was reliable, the trial court did not abuse its discretion by allowing Yaklin and Nacu to testify concerning the gas chromatography test on Jones's blood. *See Kelly*, 824 S.W.2d at 573; *see also* Tex. R. Evid. 702. We overrule issue three.

Request for Spoliation Instruction

Issue four asks: "Whether it is appropriate to require a showing of bad faith before receiving a spoliation instruction when bad faith is also required in order to prove a due process violation." A review of alleged charge error requires that the appellate court first determine whether error exists in the charge. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). If there is properly preserved error in the charge, the appellate court determines whether there is some harm to the accused from the error. *Id.*

Federal due process law distinguishes between "material exculpatory evidence" and "potentially useful evidence" in addressing the State's failure to preserve evidence in a criminal trial. *See Arizona v. Youngblood*, 488 U.S. 51, 57–

58 (1988); *Ex parte Napper*, 322 S.W.3d 202, 229 (Tex. Crim. App. 2010). A federal due process violation occurs if the State fails to disclose material exculpatory evidence, regardless of whether the State acted in good faith or in bad faith. *Illinois v. Fisher*, 540 U.S. 544, 547 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A *Brady* claim requires proof that the evidence was both material and favorable to the defendant such that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). If a defendant alleges a federal due process violation based on the State's destruction of merely "potentially useful evidence," the defendant must show that the State acted in bad faith in destroying the evidence. *Fisher*, 540 U.S. at 547–48.

Before testimony commenced, defense counsel noted for the record that Jones had just been notified that the blood draw had been recorded but that the video recording of the blood draw no longer existed. The prosecutor told the trial court that he was informed that blood draws are recorded and there should have been a recording for this case, but they had not been able to locate a recording and there was no record or history of one.

In Jones's trial, Kaydee Cross, the phlebotomist who drew the sample of Jones's blood, testified that she and an assistant district attorney routinely ride in the

District Attorney Response Team vehicle, or DART van, to locations where search warrants for blood are executed. Cross drew Jones's blood. Cross testified that a hand-held video camera was used in the van on the night that she obtained the blood sample from Jones. She could not recall who held the camera on the night at issue in this case, and she is not the person responsible for preserving the recording.

Jones requested that the jury charge include an instruction that

> there was testimony in this case that video existed of the defendant during the blood draw in the DART van . . . but has been since been destroyed. If you believe by a preponderance of the evidence that the State of Texas has the capacity to destroy the video evidence then you may infer that any subsequent analysis of that evidence would have produced a result favorable to the defendant.

The trial court refused Jones's request for the instruction.

Jones has not claimed, either at trial or on appeal, that the State acted in bad faith in either losing or failing to preserve the recording of the blood draw. He argues that the video would have been more reliable than the witness's memory, and would have provided the jury an additional opportunity to observe Jones firsthand, but he does not argue that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. Jones argues that he should have received a jury instruction regarding the missing recording from the DART van because the State disregarded its duty under article 2.139 of the Texas Code of Criminal Procedure by failing to provide a copy of the video to Jones. *See*

Tex. Code Crim. Proc. Ann. art. 2.139 (West Supp. 2016).[4] Article 2.139 applies only to a recording of conduct that occurs on or after the effective date of the statute, September 1, 2015. *See* Act of May 25, 2015, 84th Leg., R.S., ch. 1124, §§ 2, 3, 2015 Tex. Sess. Law Serv. 3804–05. Jones's blood sample was drawn in 2013. The record does not support a claim of a federal due process violation. *See Youngblood*, 488 U.S. at 56–58. Jones has not shown that there was error in the jury charge. *See Almanza*, 686 S.W.2d at 171. We overrule issue four.

