Affirmed and Memorandum Opinion filed August 23, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00827-CR

JOSE ANTHONY ALCORTA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Cause No. 1625422

MEMORANDUM OPINION

Appellant Jose Anthony Alcorta challenges his conviction of driving while intoxicated ("DWI"). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 4, 2009, on the Friday preceding a holiday weekend, Officer Murray was on patrol as an officer with the Pasadena Police Department. Although he ordinarily worked in the Burglary and Theft unit, on that night he was working under a state-funded grant program known as "DWI Safe and Sober." Under the grant program,

the officer's primary objective is enforcement of DWI laws, but he also enforces traffic laws as well.

Officer Murray observed a vehicle driven by appellant approaching him and believed the vehicle was speeding. The officer turned to follow the vehicle, which had stopped at a traffic signal. The officer observed the vehicle travel into the intersection while the traffic signal was still red. The officer activated his emergency lights and initiated a traffic stop. According to the officer, the vehicle continued straight, crossed the center line of the roadway several times, changed lanes without signaling, and made a left hand turn before finally turning right into a parking lot. By one estimate in the record, appellant traveled almost two miles before stopping.

Officer Murray approached the vehicle, obtained identification from appellant, and advised him that he was pulled over for running a red light. According to Officer Murray, appellant seemed confused and appeared as if he had just awoken. The officer, who stood roughly two feet away from the vehicle, detected the odor of alcohol emanating from within the vehicle. The officer observed that appellant had red, watery eyes and slurred speech. The officer noted that appellant staggered some when he exited the vehicle. The officer characterized appellant as having a slight sway. In response to the officer's questions, appellant explained that he had consumed five pitchers of beer with friends at a restaurant.

Officer Murray conducted three field sobriety tests with appellant, all of which were captured on video via a dashboard camera in the officer's patrol unit. The officer conducted a horizontal gaze nystagmus (HGN) field-sobriety test on appellant. The officer conducted a walk-and-turn test and determined that appellant displayed four of eight clues of intoxication. During this test, appellant expressed some difficulty in performing the test, indicating, "This is hard right now." The officer also conducted a one-leg-stand test, in which appellant exhibited four of four clues of intoxication. The officer believed that appellant had difficulty comprehending instructions during the one-

leg-stand test. When Officer Murray asked appellant whether he was intoxicated, appellant indicated he did not believe he should be speaking with the officer.

Based on his observations and appellant's performance on the tests, Officer Murray believed that appellant was driving while intoxicated and placed appellant under arrest. Officer Murray warned that appellant's license would be suspended if he refused to provide a breath sample to test for alcohol; appellant did not submit to the breath-alcohol test.

Pretrial Proceedings

Appellant was charged with the offense of driving while intoxicated, to which he pleaded "not guilty." At a suppression hearing, the trial court granted appellant's motion to suppress evidence of the HGN test because it was not properly administered. The trial court denied appellant's request to redact the portion of a video in which the HGN test was conducted. The trial court instructed the prosecutor to mute the volume on the video during that test. Appellant raised concerns that a juror who was a former military police officer might recognize signs of intoxication during the muted portion of the HGN test on the video. The trial court ruled that a redacted video would be shown to the jury in which the audio portion of the HGN test was muted. When appellant expressed concern for the relevance of showing the video of the test without audio, the State countered that the jury could not see appellant's eyes to determine how he performed on the HGN test and that the jury was entitled to see appellant allegedly swaying during the officer's instructions to determine whether that conduct was a sign of intoxication. The trial court overruled the objection.

Trial

At trial, Officer Murray testified briefly about his work pursuant to the grant program. Primarily, he testified to two of the field-sobriety tests he conducted on the night of appellant's arrest: the walk-and-turn test and the one-leg-stand test. When the State sought to enter the redacted video of the tests into evidence, appellant made

reference to his previous objections. The video was played for the jury, and the volume was muted during the portion of the video in which the officer conducted the HGN test. Appellant showed the video on cross-examination, and the officer testified to his belief that appellant appeared to sway during an unspecified portion of the video. Appellant did not cross-examine the officer regarding the grant program. At the conclusion of Officer Murray's testimony, the trial court excused him subject to appellant's request to recall him.

