AFFIRM; and Opinion Filed December 2, 2014.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00025-CR

MELLANNISE HENDERSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Collin County, Texas
Trial Court Cause No. 002-80051-2013

MEMORANDUM OPINION

Before Justices O'Neill, Fillmore, and Chief Justice Thomas, Retired[1]
Opinion by Justice O'Neill

Appellant Mellanise Henderson appeals her conviction for driving while intoxicated following a jury trial. She was sentenced to ninety days' confinement in the Collin County Jail and was assessed a $900 fine. The court suspended imposition of the sentence and placed appellant on twelve months' probation. In seven issues, appellant challenges the sufficiency of the evidence to support her conviction, the administration of a field sobriety test, error during jury deliberations, error in the charge, and failure to give *Miranda* warnings. We affirm the trial court's judgment. Because the issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

[1] The Honorable Linda Thomas, Chief Justice of the Court of Appeals for the Fifth District of Texas—Dallas, Retired, sitting by assignment.

BACKGROUND

On November 30, 2012 and into the early morning hours of December 1, 2012, appellant was driving home after working late. Officer Clifton Corley of the Richardson Police Department was on his way to assist an officer who had requested backup. Corley noticed a black Lexus sedan "weaving within its lane a little bit," but decided that his priority was to provide backup to the officer who had requested help. But when he began to go around the vehicle to pass, the vehicle "came over into the left lane without signaling," and Corley "had to brake hard and swerve a bit to the left to avoid a collision." Corley decided to "reassess the driver" for possible intoxication. The vehicle continued to swerve. Although the left turn signal was on, the vehicle did not change lanes. The vehicle also drifted on and off the reflectors dividing the lanes. Corley then saw that the officer who had requested assistance was stopped in the right lane a short distance ahead. Corley initiated a traffic stop to avoid any danger to that officer, to himself, and to other drivers.

Appellant, who was driving the black Lexus sedan, pulled over and complied with Corley's requests to produce her license and insurance card. Corley "noticed she had kind of watery glazed-over eyes," as well as "slurred speech as I was speaking with her." He noticed "a strong odor of alcoholic beverage coming from the vehicle." Appellant denied that she had consumed any alcohol. She explained she had seen the emergency vehicle ahead that Corley planned to assist, and was attempting to determine if she needed to change lanes to avoid it. Corley continued to hear appellant's slurred speech, and asked her to exit the vehicle. Appellant complied. Corley was then able to smell alcohol on her breath.

Corley attempted to administer the horizontal gaze nystagmus (HGN) field sobriety test. Appellant was unable to follow the instructions for the test, following the stimulus by moving her head instead of following it with her eyes. Corley reminded her several times not to move

her head. When these reminders were unsuccessful, he asked if she would like to hold her head still with her hands to keep it from moving. She said she would, but still turned her head with the stimulus. Despite appellant's difficulty in following the instructions for the test, Corley was able to observe a total of four clues from the HGN test, enough to reach a decision point from which he could conclude that appellant was intoxicated. Corley also testified that the inability to follow the instructions for the HGN test, in his experience, could also indicate intoxication.

Corley testified that the flashing lights on his patrol car could affect the outcome of the HGN test. He also explained that under ideal conditions, a person performing an HGN test should not be facing traffic, because "if the traffic is heavy enough and cars are going by, the eyes can tend to follow the lights as [they go] across." He testified that he turned off the lights on his patrol car, but conceded that he did not conduct the test with appellant facing away from traffic. On cross-examination, Corley admitted that there was traffic going by. On redirect examination, however, he explained that the passing traffic would not "cause the individual's head to turn" as appellant's did during the test.

Corley testified that there are other field sobriety tests, including the walk-and-turn test and the one-leg stand test. He advised appellant that he had some other exercises he wanted her to perform. Appellant "indicated she was not sure she could do anything else because she needed to urinate." Corley explained that the tests would not take very long to perform, and if appellant would continue "we could reach a conclusion and we could get her to a restroom." Corley testified that this discussion took longer than the two tests would have taken. He explained that when appellant did not perform the additional tests, he arrested her for driving while intoxicated.

Corley then took appellant to the Richardson city jail, to a room designated for the processing of intoxicated drivers. He instructed appellant to stand on the black square painted on

the white floor. Instead of standing on the square, appellant placed her shoes on it and walked over to lean against a counter and a wall. Corley gave appellant a copy of the written warning regarding intoxilyzer testing, and then read the warning aloud to her. He requested a specimen of appellant's breath. She refused, and also refused to sign the warning.

