**In The**

***Court of Appeals***

***Ninth District of Texas at Beaumont***

**NO. 09-09-00336-CR**

**BRENT EDWARD HUCKABAY, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 163rd District Court**
**Orange County, Texas**
**Trial Cause No. B-080407-R**

## MEMORANDUM OPINION

Brent Edward Huckabay appeals his conviction for driving while intoxicated (DWI), a third-degree felony. *See* Tex. Penal Code Ann. § 49.04 (West 2003), § 49.09(b) (West Supp. 2010). Huckabay argues on appeal that the trial court committed reversible error by instructing the jury that it could consider his breath and blood test refusals as evidence. Huckabay also complains of the trial court's failure to grant his request for a mistrial, and he argues the evidence is legally insufficient to support his conviction. Finding no reversible error, we affirm the trial court's judgment.

## Background

In 1992, Huckabay was injured in an automobile accident that permanently restricted the use of one of his arms and caused his right leg to be shorter than his left. On the evening of March 31, 2007, Huckabay went to an apartment leased to his step-son, Jarred Bird. When Bird's cousin, Heath Bradley, came to the apartment, Bradley and Huckabay began to argue. Shortly after that, Huckabay decided to leave.

Jonathan Roy, who lived in the same apartment complex, saw Huckabay as he was leaving Bird's apartment, which was on the second floor of the complex. Roy testified that Huckabay stumbled down the stairs and then stumbled across flat ground while walking to his truck. According to Roy, Huckabay "was pretty drunk." Huckabay backed into another truck while leaving the parking lot, and then he "[t]ook off and peeled out." Roy called the Bridge City police.

Sergeant Ronnie Denton, a patrol sergeant with the Bridge City Police Department, responded to a call regarding a "disturbance and a possible intoxicated driver in a truck." As Denton drove down the street on which the apartment complex was located, "a truck almost hit [him] head-on." Denton moved "to the edge of the road almost into the ditch and let him get past me." Denton contacted another officer, Officer Brian Foley, who was on his way to the apartment complex, and he asked Foley to stop the truck.

Officer Foley stopped Huckabay's truck. On contacting Huckabay, Foley detected a fairly strong smell of alcohol. Foley also noticed that Huckabay's eyes were glassy and bloodshot, his speech was slurred, and he saw an open can of beer in Huckabay's truck. Huckabay "was a little bit unsteady on his feet," and he used his truck to balance by placing his arm on the truck.

Huckabay declined Foley's request to stand with his hands at his sides and his feet together based on his pre-existing physical limitations. Foley attempted but could not complete the horizontal gaze nystagmus test (HGN) because Huckabay could not keep his head still. According to Foley, Huckabay was intoxicated.

Trooper Gary Hinton of the Texas Department of Public Safety stopped to assist Foley, and as he approached, he noticed that Huckabay was leaning on the truck to steady himself. Hinton decided to move Huckabay away from the vehicles so that the headlights would not blind him while performing the HGN, but Huckabay would not allow Hinton to check his eyes. According to Hinton, Huckabay's eyes were "red and glassy[,]" and his speech "was slurred." Huckabay was unsteady on his feet. Hinton thought that Huckabay was intoxicated, and he arrested Huckabay for DWI.

Huckabay fell asleep while in Hinton's pickup before being taken to the jail. According to Hinton, that indicated that Huckabay was "highly intoxicated." Hinton took Huckabay to the intoxilyzer room after arriving at the jail, but Huckabay refused to

perform any field sobriety tests due to his physical impairments. Huckabay also refused Hinton's requests for breath and blood tests.

Four witnesses were called to testify in Huckabay's defense. Lance Platt, Huckabay's expert on field sobriety testing, testified that Huckabay was not a good candidate for the walk and turn portion of the field sobriety test due to his impairments. However, Platt testified that the impairments Huckabay had in his arm and leg would have had no affect on the HGN, breath, or blood tests.

Testifying in his defense, Huckabay explained how he had injured his arm and leg in a 1992 auto accident. According to Huckabay, the video is consistent with how he normally stands and balances. Huckabay testified that he had consumed less than two beers when he was stopped. Huckabay admitted that he backed into another vehicle before leaving the parking lot, and he explained that he decided to leave because neither vehicle had been damaged. Huckabay recalled passing a policeman after leaving the parking lot, but denied that he was on the officer's side of the road. Huckabay admitted that he initially told the police that he had not been drinking. Huckabay also admitted that he had two prior felony convictions for driving while intoxicated.

Huckabay's wife, Sandy, testified that when she arrived at her son's apartment on the evening of March 31, she "knew what the situation was" and told Huckabay to leave. Huckabay left, and then she went home.

