Affirmed and Memorandum Opinion filed March 9, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00153-CR

JARETT WADE PETROSKI, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 14
Harris County, Texas
Trial Court Cause No. 1551554

MEMORANDUM OPINION

A jury convicted appellant, Jarett Wade Petroski, of driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04 (Vernon 2003). On appeal, he contends the evidence is legally and factually insufficient to support the conviction, and further argues the trial court abused its discretion by refusing to grant a mistrial after submitting a jury charge that differed from the version read to the jury. Finding no merit in these issues, we affirm.

I.

BACKGROUND

In the early morning hours of September 19, 2008, appellant, while driving on Beltway 8 in Houston, lost control of his vehicle and crashed into a guardrail and light pole. Emergency personnel, including Harris County deputies, were dispatched to the scene where they observed appellant stumbling and unable to stand without assistance. His eyes appeared bloodshot, and his speech was slurred. Further, he smelled strongly of alcohol and admitted he had been drinking beer.

After appellant refused to submit to a breath test, one of the deputies performed a field-sobriety test, the "horizontal gaze nystagmus" ("HGN") test. *See Emerson v. State*, 880 S.W.2d 759, 768–69 (Tex. Crim. App. 1994) (recognizing HGN test as scientifically reliable). Appellant displayed a maximum of six "clues" on the test, a result highly suggestive of intoxication.

Additional sobriety testing was delayed so that appellant could be examined and treated for possible chest and back injuries sustained in the collision. Following discharge by a local hospital, appellant was transported to the police station, where – more than two hours after the collision – he apparently "passed" three additional sobriety tests.

The State charged appellant with driving while intoxicated, a Class B misdemeanor, to which he pleaded "not guilty." *See* Tex. Penal Code Ann. § 49.04(b). A jury found him guilty of the charged offense, and the trial court sentenced appellant to pay a $500 fine and serve 180 days in Harris County Jail, probated for eighteen months. Appellant timely appealed, bringing three issues in which he challenges the sufficiency of the evidence and complains of the trial court's refusal to grant a mistrial.

II.

SUFFICIENCY OF EVIDENCE

In his second and third issues, which we address first, appellant contends the evidence is legally and factually insufficient, respectively, to support the jury's finding of intoxication. Specifically, appellant argues the jury should have disregarded, as unreliable, the unfavorable results from the HGN test, while still crediting his dexterous performance on field-sobriety tests conducted more than two hours later. We will consider those arguments, along with the evidence included in the record, under the applicable standards of review for legal and factual sufficiency.

A. Standard of Review

In a legal-sufficiency review, we consider all of the evidence in the light most favorable to the jury's verdict and decide whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Reed v. State*, 158 S.W.3d 44, 46 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). We may not substitute our judgment for the jury's, and we do not re-examine the weight and credibility of the evidence considered by the jury. *Id*.; *Brochu v. State*, 927 S.W.2d 745, 750 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

When we review the factual sufficiency of the evidence, by contrast, we consider the evidence in a neutral light. *Reed*, 158 S.W.3d at 46. We must set aside the verdict if (1) the proof of guilt is so obviously weak as to render the verdict clearly wrong and manifestly unjust, or (2) the proof of guilt, while legally sufficient, is nevertheless greatly outweighed by contrary proof. *See Vodochodsky v. State*, 158 S.W.3d 502, 510 (Tex. Crim. App. 2005). However, because the jury is best able to evaluate the credibility of witnesses, we must afford appropriate deference to its conclusions. *Pena v. State*, 251 S.W.3d 601, 609 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

B. Application to Facts

1. Legal Sufficiency

Appellant opens his legal-sufficiency complaint, found in his second issue, by challenging the reliability of the HGN field-sobriety test results. He suggests the administering officer, Deputy Vagliente, gave him incomplete instructions about how the test would be conducted, thereby negatively – and artificially – affecting his performance on the test. He contends the test results are therefore unreliable and constitute "no evidence." Finally, he concludes that the remaining evidence, considered without the corroborating test results, is legally insufficient to support the finding of intoxication. However, the record does not support these claims.

We begin with the basic details of the HGN sobriety test, which is outlined in a "DWI Detection Manual" issued by the National Highway Traffic Safety Administration ("NHTSA"). *See Compton v. State*, 120 S.W.3d 375, 376–77 (Tex. App.—Texarkana 2003, pet. ref'd). Briefly, while the suspect attempts to watch and track a stimulus as it moves through his field of vision, the administering officer examines the suspect's eyes to look for as many as six "clues" of intoxication. *See id.* at 377–78. Here, appellant's eyes demonstrated all six clues, suggesting intoxication. *See Lewis v. State*, 191 S.W.3d 335, 341 (Tex. App.—Waco 2006, pet. ref'd). He argues these results are unreliable, however, because Vagliente did not tell him to continue following the stimulus *until instructed to stop*.