On cross-examination, Corley testified that appellant was respectful to him at all times and not belligerent. Appellant did not stumble getting out of the car, and complied with his instructions about where to stand for the field sobriety tests. Corley also conceded that if appellant had lost control and urinated during the one-legged stand test, he would have included it in his report as a sign of insobriety. He agreed that she "was kind of between a rock and a hard place in terms of having to use the bathroom or taking a chance" of urinating during the tests.

Corley was the only witness at trial. During his testimony, two video exhibits were admitted into evidence without objection and played for the jury. The first of these videos was taken from Corley's patrol car starting at the time he observed appellant's car swerving and including the administration of the HGN test; the second was of appellant in the processing room at the Richardson jail. During jury deliberations, the jury requested a copy of the first of these videos. A note sent by the jury foreperson stated, "[w]e the jury respectfully request a copy of State's Exhibit A, DVD, for our review." The trial court first determined that the exhibit could not be played on the DVD player in the jury room. The trial court then explained that the jurors could crowd around a small computer screen in the jury room, or could watch the video on the large screen in the courtroom. Counsel for the defense and for the State both agreed the jury should watch the video in the courtroom. Counsel for the State explained that when the video was shown to the jury during trial, he had turned off one microphone input from the patrol car to enable the conversation between Corley and appellant to be heard, and also "switched from camera one to camera two" once appellant was placed in the patrol car. The trial court therefore

allowed counsel for both parties to be present in the courtroom during the playback for the jury, and instructed counsel for the State to "[p]lay the video the same way you did yesterday during trial for the jury." He also instructed, "I'm ordering that all parties not say anything, make any outward facial, you know, gestures or anything else to this jury while they're in here. Just play the video." He then asked for objections. Neither party raised any, and the video was played.

The jury reached a unanimous verdict of guilty. This appeal followed.

ANALYSIS

A person commits the offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place. TEX. PENAL CODE ANN. § 49.04 (West Supp. 2014). "Intoxicated" means "not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body" or "having an alcohol concentration of 0.08 or more." *Id.*, § 49.01(2) (West 2011). Only the first of these definitions, known as the "impairment theory," is relevant here. *See Crouse v. State*, 441 S.W.3d 508, 513 (Tex. App.—Dallas 2014, no pet.) (explaining that impairment theory and "per se" theory, based on alcohol concentration, are two alternative methods for State to prove intoxication).

A. Sufficiency of the evidence

In her fifth and sixth issues, appellant challenges the sufficiency of the evidence to support the jury's verdict. Although appellant's issues challenge the factual sufficiency of the evidence, we apply only one standard, for legal sufficiency, to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). "Accordingly, when reviewing the sufficiency of the evidence, we consider all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt." *Id.* (citing *Jackson v. Virginia*, 443 U.S.

307, 318–19 (1979)). Direct and circumstantial evidence are treated equally, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Our review of all of the evidence includes evidence that was properly and improperly admitted. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). The jury is the exclusive judge of witness credibility and the weight to be given the testimony. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). It is also the exclusive province of the jury to reconcile conflicts in the evidence. *Id.*

Appellant argues the evidence is insufficient because (1) her conviction was based on Corley's improper administration of the HGN test; (2) Corley did not conduct any other field sobriety tests, even though appellant did not refuse to complete them but only expressed her desire to go to the restroom first; (3) she promptly cooperated with Corley's requests to pull over, provide her license and insurance, and exit the car; (4) she explained to Corley that she was trying to determine if she needed to change lanes to accommodate the emergency vehicle ahead, and so had an explanation for the swerving Corley witnessed; (5) she was respectful to Corley and followed his commands during Corley's investigation, and was not visibly swaying; and (6) there was no testimony outside of the flawed HGN test to establish that she did not have normal use of mental or physical faculties by reason of the introduction of alcohol into her body.

The State in turn argues that appellant's "poor driving, physical symptoms, inability to follow basic instructions, and refusal to take a breath test" were sufficient to support her conviction for driving while intoxicated. In addition, the jury heard and saw video evidence of appellant's condition at the time of the offense. As a general rule, the testimony of a peace officer that a person is intoxicated provides sufficient evidence to establish the element of intoxication. *See Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979); *Watkins v. State*, 741 S.W.2d 546, 549 (Tex. App.—Dallas 1987, pet. ref'd). Corley testified that appellant was

weaving within her lane and nearly struck his car when swerving into his lane. He testified that appellant had slurred speech and watery eyes and that he smelled alcohol on her breath. He testified that she was unable to follow simple instructions, and that she refused further field sobriety tests, discussing her need to go to the restroom for a longer period of time than the tests would have taken. Viewing all of the evidence in the light most favorable to the jury's verdict, we conclude the evidence was sufficient to support appellant's conviction for the offense of driving while intoxicated. We overrule appellant's fifth and sixth issues.