Appellant testified that he met friends at a restaurant that evening, where they enjoyed five pitchers of beer as well as food and water. Appellant estimated that he consumed one beer at 9:50 p.m., a second beer at 10:45 p.m., and possibly a third beer at 11:45 p.m. He did not feel intoxicated when he left at 12:30 a.m. He denied committing any traffic violations that evening. He denied staggering as he exited his vehicle, slurring his speech, and swaying in the video. He claimed to have back and knee problems which would have affected his ability to balance.

Appellant's trial counsel called Vance Mitchell, who was not present. Appellant's trial counsel then moved for a writ of attachment, which the trial court denied. No other information about Mitchell or the writ of attachment is reflected in the trial transcript. The defense rested.

The jury found appellant guilty as charged. The trial court sentenced him to 180 days' confinement, probated for one year and assessed a fine.

Motion for New Trial

Appellant filed a motion for new trial, alleging that by denying the writ of attachment for Mitchell, the trial court effectively denied appellant the opportunity to put on defensive evidence pertaining to the grant program under which Officer Murray was working on the night of appellant's arrest. At an evidentiary hearing, appellant's trial counsel testified that he learned of the grant program through the officer's testimony on direct examination. The record reflects that trial counsel secured and executed a

subpoena, dated July 13, 2010, the same date of trial, directing Mitchell, as custodian of police records for the Department, to produce documents related to the grant. Trial counsel received the subpoenaed documents a couple of days after the verdict had been rendered.

The trial court admitted into evidence the subpoena directing Mitchell to appear at trial. The subpoena does not reflect what time it was served on July 13, 2010. The trial judge also admitted into evidence documentation relating to the grant program. Trial counsel testified that had he received the documents, he would have laid the predicate for admissibility, recalled Officer Murray and questioned him about the grant program, and questioned Mitchell about how the police department benefits from the grant. Trial counsel explained that he did not cross-examine Officer Murray about the grant program because he did not have the documents.

The prosecutor admitted that she did not tell defense counsel about the grant program when she learned of it on the day before trial. According to the prosecutor, when queried by the trial court, Officer Murray had been excused and was not subject to recall when he finished testifying at trial.

Both parties and the trial judge acknowledged that a series of off-the-record bench conversations occurred regarding the documents for the grant program and whether appellant's trial counsel could verify that Mitchell had been served. The parties disputed whether trial counsel could verify service on Mitchell by the time the defense rested.

Following the evidentiary hearing, the trial court denied appellant's motion for new trial. In so ruling, the trial court stated that the grant program documents would not have affected the outcome of trial because appellant's trial counsel did not cross-examine Officer Murray regarding the grant program and the documents may not have been admissible.

ANALYSIS

Is the evidence sufficient to support a conviction for driving while intoxicated?

In his first issue, appellant claims that the evidence is legally insufficient to show that he drove the vehicle while he was intoxicated. In evaluating a legal-sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The trier of fact "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State,* 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The trier of fact may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

A person commits the offense of driving while intoxicated if that person operates a motor vehicle in a public place while intoxicated. TEX. PENAL CODE ANN. § 49.04(a) (West 2011). A person is considered intoxicated if that person does not have 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 those substances or any other substance into the body or by having an alcohol concentration above 0.08 or more in his breath, blood, or urine. TEX. PENAL CODE ANN. § 49.01(2)(A)–(B) (West 2011). Appellant challenges only the jury's finding that he was intoxicated when he was stopped by Officer Murray.

