Opinion issued June 16, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00487-CR

FREDIS MAURICIO FLORES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1416994

MEMORANDUM OPINION

A jury found Appellant, Fredis Flores, guilty of the third-degree felony offense of driving while intoxicated–third offense.[1] The jury assessed Appellant's

[1] *See* TEX. PENAL CODE ANN. § 49.04(a) (Vernon Supp. 2015) (listing elements of driving while intoxicated); *id.* § 49.09(b) (Vernon Supp. 2015) (providing that driving while intoxicated is third-degree felony if person has previously been

punishment at four years and six months in prison. In one issue, Appellant asserts that the trial court abused its discretion in defining the term "intoxicated" for the jury.

We affirm.

Background

Around 10 p.m. on February 6, 2014, Deputy T. Hays with the Harris County Constable's Office was dispatched to a single-car accident on the toll road. The vehicle had crashed into the cement wall along the road, causing significant front end damage to the car. When the deputy arrived, Appellant was the only person standing outside the car, and no one else was inside the vehicle. Deputy Hays determined that the car was registered to Appellant.

Deputy Hays observed that Appellant had glassy, bloodshot eyes, slurred speech, a strong order of alcohol, and was unsteady on his feet. Appellant was also chewing gum, which Deputy Hays would later testify is common when someone is attempting to mask the odor of alcohol. Appellant initially claimed that a friend had been driving the car, but he did not know where his friend had gone. Deputy Hays noticed that only the driver's side air bag had deployed in the crash. Contrary to his initial denial that he had been driving, Appellant later indicated that he had hit the wall because he was on his cell phone. Appellant also initially

---

convicted on two occasions of offense relating to operating motor vehicle while intoxicated).

denied that he had been drinking, but he later said that he had been at a bar and admitted that he had two beers that night.

Deputy Hays administered three field-sobriety tests to Appellant: the Horizontal the Gaze Nystagmus (HGN), the walk-and-turn, and the one-leg-stand tests. Deputy Hays first administered the HGN test. He observed that Appellant displayed all six clues of intoxication during the test. In addition, Appellant was swaying while the test was being administered. Appellant then exhibited five out of eight clues of intoxication on the walk-and-turn test and three out of four clues during the one-leg-stand test. Based on Appellant's poor performance on the tests and the other observations that he had made, Deputy Hays arrested Appellant for driving while intoxicated.

When asked, Appellant did not consent to giving a blood sample. Deputy Hays obtained a warrant to have Appellant's blood drawn. At the hospital, Appellant refused to cooperate with the blood draw. Ultimately, Appellant had to be held down for his blood to be taken. This was around 1:00 a.m., approximately three hours after his car accident.

Appellant had previously been convicted of the offense of driving while intoxicated in 2008 and in 2013. In this case, Appellant was charged with the felony offense of driving while intoxicated–third offense.

At trial, the State's evidence included the testimony of a toxicologist who works for the lab that tested Appellant's blood specimen. She testified that, at the time his blood was drawn, Appellant had a blood-alcohol concentration (BAC) "[of] 0.248, plus or minus, 0.20 grams per 100 milliliter." When asked what "the legal limit" is in Texas, the toxicologist responded "0.08 grams per 100 milliliter."

At the close of the State's case, Appellant moved for an instructed verdict. Appellant pointed out that his blood had been drawn over three hours after the accident. Appellant asserted that the State presented no evidence regarding what Appellant's BAC had been at the time he was driving. Appellant averred,

> So, we would have a specific motion at least as to that portion . . . of the three different types of intoxication that the State has to prove. We would respectfully ask that at least the blood level content be taken out because their own expert testified she can't say whether the person was below or above a .08 [at the time Appellant was driving].

The trial court denied Appellant's motion for directed verdict.

In the charge, the trial court instructed the jury that "intoxicated" means:

> (A) not having the normal use of mental or physical faculties by reason of the introduction of 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; or
>
> (B) having an alcohol concentration of 0.08 or more.

The jury found Appellant guilty of the offense of driving while intoxicated, third offense, and assessed Appellant's punishment at four years and six months in prison. This appeal followed. In one issue, Appellant contends that the trial court

abused its discretion by including "having an alcohol concentration of 0.08 or more" in the definition of "intoxicated" in the jury charge.

Jury-Charge Error

A. Applicable law

In reviewing a jury-charge issue, an appellate court's first duty is to determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If error is found, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453–54 (Tex. Crim. App. 2003).