B. Evidentiary rulings

We review the trial court's decisions to admit or exclude evidence for abuse of discretion. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007).

1. Probable cause

In her first issue, appellant complains that there was no probable cause to arrest her. She asserts that probable cause was lacking because Corley administered, incorrectly, only one field sobriety test. Although lack of probable cause is typically made in connection with a motion to suppress specific evidence,[2] appellant does not point to any evidence that should have been excluded for lack of probable cause, or to any objection she made at trial on that basis. "[T]he failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence." *Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002). And even if she had preserved her complaint, Corley's decision to arrest appellant was made on more than the results of the HGN test, as we have discussed.

Probable cause for a warrantless arrest exists if, at the moment the arrest is made, the facts and circumstances within the arresting officer's knowledge and of which he has reasonably

[2] *See, e.g., Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997) (appellant moved to suppress evidence of drug possession where no probable cause for arrest).

trustworthy information are sufficient to warrant a prudent person as believing that an offense has been or is being committed. *Tex. Dep't of Pub. Safety v. Gilfeather*, 293 S.W.3d 875, 880 (Tex. App.—Fort Worth 2009, no pet.) (en banc op. on reh'g) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Corley testified that appellant's erratic driving raised concern for the officer requesting assistance as well as others on the road. He testified to the smell of alcohol on appellant's breath, her glassy eyes and slurred speech, and her inability to follow instructions. Similar signs of intoxication have been held to provide sufficient probable cause to arrest for DWI. *See Learning v. State*, 227 S.W.3d 245, 249 (Tex. App.—San Antonio 2007, no pet.) (also noting that article 14.01(b), Texas Code of Criminal Procedure, permits warrantless arrest by police officer for offense committed in officer's view). Had appellant objected, the trial court would not have abused its discretion by admitting Corley's testimony regarding probable cause to arrest appellant. We overrule appellant's first issue.

2. *Miranda* warnings

In her seventh issue, appellant contends "the case should have been dismissed for failure to Mirandize [her] after she was in police custody." It is undisputed that appellant was not given *Miranda* warnings until after she had been arrested and had refused to give a specimen of her breath. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A traffic stop, however, does not constitute "custody" for *Miranda* purposes. *State v. Stevenson*, 958 S.W.2d 824, 828 (Tex. Crim. App. 1997) (citing *Berkemer v. McCarty*, 468 U.S. 420 (1984)). Performance of field sobriety tests alone does not give rise to custody. *Id.* at 829. An officer may detain a person in order to gather information in the course of a roadside investigation before placing the person in custody under *Miranda*. *See Lewis v. State*, 72 S.W.3d 704, 707–713 (Tex. App.—Fort Worth 2002, pet. ref'd) (collecting cases).

After appellant's arrest, Corley drove her to the Richardson jail and read her the warnings regarding a breath sample. She refused to give a breath sample. This refusal was admissible evidence. TEX. TRANSP. CODE ANN. § 724.061 (West 2011). Corley then gave appellant *Miranda* warnings and asked if she would talk with him then. She refused, and he did not ask any other questions. "Police requests that suspects perform sobriety tests and directions on how suspects are to do the tests do not constitute 'interrogation;' neither do queries concerning a suspect's understanding of her rights." *Jones v. State*, 795 S.W.2d 171, 176 (Tex. Crim. App. 1990); *see also Gassaway v. State*, 957 S.W.2d 48, 50 (Tex. Crim. App. 1997) (sobriety tests of counting and reciting alphabet not testimonial in nature; defendant's Fifth Amendment rights not implicated).

Appellant concedes that she did not complain in the trial court about the lack of *Miranda* warnings. She argues, however, that we may consider the complaint because it is a pure issue of law and an injustice would be avoided. Although her initial brief did not specify any evidence that should have been excluded, she argues in her reply brief that custodial interrogation began when she was refused the right to leave to use the restroom. She specifically argues that statements regarding "taking of the breathalyzer" were "impermissibly used." But the court in *Jones* noted that "[i]n Texas, we have held that asking a suspect in custody whether he will take a blood alcohol test or repeatedly asking a suspect to give a breath sample are not 'interrogations.'" *Jones*, 795 S.W.2d at 174 n.3. Corley's reading of the statutory warning and his request that appellant provide a breath sample did not constitute custodial interrogation. *See Morris v. State*, 897 S.W.2d 528, 532 (Tex. App.—El Paso 1995, no pet.) (even though appellant was in custody, officer's reading of statutory warning and request for breath and blood samples did not constitute custodial interrogation). We overrule appellant's seventh issue.