Appellant's argument derives from a strained reading of Vagliente's testimony under cross-examination, when the witness attempted to recall the instructions he gave to appellant before administering the HGN test:

> I instructed [appellant] to put his heels together. Put his hands down by his side. I asked [appellant], without moving his head and with his eyes only to

follow my pen, tip of my finger on top of my pen, and without moving his head, just his eyes, for him to follow – follow my pen as I move it across his eyes.

Then, the following exchange occurred:

Q. And is that the way the instructions are in the NHTSA manual?

A. Yes, sir.

. . . .

Q. [The] NHTSA manual tells you to follow the stimulus until you specifically tell him to stop.

A. Yes, sir.

Q. You didn't say that to the jury, did you?

A. No, sir. I don't remember exactly word for word.

Q. So you don't really remember word for word what these instructions are, do you?

A. Not without – not off the top of my head, sir. I usually have the field manual out there when I'm on patrol.

Q. You carry this NHTSA manual out there with you.

A. Not the NHTSA manual but it's condensed in a smaller –

Appellant construes this testimony as a concession that Vagliente "did not instruct appellant to follow the stimulus until he was instructed to stop, as is required by NHTSA." We disagree. The highlighted testimony does not indicate that Vagliente failed to properly administer appellant's HGN test, but instead shows only that, *during his testimony*, he could not recall all of the instructions contained in his condensed NHTSA manual. Therefore, even were we to assume the omission of this instruction might affect

the validity of the test results,[1] the record does not support appellant's claim. Accordingly, the jury could properly consider and give weight to the HGN test results in reaching a verdict in this case.

Moreover, exclusion of the HGN test results as unreliable, as appellant requests, would not change the outcome because the remaining evidence is still legally sufficient to support appellant's conviction. As the Court of Criminal Appeals recently observed:

> [E]vidence that would logically raise an inference that the defendant was intoxicated at the time of driving . . . includes, *inter alia*, erratic driving, post-driving behavior such as stumbling, swaying, slurring or mumbling words, inability to perform field sobriety tests or follow directions, bloodshot eyes, any admissions by the defendant concerning what, when, and how much he had been drinking – in short, any and all of the usual indicia of intoxication.

Kirsch v. State, No. PD-0379-09, ___ S.W.3d ___, 2010 WL 447437, at *5 (Tex. Crim. App. Feb. 10, 2010). Here, the record reflects several examples of these "indicia of intoxication."

Jessica Ziegmont, an eyewitness to the accident, testified that appellant was driving erratically and at a high speed when he lost control of his vehicle and collided with a highway guardrail and light post. *See Hennessy v. State*, 268 S.W.3d 153, 162 (Tex. App.—Waco 2008, pet. ref'd) (holding erratic driving to be evidence of intoxication); *Chaloupka v. State*, 20 S.W.3d 172, 175 (Tex. App.—Texarkana 2000, pet. ref'd). Several witnesses observed his slurred speech and bloodshot eyes; further, he was described as confused, stumbling, and unable to stand without assistance. *See Cotton v. State*, 686 S.W.2d 140, 142 n.3 (Tex. Crim. App. 1985) (listing several indicators of

[1] *But see Compton*, 120 S.W.3d at 378–79 (holding HGN test results were reliable despite officer's deviation from instructions contained in DWI Detection Manual).

intoxication, including slurred speech, bloodshot eyes, unsteady balance, and staggered gait); *Hennessy*, 268 S.W.3d at 162; *Lewis*, 191 S.W.3d at 341; *Chaloupka*, 20 S.W.3d at 175. Vagliente detected a strong odor of alcohol on appellant's breath, and Ziegmont confirmed that the accident scene "smelled of alcohol." *See Cotton*, 686 S.W.2d at 142 n.3; *Lewis*, 191 S.W.3d at 341; *Chaloupka*, 20 S.W.3d at 175.

In fact, appellant admitted he had been drinking beer, *see Hennessy*, 268 S.W.3d at 162, and the jury was permitted to infer intoxication from his refusal to submit to a breath test. *See Gaddis v. State*, 753 S.W.2d 396, 399 (Tex. Crim. App. 1988); *Lewis*, 191 S.W.3d at 341; *Burkett v. State*, 179 S.W.3d 18, 26–27 (Tex. App.—San Antonio 2005, no pet.). Finally, Vagliente opined, based on the evidence described above, that appellant was intoxicated. *See Hartman v. State*, 198 S.W.3d 829, 835 (Tex. App.—Corpus Christi 2006, pet. struck) ("[T]he testimony of an officer that a person is intoxicated provides sufficient evidence to establish the element of intoxication.") (citations omitted).