Article 36.14 of the Code of Criminal Procedure requires that the trial court deliver to the jury a "written charge distinctly setting forth the law applicable to the case." TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007). Trial courts have "broad discretion" in submitting proper definitions and explanatory phrases to aid the jury. *Nava v. State*, 379 S.W.3d 396, 420 (Tex. App.—Houston [14th Dist.] 2012), *aff'd*, 415 S.W.3d 289 (Tex. Crim. App. 2013). However, a trial court has no discretion in determining what the law is or applying the law to the facts. *State v. Kurtz*, 152 S.W.3d 72, 81 (Tex. Crim. App. 2004).

The Penal Code offers two alternate definitions for "intoxicated." *Kirsch v. State*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010). Under the "impairment theory" definition, a person is intoxicated when he experiences a loss of the normal

use of mental or physical faculties by reason of the introduction of alcohol into the body. TEX. PENAL CODE ANN. § 49.01(2)(A) (Vernon 2011); *Kirsch*, 306 S.W.3d at 743. Under the "per se theory," a person is intoxicated if he has an alcohol concentration in the blood, breath, or urine of 0.08 or more. TEX. PENAL CODE ANN. § 49.01(2)(B); *Kirsch*, 306 S.W.3d at 743. They are not distinct offenses, distinct elements of the offense, or even alternative means of committing the offense, but are instead alternative means by which the State may prove intoxication. *Bagheri v. State*, 119 S.W.3d 755, 762 (Tex. Crim. App. 2003). The two definitions may overlap and are not mutually exclusive. *Crenshaw v. State*, 378 S.W.3d 460, 466 (Tex. Crim. App. 2012).

B. Analysis

Appellant asserts that it was not proper for the trial court to include the per se "having an alcohol concentration of 0.08 or more" definition for "intoxicated" in the jury charge because submission of the definition was not supported by the proper type of evidence. In his brief, Appellant avers,

> Evidence of a blood alcohol concentration (BAC) test result of at least .08 constitutes proof that the individual was intoxicated at the moment the test is performed, but it does not constitute proof of the blood concentration level at the time of the driving. This type of per se intoxication can be shown through retrograde extrapolation provided the necessary information is available to perform a proper extrapolation.

Appellant points out that the State offered evidence of what his BAC was three hours after the accident, but it did not offer retrograde extrapolation evidence to show what his BAC was at the time of the accident. *See Mata v. State*, 46 S.W.3d 902, 908–09 (Tex. Crim. App. 2001) (defining retrograde extrapolation as "the computation back in time of the blood-alcohol level–that is, the estimation of the level at the time of driving based on a test result from some later time"). Without the retrograde extrapolation evidence, Appellant asserts that the trial court should not have submitted the per se definition of intoxicated to the jury.

Appellant acknowledges that whether the trial court abused its discretion in giving the per se definition in this case is governed by the Court of Criminal Appeals' decision in *Kirsch*, 306 S.W.3d at 746. There, the jury heard evidence that, 80 minutes after the defendant crashed his car, his BAC was 0.10. *Id.* at 746. The trial court gave both the per se and impairment definition of intoxicated. *See id.* at 742–43. On appeal, the defendant asserted "that the trial judge erred in submitting jury instructions on the per se definition of intoxication." *Id.* at 743.

The *Kirsch* court recognized that it had previously held that BAC results, while not "conclusive" evidence of intoxication at the time of driving, were "probative and, coupled with the other evidence, could suffice to prove per se intoxication at the time [a defendant] was driving." *Id.* at 744 (citing *Stewart v. State*, 129 S.W.3d 93, 97 (Tex. Crim. App. 2004)).

The court explained,

> BAC-test results, even absent expert retrograde extrapolation testimony, are often highly probative to prove both per se and impairment intoxication. However, a BAC-test result, by itself, is not sufficient to prove intoxication at the time of driving. There must be other evidence in the record that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test.

Id. at 745.

With regard to when it is appropriate to submit a charge on per se intoxication, the court held as follows:

> [E]vidence is sufficient to support a jury charge on the "per se" theory of intoxication if it includes either (1) expert testimony of retrograde extrapolation, or (2) other evidence of intoxication that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test.

Id. at 745–46.

In *Kirsch*, the jury also heard evidence of (1) the defendant's driving over 20 miles per hour over the speed limit before the accident; (2) his failure to see and avoid hitting an 18-wheel tractor-trailer; (3) his failure to brake until less than one second before the crash; (4) his unconsciousness after the crash, precluding his drinking of alcohol post-crash; (5) the odor of alcohol on the defendant; (6) the presence of vodka bottle caps in his car; (7) the defendant's belligerence; and (8) the observations of hospital personnel that the defendant was intoxicated. *Id.* The

Kirsch court determined that this evidence, in addition to the BAC results, supported the submission of the jury charge on per se intoxication. *Id.* at 746.