Sufficiency of the Evidence

In his fifth issue, Jones contends the evidence is insufficient to support his conviction because the State failed to prove beyond a reasonable doubt that he was intoxicated at the time he was operating the motor vehicle. When evaluating the sufficiency of the evidence, we view all of the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found

[4] Article 2.139 provides:

> A person stopped or arrested on suspicion of an offense under Section 49.04, 49.045, 49.07, or 49.08, Penal Code, is entitled to receive from a law enforcement agency employing the peace officer who made the stop or arrest a copy of any video made by or at the direction of the officer that contains footage of: (1) the stop; (2) the arrest; (3) the conduct of the person stopped during any interaction with the officer, including during the administration of a field sobriety test; or (4) a procedure in which a specimen of the person's breath or blood is taken.

the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We "must give deference to 'the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 319). "The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses." *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). In this role, the jury may choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

In a prosecution for driving while intoxicated, the State must prove the defendant "is intoxicated while operating a motor vehicle in a public place." Tex. Penal Code Ann. § 49.04 (West Supp. 2016). "Intoxicated" is defined by the code as "(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . ; or (B) having an alcohol concentration of 0.08 or more." Tex. Penal Code Ann. § 49.01(2) (West 2011).

Citing *Mata v. State*, Jones contends that the absorption of alcohol depends on several factors, including the type of beverage consumed, the weight, gender, age, and mental state of the drinker, and the type and amount of food consumed before

the consumption of alcohol. *See generally*, 46 S.W.3d 902, 908–10 (Tex. Crim. App. 2001) (describing alcohol absorption in a challenge to the reliability of expert testimony on retrograde extrapolation). Without this information, Jones argues, the jury had no context in which to understand the evidence that Jones's blood alcohol content was at least .134 grams of alcohol per 100 milligrams of blood 108 minutes after Jones was last driving in a public place. Additionally, he argues that Corporal Martinez's observations that Jones had bloodshot eyes, an odor of alcohol, swayed slightly, and admitted he had been drinking is insufficient to establish that Jones had lost control of his mental and physical faculties in light of Corporal Martinez's observation that Jones displayed perfect use of his faculties while he was driving the motorcycle.

In reviewing the sufficiency of the evidence, we must consider the cumulative effect of all of the evidence before the jury, not matters that are missing from the record. *See Murray v. State*, 457 S.W.3d 446, 448–49 (Tex. Crim. App. 2015). "When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination." *Id.* A blood alcohol test result showing that the defendant was intoxicated at the time of taking the test, considered with indicia of intoxication at the time of driving, may

logically support an inference that the defendant was driving while intoxicated. *See Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010).

The jury heard evidence concerning how absorption affects blood alcohol concentration. Nacu testified that

> [W]hen someone[] stops consuming alcohol the first thing that happens is body absorbs the alcohol. And during the time you are drinking your body is absorbing alcohol. While you are drinking you are absorbing more than you are eliminating. So your alcohol concentration is going up. Now, eventually you stop absorbing alcohol after you stop drinking and your body begins to eliminate that alcohol or you are eliminating it faster than you are absorbing it. So you get to a plateau in which your body is eliminating the alcohol. So your alcohol concentration is going to go up for a period of time after you start drinking and then eventually it's going to go down.

According to Nacu, "For elimination we use an average rate of eliminating point 02 grams per one hundred milliliters of blood per hour." Additionally, the jury heard evidence that logically created an inference that Jones was impaired when Corporal Martinez stopped him. Jones either ignored or failed to notice a police officer and proceeded to drive well in excess of the speed limit. Corporal Martinez testified that he thought Jones was intoxicated because he could smell the odor of alcohol coming from Jones and Jones had bloodshot eyes. Jones appeared to avoid breathing on the officer and eventually admitted that he had been drinking, but he either could not remember or was unwilling to state how much he had to drink. Corporal Martinez noticed that Jones was swaying. Jones refused to perform field sobriety tests and told

the officer to take him to jail, indicating consciousness of guilt. Viewing all of the evidence in the light most favorable to the jury's verdict, we hold that the evidence was sufficient for a rational fact finder to have found beyond a reasonable doubt that Jones was intoxicated at the time he was stopped by Corporal Martinez. We overrule issue five and affirm the trial court's judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on May 3, 2017
Opinion Delivered July 5, 2017
Do Not Publish

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