The record reflects that Officer Murray initiated a traffic stop when he observed appellant failing to stop at a red traffic signal. Even after Officer Murray activated his emergency equipment, appellant did not pull over for roughly two miles and had crossed over the center line of the roadway at least once and had changed lanes without signaling before stopping in the parking lot. Officer Murray testified that appellant exhibited signs of intoxication including red, watery eyes, slurred speech, and a staggered gait. Officer Murray detected the odor of alcohol from within the vehicle, and appellant admitted he had consumed five pitchers of beer while out with friends. Appellant exhibited clues of intoxication on the two field-sobriety tests that were admitted into evidence. Appellant indicated that he had trouble performing the field-sobriety tests. Although the record contains evidence that appellant suffered from back and knee problems, he did not share this information with Officer Murray at any time, and the officer testified that this information would not have changed his opinion that appellant exhibited signs of intoxication.

Appellant claims that the circumstantial evidence supports a finding of "not guilty." On this basis, appellant contends, the video and appellant's booking photograph upon his arrival at the police station belie the officer's testimony. Appellant points to the fact that Officer Murray failed to engage the video camera in time to capture what Officer Murray described as appellant's staggering gait and slurred speech. Appellant also claims that the video rebutted the officer's testimony because he did not slur his speech and had no difficulty producing his driver's license and proof of insurance on demand.

The video is not required to convict appellant because Officer Murray's testimony, standing alone, can be sufficient to prove the elements 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). Moreover, the video reflects appellant's performance in two field-sobriety tests, which supports the officer's testimony. During the walk-and-turn test, Officer Murray indicated by a subtle motion of his hand each time

appellant exhibited clues of intoxication in performing those tests. The officer testified to this information. And the video reflects appellant's poor performance during the one-leg-stand test. Likewise, although appellant claims the booking photograph does not reflect red, glassy eyes, the booking photograph is not required to convict appellant of the charged offense.

The jury was free to consider appellant's refusal to submit to a breath-alcohol test as evidence of intoxication. *See* TEX. TRANSP. CODE ANN. § 724.061 (West 2011); *Bartlett v. State*, 270 S.W.3d 147, 152 (Tex. Crim. App. 2008) (noting with approval *Hess v. State*, 224 S.W.3d 511, 513 (Tex. App.—Fort Worth 2007, pet. ref'd)); *Finley v. State*, 809 S.W.2d 909, 913 (Tex. App.—Houston [14th Dist.] 1991, pet ref'd). Although appellant claims he did not commit any traffic law infractions and denied being intoxicated, the jury was not required to believe his testimony. *See Scott v. State*, 914 S.W.2d 628, 630 (Tex. App.—Texarkana 1995, no pet.) (involving an accused that denied committing traffic violations and being intoxicated).

Appellant also claims that Officer Murray could not rule out whether appellant's allegedly slurred speech was how appellant normally spoke. This testimony was but one portion of a larger body of evidence the jury considered. Even without the "slurred speech" testimony, the record contains sufficient evidence to support the DWI conviction.

A rational finder of fact reasonably could have determined from the evidence that appellant committed the offense of driving while intoxicated by operating a motor vehicle in a public place while intoxicated. *See* TEX. PENAL CODE ANN. § 49.04(a); *Tutt v. State*, 940 S.W.2d 114, 123 (Tex. App.—Tyler 1996, pet. ref'd) (concluding evidence was sufficient to support conviction for driving while intoxicated based on evidence that an accused smelled strongly of alcohol, was unsteady on his feet, used vehicle for support to stand, had glassy eyes, performed poorly on field-sobriety tests, refused breath test, and

admitted having beers earlier in the day). We conclude that the evidence is sufficient to support appellant's conviction. We, therefore, overrule his first issue.

Is appellant entitled to a new trial?