C. Jury charge

In her second issue, appellant complains the trial court erroneously submitted "two issues" to the jury on the impairment theory of intoxication. She argues that the charge "suggested to the jury there were two alternate means of committing the offense." She also contends that the trial court erroneously included the per se theory in the definition of intoxication.

In reviewing this complaint, we first determine if the charge given was erroneous. *See Posey v. State*, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998). The trial court's judgment will not be reversed for error in the charge unless the error was calculated to injure the rights of the defendant or unless it appears from the record that the defendant has not had a fair and impartial trial. TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2006). Where, as here, no objection is made to the error in the charge, appellant must show "egregious harm" to warrant reversal. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g), *superseded on other grounds by rule as stated in Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988).

The charge included the following paragraphs:

> The word ***"intoxicated"*** means not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body, or having an alcohol concentration of 0.08 or more.
> . . .
> Now, if you find and believe from the evidence beyond a reasonable doubt that on or about December 1, 2012, in Collin County, Texas, **MELLANNISE HENDERSON** did then and there operate a motor vehicle in a public place while the said **MELLANNISE HENDERSON** was intoxicated by:
>
> 1. not having the normal use of her mental faculties by reason of the introduction of alcohol into the body; **OR**

2. not having the normal use of her physical faculties by reason of the introduction of alcohol into the body;

Then you will find the defendant guilty as charged.

Appellant complains that the trial court allowed "two separate questions" on the impairment theory of intoxication.[3] She cites *Kirsch v. State*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010), for the proposition that there are only two alternative methods for proving intoxication, the impairment theory and the per se theory. She correctly argues that these methods of proof are not alternate means of committing the offense. *See State v. Barbernell*, 257 S.W.3d 248, 256 (Tex. Crim. App. 2008) (per se and impairment definitions of "intoxicated" are purely evidentiary matters that do not "create two different manners and means of committing DWI"). She concludes, however, that the trial court's charge impermissibly created an alternate method of committing the offense.

A similar contention was rejected in *Bradford v. State*, 230 S.W.3d 719, 722–23 (Tex. App.—Houston [14th Dist.] 2007, no pet.). In *Bradford*, the appellant argued the jury's verdict was not unanimous because some jurors may have found loss of mental faculties, while others may have found loss of physical faculties. *See id.* at 722. The court explained that the appellant was charged with a single criminal act or offense, driving while intoxicated. *Id.* at 722. There were no separate criminal acts on which the jury could disagree. *Id.* at 723. The court also explained that the "physical versus mental ability, as a component of the impairment theory," was "not a separate element of the offense." *Id.* In *Zamora v. State*, No. 14-08-01084-CR, 2010 WL 456941, at *2 (Tex. App.—Houston [14th Dist.] Feb. 11, 2010, no pet.) (not designated for publication), the court cited *Bradford* and further explained, "[t]herefore, whether loss of both

[3] Appellant's initial argument appears to be based on the contention that the statutory definition of intoxication uses the word "and," not "or," in describing the impairment theory; her brief quotes the definition as "not having the normal use of mental **and** physical faculties." (Emphasis added). The statute, however, uses the word "or," not "and." *See* TEX. PENAL CODE ANN. § 49.01(2)(A) ("Intoxicated" means: (A) not having the normal use of mental **or** physical faculties . . . ." (Emphasis added)). In her reply brief, she correctly quotes the statute.

faculties or just one has been proven does not affect whether the offense itself has been committed." The trial court's disjunctive submission in the application paragraph of the charge tracked the statutory definition of intoxication and was not erroneous. *See Benn v. State*, 110 S.W.3d 645, 649 (Tex. App.—Corpus Christi 2003, no pet.) (where jury charge tracked statutory definition of intoxication, it was accurate statement of law and was not erroneous).

Appellant also complains that the per se definition of intoxication was included in the jury charge. At trial, the State requested that the per se definition be omitted from the charge because appellant had refused the breath test. Appellant objected, arguing that the definition as given followed the statutory language. In accordance with appellant's objection, the trial court did not change the definition. A defendant may not complain of a charge that she requested. *Trejo v. State*, 280 S.W.3d 258, 259 (Tex. Crim. App. 2009). In addition, the per se definition was a correct statement of the law, tracking the statutory definition. *See* TEX. PENAL CODE ANN. § 49.01(2)(B). Because the per se definition was included in the abstract portion of the charge, not the application paragraph, and because it correctly stated the law, there is no reversible error. *See Crenshaw v. State*, 378 S.W.3d 460, 466–67 (Tex. Crim. App. 2012). We overrule appellant's second issue.

