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

YEARY, J., filed a dissenting opinion in which KELLER, P.J., joined.

DISSENTING OPINION

In order to prove the offense of driving while intoxicated (DWI), the State must present evidence to show that "[a] person . . . [was] intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE § 49.04(a). To prove the person was "intoxicated," the State must establish either that he had a blood alcohol concentration of 0.08 or more, TEX. PENAL CODE § 49.01(2)(B), or that he lacked "the normal use of mental or physical faculties by reason of the introduction of" an intoxicating substance—any intoxicating substance—including, but not limited to, alcohol. TEX. PENAL CODE §

49.01(2)(A).[1] The State is not bound to prove any *particular* substance in order to prove intoxication under Section 49.01(2)(A). Precisely what that intoxicating substance may be, we have said, is not elemental. *Gray v. State*, 152 S.W.3d 125, 132 (Tex. Crim. App. 2004); *see also State v. Barbernell*, 257 S.W.3d 248, 253-54 (Tex. Crim. App. 2008) (describing *Gray* as rejecting the proposition "that the type of intoxicant is an element of DWI"). But the State must show that the defendant has lost the normal use of his physical or mental faculties "by reason of the introduction of" *some* intoxicating substance. It does not suffice to establish DWI if the State proves only that a defendant was driving a motor vehicle in a public place while lacking the normal use of his physical or mental faculties. The "introduction" of *some* kind of intoxicating substance into the defendant's system that causes the impairment must be proven before it may be said that the State has established the offense of driving *while intoxicated*, even if the "type" of intoxicant is not elemental.

The jury charge in the instant case gave the full definition of "intoxicated" in the abstract instructions of law. This included as intoxicating substances: "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[.]" It was not reversible error for the trial court to include the full definition in the abstract instructions because even those portions of the definition that do not apply to the facts proven in a particular case, and are therefore "superfluous,"

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[1] The information did not allege, and the jury was not charged on, the theory that Appellant had a blood alcohol concentration in excess of 0.08.

"do[] not produce[] reversible error . . . because [they have] no effect on the jury's ability fairly and accurately to implement the commands of the application paragraph or paragraphs." *Plata v. State*, 926 S.W.2d 300, 302-03 (Tex. Crim. App. 1996). But to include the full definition of "intoxicated" in the application paragraph, as the trial court did in this case, may be problematic if that full definition includes certain categories of intoxicant that the evidence simply does not show the defendant may have ingested in a particular case.[2] In that event, the trial court has failed to tailor the jury charge to reflect "the law applicable to the case[,]" as required by Article 36.14 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 36.14. I agree with the Court today that such an application paragraph could be erroneous on the facts of a given case, Majority Opinion at 13, and in some of those cases, the error could prove to be reversible.

But not in this case. Here, there was some evidence that Appellant had been drinking. Though Appellant himself denied it, the arresting officer detected a faint odor of alcohol, as did both the driver and passenger of the car that Appellant rear-ended. So the application paragraph rightly included alcohol in its enumeration of intoxicating substances shown by the evidence to have potentially caused Appellant to lose the normal use of his mental or physical faculties. There was also evidence that Appellant had pills in his pocket. Presiding

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[2] Instead, the information alleged DWI under the terms of Section 49.01(2)(A), and included the full definition of "intoxicated." Thus, the jury charge, including the application paragraph, conformed with the charging instrument. The issue in this case is whether the *evidence* would support conviction for all types of intoxicant listed in the information.

Judge Keller argues in her dissent, and I agree, that the evidence is sufficient to establish that some of these pills were hydrocodone. Dissenting Opinion at 1-2. I also agree with Presiding Judge Keller that the intoxicating effects of hydrocodone are sufficiently common knowledge that there is no need for expert testimony to establish that fact. Dissenting Opinion at 2-3. Hydrocodone, it should be emphasized, is both a controlled substance—Penalty Group 1—and a drug. For these reasons, I agree with Presiding Judge Keller's conclusion that the trial court did not err to include, at least, "a controlled substance, a drug, [or] a combination of . . . those substances" within the application paragraph's definition of intoxicants shown by the evidence in this particular case to have potentially been ingested by Appellant.[3] *Ouellette v. State*, 353 S.W.3d 868, 870 (Tex. Crim. App. 2011).

We cannot simply reverse the judgment of the court of appeals, however. That court held that the trial court committed *two* errors in this case. Besides concluding that there was jury charge error, the court of appeals also held that the trial court erred to permit the State to introduce the evidence of hydrocodone. *Burnett v. State*, 488 S.W.3d 913, 921-22 (Tex. App.—Eastland 2016). The court of appeals did not assess whether this alternative error was

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[3] It is not clear to me that hydrocodone would fit within the definition of a "dangerous drug," as that term is set out in Section 483.001(2) of the Health and Safety Code. TEX. HEALTH & SAFETY CODE § 483.001(2). But I am not inclined to regard the inclusion of that definition, if error, as *reversible* error. A jury instructed that it could rely on the presence of hydrocodone as an intoxicating "controlled substance" or "drug" would not likely have felt the need to resort to the "dangerous drug" part of the definition in order to find that Appellant's loss of mental or physical faculties was caused by *some* intoxicant or combination of intoxicants.

harmless, however, because it concluded that the jury charge error was, by itself, reversible. *Id*. at 922-25. In its petition for discretionary review, the State has not challenged the court of appeals' alternative holding. In my view, the appropriate disposition of the case is to vacate the court of appeals' judgment and remand the cause to that court for further proceedings not inconsistent with this dissent (as well as Presiding Judge Keller's). I would leave it open to the court of appeals to revisit its holding with respect to the admissibility of the evidence regarding Appellant's possession of hydrocodone, subject to later discretionary review. But that court should at least decide in the first instance whether, if there was error in the admission of the evidence of hydrocodone, it was harmless error.

Because the Court instead affirms the judgment of the court of appeals, I respectfully dissent.

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