In his second and third issues, appellant claims he is entitled to a new trial and the trial court abused its discretion in denying his motion for new trial. The trial judge is the trier of fact at a hearing on a motion for new trial, and we will not disturb the judge's findings unless an abuse of discretion is demonstrated. *Charles v. State*, 46 S.W.3d 204, 208 (Tex. Crim. App. 2004), *superseded in part on other grounds by*, Tex. R. App. P. 21.8(b), *as recognized in State v. Herndon*, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007). A reviewing court does not substitute its judgment for that of the trial court, but rather decides whether the trial court's decision was arbitrary or unreasonable. *Id.* We view the evidence in the light most favorable to the trial court's ruling, deferring to its credibility determinations, and we presume all reasonable factual findings that could have been made in support of the trial court's ruling. *Id.*

The evidentiary hearing on appellant's motion for new trial centered primarily on documentary evidence of the grant program and the subpoena and service thereon in procuring those documents. Appellant's trial counsel testified that although a subpoena was served on Mitchell on the day of trial, the grant program documents were not received until a couple of days following the jury's verdict. According to trial counsel, had he received the documents in time, he would have recalled Officer Murray to question him about the grant. Trial counsel explained that he did not cross-examine Officer Murray about the grant program because he did not have the documents.

The prosecutor testified that Officer Murray had been excused at the end of his trial testimony. The prosecutor stated that Officer Murray would not have been subject to cross-examination of the grant program documents because he had been excused by the trial court with the agreement of both parties. The trial judge clarified that had the officer been subject to recall, she would have considered that as a "heads up" and that she may

have allowed the officer to testify again. Neither trial counsel nor the trial judge could remember whether the officer was subject to recall, but they agreed that the record will speak for itself. The trial record reflects that, contrary to the prosecutor's testimony, at the conclusion of his testimony, Officer Murray was excused subject to recall and that the trial court ensured the State had a contact number by which to reach the officer at a later time.

In denying the motion for new trial, the trial judge noted that because appellant's trial counsel did not cross-examine Officer Murray about the grant program, she could not rule on whether the grant documents would have been relevant or admissible without knowing what arguments trial counsel would have made at that time. The trial judge could not remember the off-record discussions at trial relating to the grant program documents. The trial court denied the motion based on the testimony at the evidentiary hearing.

According to appellant, as raised in both his second and third issues on appeal, the State failed to disclose evidence that Officer Murray was working pursuant to the state-funded DWI grant program at the time of appellant's arrest. Appellant points to the grant program documents, as produced at the hearing on his motion for new trial, as being material and favorable evidence to his defense that was withheld in violation of his due process rights under *Brady v. Maryland*. *See* 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215 (1963). We presume for the sake of argument that the grant program documents in question constitute *Brady* material. The opportunity to request a continuance once *Brady* material is disclosed at trial adequately protects due process. *See Payne v. State*, 516 S.W.2d 675, 677 (Tex. Crim. App. 1974). When, as in this case, the State's failure to disclose *Brady* material is discovered during trial, the accused is entitled to a recess to obtain production of the material, even if the defense did not make pre-trial efforts to obtain it. *Crawford v. State*, 892 S.W.2d 1, 4 (Tex. Crim. App. 1994). When an accused fails to request a continuance, he waives any error resulting from the State's

failure to disclose evidence. *See Lindley v. State*, 635 S.W.2d 541, 543–44 (Tex. Crim. App. 1982). The record does not reflect that appellant sought a postponement or moved for continuance upon learning of the grant program,[1] which would have allowed him time to address the impact of the evidence and develop any necessary response to it. Appellant did not seek this relief and consequently waived any error. *See Taylor v. State*, 93 S.W.3d 487, 502 (Tex. App.—Texarkana 2002, pet. ref'd); *Williams v. State*, 995 S.W.2d 754, 762 (Tex. App.—San Antonio 1999, no pet.); *see also Lindley*, 635 S.W.2d at 544; *Zule v. State*, 802 S.W.2d 28, 33 (Tex. App.—Corpus Christi 1990, pet. ref'd).

To the degree appellant asserts as part of his third issue that the prosecutor factually misled the trial court regarding whether Officer Murray was subject to recall, the record for the hearing on the motion for new trial reflects that neither appellant's trial counsel nor the trial judge could remember whether the officer was excused or remained subject to recall at the conclusion of his trial testimony. In reviewing a trial court's ruling on a motion for new trial, we do not substitute our judgment for that of the trial court, but rather determine whether the trial court's decision was arbitrary or unreasonable. *See Charles*, 46 S.W.3d at 208. Based on the information before the trial court at the time of its ruling, we cannot conclude that the trial court's decision was unsupportable. We find no abuse of discretion, and, accordingly, we overrule appellant's second and third issues.