Thus, considering all of this evidence in the light most favorable to the verdict, we hold a rational jury could have found appellant guilty, beyond a reasonable doubt, of driving while intoxicated. *See Reed*, 158 S.W.3d at 46. Therefore, we overrule appellant's second issue.

2. Factual Sufficiency

In his third issue, appellant challenges the factual sufficiency of the proof of intoxication. Notwithstanding all of the foregoing evidence, appellant argues his innocence was overwhelmingly established by the mere fact that he was able to complete subsequent sobriety tests conducted at the police station. He therefore concludes that, viewed in a neutral light, the evidence of intoxication is greatly outweighed by this contrary proof, which was documented on a videotape shown to the jury. *See Vodochodsky*, 158 S.W.3d at 510; *Reed*, 158 S.W.3d at 46–47. We disagree.

A conviction under section 49.04 requires the State to prove that the accused was intoxicated "*while* operating a motor vehicle in a public place." Tex. Penal Code Ann. § 49.04(a) (emphasis added); *see Chaloupka*, 20 S.W.3d at 175 ("The State had to prove not that Chaloupka was intoxicated when the state trooper arrived, but that he had been intoxicated while driving on a public roadway."). The sobriety tests depicted in the videotape, however, were conducted more than two hours *after* the collision, affording appellant some opportunity to – as one testifying officer termed it – "sober up." *See Yates v. State*, 1 S.W.3d 277, 280 (Tex. App.—Fort Worth 1999, pet. ref'd) (finding evidence factually sufficient to support DWI conviction despite videotape, taken ninety minutes later, in which defendant appeared sober).[2]

The jury watched both the witnesses' testimony and the videotape and, as the sole factfinder, could freely decide the weight and value to be assigned to each. *See Cuong Quoc Ly v. State*, 273 S.W.3d 778, 781 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *Hartman*, 198 S.W.3d at 837. Given the passage of time before the events depicted in the videotape, we cannot fault the jury's apparent decision to assign more probative value to the more contemporaneous evidence of intoxication found at the accident scene. *See Yates*, 1 S.W.3d at 280. Accordingly, we hold the evidence is factually sufficient to support the conviction, and overrule appellant's third issue.

III.
JURY CHARGE ERROR

Finally, appellant complains about the trial court's refusal to grant a mistrial after the verdict, when it was discovered that the jury charge *submitted* to the jury differed slightly from the version read aloud before final arguments. We review the trial court's

[2] *See also, e.g., Kennemur v. State*, 280 S.W.3d 305, 310–11 (Tex. App.—Amarillo 2008, pet. ref'd) (explaning metabolic process in which a person's blood-alcohol content diminishes over a period of hours).

ruling on a motion for mistrial under the abuse-of-discretion standard of review. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). That is, we consider the evidence in the light most favorable to the ruling and will uphold the decision if it was within the zone of reasonable disagreement. *Id*. We cannot substitute our judgment for the trial court's; therefore, we will reverse only if no reasonable view of the record could support the trial court's decision. *See id.*

The difference in the two jury charges[3] involves the definition of the word "intoxicated." When reading the charge aloud, the trial court stated, "'Intoxicated' means not having the normal use of mental or physical faculties by reason of the introduction of *a substance* into the body."[4] The charge as submitted, however, replaced the words "a substance" with "alcohol."

Apparently, no one discovered the discrepancy until after the verdict, when appellant asked to inspect the charge given to the jury. He then objected that the charge, as submitted, had not been approved by counsel or the trial court, and he moved for a mistrial. In response, the trial court re-submitted the "correct" charge – that is, the version originally approved by counsel and read aloud in open court – to the jury, which reached the same verdict as before.[5] However, the trial court declined to grant a mistrial,

[3] For the sake of clarity, we will occasionally refer to the charge originally submitted to the jury as "the first charge," and the version given following appellant's post-verdict objection as "the second charge."

[4] Emphasis added.

[5] In his brief, appellant also protests the submission of the second charge, claiming the trial court violated two separate provisions of the Code of Criminal Procedure. First, citing article 36.16, he argues the trial court was powerless to amend the jury charge *after* the verdict. *See Bustillos v. State*, 464 S.W.2d 118, 125–26 (Tex. Crim. App. 1971) ("In light of the purpose of [article 36.16] the court may *before verdict* withdraw and correct its charge if convinced an erroneous charge has been given.") (emphasis added); *but see, e.g.*, *Shannon v. State*, 115 Tex. Crim. 249, 252, 30 S.W.2d 331, 332–33 (1929) (recognizing trial courts' ability to correct informal or contradictory verdicts). Second, he contends that, under article 36.27, the additional instructions contained in the second charge should have been given to the jury in open court, and not delivered by the bailiff to the jury room. *See* Tex. Code Crim. Proc. Ann. art. 36.27 (Vernon 2006). However, appellant did not present these objections to the trial court; therefore, they are waived.