D. Replay of video

In her third and fourth issues, appellant contends the trial court erred by allowing the State "to replay and control the enhancement aspects of the video" for the jury, and complains that the State's control of the video "was tantamount to added evidence." Appellant contends that a new trial is required under Rule 21.3(f), Texas Rules of Appellate Procedure. This rule provides in part that a defendant must be granted a new trial "when, after retiring to deliberate, the jury has received other evidence." *See In re M.A.F.*, 966 S.W.2d 448, 450 (Tex. 1998) (rule requires new trial if other evidence received by jury after retiring to deliberate, and evidence is

detrimental to accused). In *In re M.A.F.*, a new trial was required where during the jury's deliberations in a murder trial, jurors reviewing evidence found a marijuana cigarette in the pocket of the juvenile defendant's jacket. *Id.* at 449. The supreme court reversed the conviction because the jury received new, adverse evidence after retiring to deliberate. *Id.* at 451. Under Rule 23.1(f), the effect of the evidence on the jury is not a consideration; the controlling factor is the character of the evidence in light of the issues before the jury. *See Carroll v. State*, 990 S.W.2d 761, 762 (Tex. App.—Austin 1999, no pet.).

Assuming error was preserved,[4] the replaying of a video already admitted into evidence without objection and seen by the jury did not constitute receipt of other evidence for purposes of Rule 21.3(f). In *Thomison v. State*, No. 11-10-00368-CR, 2012 WL 5989193, at *3 (Tex. App.—Eastland Nov. 29, 2012, no pet.) (mem. op., not designated for publication), the jury "inadvertently received the State's copy of the jury charge, which included the prosecutor's notes in the margin." The appellant requested a mistrial and asserted the ground in a motion for new trial; both requests were denied by the trial court. *Id.* On appeal, the court explained that in most cases under Rule 21.3(f), "the evidence that has been considered detrimental contained new information that damaged the defendant because it has not been admitted during the trial." *Id.* In contrast, the State's copy of the charge was an exact copy of the court's charge that had been submitted to the jury for deliberations. The State's counsel's notes "did not add additional facts; they were merely shorthand for what had been alleged." *Id.* at *4. The jurors "likely did not know who had made the notes," and the notes were "not biased or inflammatory." *Id.*

[4] Appellant did not offer any objection at trial when given the opportunity to do so by the trial court. She argues, however, that in "exceptional circumstances" we may consider her complaint on appeal, citing opinions from several federal appellate courts in civil cases. *See, e.g., Batiansila v. Advanced Cardiovascular Sys., Inc.*, 952 F.2d 893, 896 (5th Cir. 1992) (although appellate court usually refuses to consider issues not raised before trial court, appellate court will make exception when new issue raises pure question of law, and failure to consider would result in miscarriage of justice). We note that Rule 21 includes its own provisions about presenting motions for new trial in criminal cases. *See* TEX. R. APP. P. 21.2 (when motion for new trial required); 21.6 (time to present motion). There is no indication that appellant sought a new trial or a mistrial on this basis in the trial court.

Therefore, the trial court did not abuse its discretion in denying appellant's motion for new trial. *Id.*

As in *Thomison*, there was no new information given the jury here. The video was admitted into evidence without objection; was played in its entirety for the jury; and it was played again at the jury's request, again without objection. The trial court was required to "furnish[ ] to the jury upon its request any exhibits admitted as evidence in the case," and was thus required to provide the video when the jury requested it. TEX. CODE CRIM. PROC. ANN. art. 36.25 (West 2006); *see also Parker v. State*, 745 S.W.2d 934, 936–37 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (article 36.25 is mandatory; trial court's refusal to comply with jury's request to view videotape that had been introduced into evidence was fundamental error). Appellant and her counsel were present when the video was replayed. Appellant does not contend there was anything new, added, or different in the replaying, and did not seek to offer evidence of any difference to be considered by the trial court. She did not object, move for a mistrial, or seek a new trial. We overrule appellant's third and fourth issues.

CONCLUSION

Having overruled appellant's seven issues, we affirm the trial court's judgment.

/Michael J. O'Neill/
MICHAEL J. O'NEILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MELLANNISE HENDERSON, Appellant	On Appeal from the County Court at Law No. 2, Collin County, Texas
No. 05-14-00025-CR V.	Trial Court Cause No. 002-80051-2013.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice O'Neill, Justices Fillmore and Chief Justice Thomas, Retired, participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 2nd day of December, 2014.