Did the trial court abuse its discretion in admitting into evidence a video of a field-sobriety test?

In his fourth issue, appellant claims that the trial court abused its discretion in allowing the State to publish a video depicting appellant's performance during the HGN test. We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)

[1] Although appellant asserted in his motion for new trial that the trial court denied a request for continuance, the record does not reflect that appellant ever moved for a continuance. Appellant did not address this assertion at the hearing on his motion for new trial.

(op. on reh'g). Under this standard, we reverse only if the ruling is outside the zone of reasonable disagreement. *Id.*

The record reflects that appellant objected to the admission of evidence of the HGN test on the basis that it was not properly administered and moved to suppress it. After reviewing the video of the HGN test, the trial court ruled that the test was not properly administered and granted appellant's motion to suppress.

At trial, the prosecutor sought to enter the video into evidence because it demonstrated that appellant allegedly was swaying as Officer Murray gave instructions for performing the HGN test. The trial court allowed that portion of the video, without audio, to be played for the jury over appellant's objections.

Evidence introduced at a DWI trial is not necessarily limited to oral testimony, but may also include relevant photos and videos. *See Griffith v. State*¸ 55 S.W.3d 598, 600–01 (Tex. Crim. App. 2001) (concluding that audio portions of a video are relevant to show impaired speech in support of a finding of intoxication); *Jones v. State*, 795 S.W.2d 171, 175–76 (Tex. Crim. App. 1990) (concluding that audio portions of video should be admitted when questioning did not call for testimony responses); *Smith v. State*, 105 S.W.2d 203, 207 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (concluding that audio portions of video are relevant to issue of intoxication because impaired speech is relevant to a whether a person was driving while intoxicated). As a general matter, video and audio portions of a videotape recording of an accused's performance on field-sobriety tests are admissible. *See Jones*, 795 S.W.2d at 172.

A video-only portion, as in this case, is admissible because an accused's performance on the test does not call for testimonial responses. *See id.* at 171–72. An accused's performance of a field-sobriety test shows the physical condition of a suspect's body. *See Gassaway v. State*, 957 S.W.2d 48, 51 (Tex. Crim. App. 1997); *Jones*, 795 S.W.2d at 175. Any indication of intoxication comes from a suspect's demeanor, the manner in which the suspect speaks, and whether the suspect has the mental and physical

ability to perform the tests correctly. *Gassaway*, 957 S.W.2d at 51. A videotape of a field-sobriety test is relevant to the issue of intoxication because the video provides nothing more than what the arresting officer saw and could have described in testimony at trial. *Miffleton v. State*, 777 S.W.2d 76, 80 (Tex. Crim. App. 1989). Officer Murray, in fact, testified, without objection, to seeing appellant sway slightly, which he asserted was captured on an unspecified portion of the video. *See id.* A videotape depicting evidence that is otherwise admissible through testimony is admissible unless it is offered with the sole intent to inflame the minds of the jury. *See Lucas v. State*, 791 S.W.2d 35, 55 (Tex. Crim. App. 1989). In short, evidence of the circumstances surrounding appellant's sobriety test was admissible. *See Miffleton*, 777 S.W.2d at 80.

The trial court excluded the audio portion of the HGN test from evidence because Officer Murray failed to follow proper procedures in administering the test; that ruling is not contested on appeal. *See Emerson v. State*, 880 S.W.2d 759, 768–69 (Tex. Crim. App. 1994). But, appellant's physical behavior during the test is relevant for the purpose of evaluating his physical faculties, and the portion of the video shown during trial without audio was admissible for that purpose. *See Miffleton*, 777 S.W.2d at 80. Therefore, the trial court did not err in admitting the video-only portion of the HGN test in which appellant allegedly swayed. *See id.* We overrule appellant's fourth issue.

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

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Jamison, and McCally.
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