# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-16-00058-CR**

KARY GENE TOOMER — APPELLANT

V.

THE STATE OF TEXAS — STATE

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FROM COUNTY CRIMINAL COURT NO. 4 OF TARRANT COUNTY
TRIAL COURT NO. 1226449

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## MEMORANDUM OPINION[1]

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### I. INTRODUCTION

Appellant Kary Gene Toomer appeals his conviction for driving while intoxicated (DWI). In two points, Toomer argues that the trial court erroneously admitted expert testimony regarding the effects of alcohol on the human body and that the trial court's assessed cost for "Emergency Medical Services" is

[1]*See* Tex. R. App. P. 47.4.

unconstitutional. We conclude that the trial court did not err by allowing the complained-of testimony, although we will modify the trial court's bill of cost to delete the Emergency Medical Services fee and will affirm as modified.

## II. BACKGROUND

At roughly 11:00 p.m., January 6, 2011, Sergeant Leah Lewis of the Southlake Police Department observed Toomer commit multiple traffic violations while driving a white Hummer, including changing lanes without signaling and failing to maintain a single lane of traffic. Lewis initiated a traffic stop. When Lewis approached the vehicle, she detected an odor of alcohol emitting from Toomer. Toomer also exhibited slurred speech. Toomer initially told Lewis that he was not sure where he was coming from and that he had consumed four or five beers that evening. Lewis decided to conduct field-sobriety tests. The State introduced video from Lewis's in-car camera displaying Lewis administering these tests to Toomer.

According to Lewis, Toomer lost his balance, stepped off the line, missed walking heel-to-heel, and stopped during the walk-and-turn test. She said that Toomer also swayed while standing, used his arms for balance, put his foot down, and did not complete the one-leg-stand test. Lewis averred that Toomer also exhibited six out of six clues on the Horizontal Gaze Nystagmus (HGN) test. Based on her observations, training, and experience, Lewis said that she believed that Toomer had lost the normal use of his mental and physical faculties due to the introduction of alcohol into his body. Lewis arrested Toomer for DWI

and transported him to the police station. After Toomer refused to provide a breath sample, Lewis obtained a warrant and ordered a blood draw. Laboratory testing of Toomer's blood sample showed an alcohol concentration of 0.092 blood alcohol content (BAC).

After Lewis testified, and during its case in chief, the State presented the testimony of Dr. Nate Stevens, the forensic scientist who conducted the laboratory analysis on Toomer's blood sample. In addition to testifying to his methods used and the results obtained from Toomer's blood sample, Stevens testified, over objection, that a level of 0.092 BAC would cause an individual to experience some euphoria, some level of impairment, and "a little bit of loss of motor skill, balance, [and] perhaps even some speech impediments." Regarding how that level of BAC would affect a person's judgment, Stevens averred that "it would affect your ability to make decisions and it would also delay your reaction time to certain things in some impairing fashion." Stevens further stated that based on his experience, he did not believe that someone with a BAC above 0.08 could safely operate a motor vehicle.

A jury returned a verdict of guilty, and after the trial court heard punishment evidence, it assessed punishment at 120 days in jail and a $1,000 fine. The trial court then suspended Toomer's jailtime and placed him on community supervision for eighteen months. This appeal followed.

## III. DISCUSSION

### A. Expert Testimony Regarding Effects of BAC

In his first point, Toomer argues that the trial court erred by allowing Stevens to testify to the effect that a BAC above 0.08 has on people. Specifically, Toomer argues that the trial court erred by allowing Stevens to "testify as an expert regarding the medical and toxicological effect of alcohol on humans."

We review the trial court's decision on the admissibility of expert testimony for an abuse of discretion. *Alvarado v. State*, 912 S.W.2d 199, 216 (Tex. Crim. App. 1995). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009). A trial court's determination that a witness is or is not qualified to testify as an expert is afforded great deference. *Davis v. State*, 313 S.W.3d 317, 350–51 (Tex. Crim. App. 2010). Such rulings are rarely disturbed by appellate courts. *Vela v. State*, 209 S.W.3d 128, 136 (Tex. Crim. App. 2006).

Rule 702 provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education 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 evaluation of an expert's qualifications entails a two-step inquiry: first, a witness must first have a sufficient background in a particular field, and second, the trial court must determine whether that

background goes to the very matter on which the witness is to give an opinion. *Vela*, 209 S.W.3d at 131. To be qualified to give expert opinion testimony, the witness must possess some additional knowledge or expertise beyond that possessed by the average person. *Davis*, 313 S.W.3d at 350.

In *Rodgers v. State*, the Texas Court of Criminal Appeals outlined three criteria to be used in assessing whether a trial court has clearly abused its discretion in ruling on an expert's qualifications. 205 S.W.3d 525, 528 (Tex. Crim. App. 2006). These include (1) whether the field of expertise is complex, (2) how conclusive the expert's opinion is, and (3) the centrality of the area of expertise to the resolution of the lawsuit. In considering these criteria, "the appellate court must review the trial court's ruling in light of what was before that court at the time the ruling was made." *Id.* at 528–29.