describing the word substitution as a "*de minimis* difference in terms of its impact on the jury's verdict."[6]

Here, appellant disagrees with the trial court's estimation of the impact of the word "alcohol" on the jury's verdict. He contends that, despite the submission of a second charge containing the approved wording, the jury's verdict was incurably tainted by the reference to "alcohol" in the first charge:

> Appellant expressed his defensive strategy during summation when trial counsel argued that ingesting a substance, like a cup of coffee, may make a person feel different than normal, but does not equate to losing the normal use of mental or physical faculties. . . .
>
> . . . .
>
> The submission of the conflicting definition of intoxication, as the loss of normal use of mental or physical faculties due to the introduction of alcohol into the body, indelibly impressed upon the jurors that appellant had consumed alcohol. Appellant's defensive theory, substances which may cause a person to feel different than normal do not always lead to the conclusion that the normal use of mental or physical faculties have been lost, was inexplicably destroyed when the jury was left only to consider the effects of alcohol. . . . Had counsel objected, *the court would have sustained the error, instructed the jury with the proper jury charge*, and appellant's defensive theory would have remained intact.[7]

Appellant's argument, as we read it, apparently relies on the unsupported premise, highlighted above, that the jury-charge definition of the word "intoxicated" should have omitted any reference to alcohol.[8] However, the definition of "intoxicated" submitted in

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See Tex. R. App. P. 33.1(a); *Hawkins v. State*, 660 S.W.2d 65, 81 (Tex. Crim. App. 1983); *Harris v. State*, 736 S.W.2d 166, 166–67 (Tex. App.—Houston [14th Dist.] 1987, no pet.).

[6] Emphasis added.

[7] Emphasis added.

[8] To the extent appellant's argument may be read as objecting to the word "alcohol" as an improper comment on the weight of the evidence, that complaint was waived by appellant's failure to raise that

the first charge fairly tracks the statutory meaning of the word: "'Intoxicated' means . . . 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[.]" Tex. Penal Code Ann. § 49.01(2)(A) (Vernon 2003) (emphasis added). Generally, a trial court does not err by including a statutory definition in a jury charge. *See Martinez v. State*, 924 S.W.2d 693, 699 (Tex. Crim. App. 1996) ("Following the law as it is set out by the Texas Legislature will not be deemed error on the part of a trial judge."); *Drew v. State*, 76 S.W.3d 436, 455 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Moreover, the State need not prove the particular substance causing intoxication. *Gray v. State*, 152 S.W.3d 125, 132 (Tex. Crim. App. 2004).

Nevertheless, appellant suggests the mere reference to alcohol in the charge somehow undermined a "defensive theory" that he was not, in fact, intoxicated. Specifically, appellant contended during closing argument that his behavior at the accident scene, if abnormal, did not demonstrate a loss of his normal mental or physical faculties:

> And I know this prosecutor is going to want you to believe that [intoxication] means that you're just not normal. Well, folks, that's not what the law says because there are things that make us feel not normal all the time. If we drink a cup of coffee, sure, we might be a little bit more alert than we normally are. We might feel a little bit different than normal but we absolutely still have the use of our – normal use of our mental and physical faculties. If we are happy, we might feel a little bit different than normal; but we still have the use of our mental and physical faculties.

Appellant does not explain how the insertion of "alcohol" into the definition of "intoxicated" somehow deprived him of a fair trial. To the extent he attributed his behavior at the accident scene to something other than intoxication, the jury impliedly

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objection below. *See Sharp v. State*, 707 S.W.2d 611, 619 (Tex. Crim. App. 1986).

rejected that contention. That is, by convicting him under the "impairment" theory of intoxication argued by the State, the jury necessarily found that appellant lost the normal use of his mental or physical faculties. *See* Tex. Penal Code Ann. §§ 49.01(2)(A), 49.04(a); *Bagheri v. State*, 119 S.W.3d 755, 756 n.1 (Tex. Crim. App. 2003). Thus, we cannot see how a passing reference to alcohol in the first charge unfairly impinged on appellant's rights or the validity of the jury's verdict.[9]

Appellant has not demonstrated that the trial court abused its discretion by declining to grant a mistrial, a device used in situations "when error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Therefore, we overrule appellant's first issue.

IV.
CONCLUSION

Finding no merit in the issues presented, we affirm the judgment of conviction.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
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[9] In fact, appellant arguably benefited from the narrower definition of "intoxication" in the first charge to the extent the jury may have believed it had to unanimously agree on alcohol as the intoxicant. By contrast, the second charge, approved by defense counsel, seemingly required the jury to find only that appellant lost the normal use of his mental or physical faculties by introducing *any substance*.