Here, Appellant does not deny that, in addition to the evidence of his BAC—obtained three hours after he was driving—the State presented evidence of his intoxication at the time of the accident. Nor does he deny that, under *Kirsch*, the trial court properly submitted the charge on per se intoxication. Instead, Appellant claims that "the reasoning in Kirsch is flawed and it ought to be revisited."

Appellant asserts that the theory of per se intoxication should only be submitted when the State has introduced retrograde extrapolation evidence. Appellant suggests that *Kirsch* improperly permits a per se instruction "to be given in all cases in which BAC test results are admitted."

Appellant, however, misinterprets *Kirsch*. As discussed, the *Kirsch* court held that submission of a jury instruction on the per se theory of intoxication is permitted in two instances: (1) when there is expert retrograde extrapolation evidence or (2) when there is other evidence of intoxication supporting an inference that the defendant was intoxicated at the time of driving in addition to the BAC evidence. *Id.* at 745–46. *Kirsch* does not authorize submission of the theory of per se intoxication based on the BAC results alone.

In any event, "[t]he Court of Criminal Appeals is the highest court on matters of criminal law, and when it has deliberately and unequivocally interpreted

the law in a criminal matter, we must adhere to its interpretation." *Rodriguez v. State*, 47 S.W.3d 86, 94–95 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (citing *Southwick v. State*, 701 S.W.2d 927, 929 (Tex. App.—Houston [1st Dist.] 1985, no pet.)). This Court, as an intermediate court of appeals, is "duty bound to follow precedent issued by the Texas Court of Criminal Appeals." *Kiffe v. State*, 361 S.W.3d 104, 109 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). "Once the law is declared, we are not at liberty to impose a different declaration of the law." *Rodriguez*, 47 S.W.3d at 95 (citing *Abdnor v. Ovard*, 653 S.W.2d 793, 794 (Tex. Crim. App. 1983)). Because it is deliberate and unequivocal, the holding in *Kirsch* is binding on this Court, and we must follow it. *See id.*

As in *Kirsch*, the State in this case presented other evidence of intoxication, in addition to the BAC results, to support an inference that Appellant was intoxicated at the time he was driving. The evidence showed that Appellant, in a single-car accident, crashed his vehicle into a wall, causing heavy damage to it. When Deputy Hays arrived, Appellant was found standing by his car. Deputy Hays noticed that Appellant had slurred speech, glassy, bloodshot eyes, and was unsteady on his feet. Appellant smelled of alcohol and was chewing gum, which Deputy Hays testified is often used to cover up the odor of alcohol. Appellant initially denied driving the car, even though he was the only person at the scene. Deputy Hays determined that the car was registered to Appellant, and he noted that

only the driver's side airbag had deployed. Later, Appellant made statements acknowledging that he had been driving the car when it crashed, stating that he had crashed into the wall because he had been on his cell phone. Appellant also initially denied drinking, but he later admitted to having two beers that night and stated that he had been to a bar.

Deputy Hays also testified that Appellant performed poorly on the field-sobriety tests. A video taken at the scene, and admitted at trial, shows that Appellant was unsteady on his feet while performing the tests.

Appellant also refused to give a blood specimen. Appellant continued to refuse even after a warrant was obtained for his blood to be drawn. Appellant was uncooperative and combative at the hospital and had to be held down for a blood sample to be obtained.

We conclude that, because the State offered sufficient evidence of Appellant's intoxication at the time he was driving, in addition to the BAC results, the trial court did not abuse its discretion in submitting a jury charge on the per se theory of intoxication.[2] *See Kirsch*, 306 S.W.3d at 745–46. We overrule Appellant's sole issue.

---

[2] In the statement of his sole issue on appeal, Appellant indicates, without argument or authority, that an instruction on per se intoxication should not be given unless the evidence rises to a level sufficient to permit a jury to find a defendant guilty, beyond a reasonable doubt, of driving while having a .08 blood alcohol content. However, as mentioned, the Court of Criminal Appeals stated in *Kirsch* that a an

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Bland, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).

---

instruction on per se intoxication will be given when the evidence includes either "(1) expert testimony of retrograde extrapolation, or (2) other evidence of intoxication that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test." *Kirsch v. State*, 306 S.W.3d 738, 745–46 (Tex. Crim. App. 2010); *see also* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007) (providing that trial court must instruct a jury by "a written charge distinctly setting forth the law applicable to the case"). The Court of Criminal Appeals did not state the test for submission of a per se intoxication instruction in terms of a reasonable doubt standard. *See id.*