Here, the record supports the trial court's ruling that Stevens possessed sufficient qualifications to testify about alcohol's effect on the human body. The record evidence shows that Stevens has conducted independent research by reading literature on the subject and by attending two workshops, and that he has testified on the subject in other Tarrant County courts. Furthermore, as Stevens testified, understanding the effect of alcohol on the human body falls "within the scope of what [his] job description entails." That Stevens obtained his information and knowledge about the effect of alcohol on the human body by attending two workshops and reading literature does not disqualify him as an expert. *See Negrini v. State*, 853 S.W.2d 128, 131 (Tex. App.—Corpus Christi

1993, no pet.) ("We do not find that, because Gonzalez received his information solely from course work, he is not qualified to testify as an expert.").

We also agree with the State that Toomer over characterizes the subject matter of Stevens's testimony as medical evidence requiring education and experience in the fields of medicine and toxicology. To the contrary, at least one court has held that the subject of Stevens's testimony—the general effect of alcohol on the human body—is not a complex subject. *See Sims v. State*, No. 11-09-00059-CR, 2010 WL 4148372, at *2 (Tex. App.—Eastland Oct. 21, 2010, no pet.) (mem. op., not designated for publication) (holding that trial court did not abuse its discretion by finding police officer an expert on the effect of alcohol on the body as well as on tolerance and homeostasis); *see also Ruiz v. State*, No. 14-00659-CR, 2013 WL 6047030, at *5 (Tex. App.—Houston [14th Dist.] Nov. 14, 2013, no pet.) (mem. op., not designated for publication) (holding that effects of Tramadol on body not complex field of expertise because determining effect of most prescription medications by running computer search is fairly easy for anyone with Internet connection). Thus, the State's questions did not require Stevens to have the type of extensive medical or toxicological expertise suggested by Toomer.

Moreover, Stevens's brief testimony on the subject did not render any conclusive opinion that the effects of alcohol which he described applied to Toomer or occurred in every case. And the jury saw Toomer's actions and demeanor when it watched the video from Lewis's dashcam. It can hardly be

said that Stevens's testimony was central to the resolution of this case. Indeed, the focus of the State's case was on Lewis's observations, the video recording of Toomer at the scene of the traffic stop, his poor performance on the field sobriety tests, and his blood-test results. This evidence, without Stevens's brief opinions about the general effects of alcohol on the human body, overwhelmingly supported the jury's finding that Toomer was intoxicated. *See Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010) (describing evidence that raises inference of intoxication to include stumbling, swaying, slurring or mumbling words, inability to perform field sobriety tests or follow directions, and making any admissions about what, when, and how much defendant had been drinking); *see also Kiffe v. State*, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (reasoning that an officer's testimony that a person is intoxicated is sufficient to establish intoxication).

We conclude that the trial court did not abuse its discretion by finding that Stevens possessed sufficient knowledge, training, or education to testify about the effects of alcohol on the human body. *See* Tex. R. Evid. 702; *see also Sims*, 2010 WL 4148372, at *2. We overrule Toomer's first point.

**B. Emergency Medical Services Fee**

In his second point, Toomer argues that the trial court erred by assessing an "Emergency Medical Services" fee pursuant to Article 102.0185(a) of the Texas Code of Criminal Procedure because such a fee is unconstitutional. We agree.

Even though neither party addresses the issue, this court has a duty to ensure that Toomer's claim was preserved in the trial court before we can address this point. *Wilson v. State*, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010). We conclude that Toomer may raise this complaint on appeal, even though he did not raise it in the trial court, because the trial judge pronounced an incorrect amount of costs in open court and the court costs were not itemized in the judgment. *See Ingram v. State*, 503 S.W.3d 745, 748 (Tex. App.—Fort Worth 2016, pet. ref'd) (holding that because court costs were not imposed in open court nor itemized in judgment, appellant could raise issue for first time on appeal). Thus, we will address this point.

This court has held that the medical-services cost that Toomer complains of suffers the same infirmity that the court of criminal appeals has found applicable to portions of a consolidated fee imposed as a court cost upon criminal conviction under the local government code. *Casas v. State*, No. 02-16-00122-CR, 2017 WL 3081152, at *4 (Tex. App. July 20, 2017, no pet. h.); *see Salinas v. State*, 523 S.W.3d 103, 109, n.26 (Tex. Crim. App. 2017) (analyzing portions of consolidated fees on conviction imposed under local government code section 133.102(e)(1), (6)). That is because, as this court has previously concluded, "[n]either the statute authorizing the collection of the emergency-services cost nor its attendant statutes direct the funds to be used for a legitimate, criminal-justice purpose; therefore, it is a tax that is facially

unconstitutional." *Casas*, 2017 WL 3081152, at *5. Thus, we sustain Toomer's second point.

## IV. CONCLUSION

Having overruled Toomer's first point, but having sustained his second point, we modify the trial court's bill of cost to deduct the $100 emergency management services cost from the $435.10 assessed, thereby making the total cost $335.10, and leaving the fine at $1,000, requiring a total payment by Toomer of $1,335.10. We affirm the trial court's judgment as modified.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: MEIER, GABRIEL, and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 5, 2017