Huckabay's step-son, Jarred Bird, testified that he and Huckabay got to his apartment around eight o'clock that evening and that Huckabay left to get them a pizza and some beer. When Huckabay returned, Bird, his roommate, and Huckabay shared the pizza and a six pack of beer. According to Bird, each of them drank two beers. When Bird's cousin, Heath Bradley, came over, Bradley and Huckabay began to argue about a car that Huckabay had sold him, and then Huckabay left. Bird did not believe that Huckabay was intoxicated when he left the apartment.

Legal Sufficiency

First, we address Huckabay's fourth issue, which challenges the legal sufficiency of the evidence supporting Huckabay's conviction. In *Brooks v. State*, the Texas Court of Criminal Appeals held that the *Jackson v. Virginia* standard is the only standard a reviewing court should apply in determining whether the evidence sufficiently supports each element of a criminal offense the State is required to prove beyond a reasonable doubt. 323 S.W.3d 893, 894 (Tex. Crim. App. 2010); *see Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Brooks* states that "[i]t is fair to characterize the *Jackson v. Virginia* legal-sufficiency standard as: Considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt." *Brooks*, 323 S.W.3d at 899 (citing *Jackson*, 443 U.S. at 319). "The *Jackson* standard of review gives full play to the jury's responsibility to fairly resolve conflicts in the evidence, to weigh the evidence, and to draw reasonable

inferences from the evidence." *Williams v. State*, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009), *cert. denied*, 130 S.Ct. 3411, 177 L.Ed.2d 326, 78 U.S.L.W. 3729 (2010).

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. The term "[i]ntoxicated[,]" as defined by the Penal Code, 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; or [] having an alcohol concentration of 0.08 or more." Tex. Penal Code Ann. § 49.01(2) (West 2003). The State contends that its evidence is sufficient, and it relies on the testimony of the witnesses who testified that Huckabay was intoxicated.

Several of the witnesses described Huckabay as being intoxicated. Huckabay argues that these witnesses were mistaken because the signs they used to determine he was intoxicated are explained by his pre-existing physical impairments. Huckabay made the same argument to the jury during the trial, but the jury apparently chose to reject Huckabay's explanation. It is the jury's responsibility to resolve the conflicts in the evidence, to weigh the evidence, and to draw reasonable inferences from the evidence. *See Williams*, 301 S.W.3d at 684. The officers' observations of the typical signs associated with alcohol intoxication, combined with the officers' opinions that Huckabay was intoxicated, provide sufficient support for a finding of driving while intoxicated. *See*

*Whisenant v. State*, 557 S.W.2d 102, 105 (Tex. Crim. App. 1977) (noting that the arresting officer observed that the defendant drove erratically, had a strong smell of alcohol on his breath, appeared sleepy, and slurred his speech); *see also Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (concluding that a police officer's testimony "that an individual is intoxicated is probative evidence of intoxication"). Further, because the jury saw the videotape of the stop, it could draw its own conclusions from observing Huckabay's behavior in deciding whether he appeared intoxicated. *See generally Vaughn v. State*, 493 S.W.2d 524, 525 (Tex. Crim. App. 1972) ("It is elementary in Texas that one need not be an expert in order to express an opinion upon whether a person he observes is intoxicated.").

In addition, the jury in this case could have inferred from Huckabay's refusal to take a breath or blood test that Huckabay believed he was intoxicated. *See Gaddis v. State*, 753 S.W.2d 396, 399 (Tex. Crim. App. 1988) (noting that "it was not improper to simply argue that appellant refused [testing] because he was intoxicated"); *Finley v. State*, 809 S.W.2d 909, 913 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (finding that a jury may consider refusal to provide breath or blood samples as evidence of guilt); *see also* Tex. Transp. Code Ann. § 724.061 (West 1999) ("A person's refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person's trial."). Determinations about the credibility of each witness

and about whether to believe or disbelieve any portion of a witness's testimony are left to the jury. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The jury may also draw reasonable inferences from basic facts to ultimate facts. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996), *overruled on other grounds*, 323 S.W.3d 893 (Tex. Crim. App. 2010). When a jury is faced with conflicting testimony and returns a verdict of guilty, we presume the jury resolved the conflicts in the testimony in favor of the prosecution. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

Based on the record before us, a rational trier of fact could find that Huckabay was intoxicated. *See Brooks*, 323 S.W.3d at 894; *Jackson*, 443 U.S. at 319. We overrule Huckabay's fourth issue.

Jury Charge

In issues one and two, Huckabay argues the trial court committed reversible error by instructing the jury that it could consider his breath and blood test refusals as evidence. In response, the State concedes that the trial court's instruction constitutes error, and then argues that the error was not harmful.

A person's refusal to take a breath or blood test may be introduced into evidence at the person's trial. Tex. Transp. Code Ann. § 724.061. However, "a jury instruction informing the jury that it may consider evidence of a refusal to take a breath test constitutes an impermissible comment on the weight of the evidence." *Bartlett v. State*,

270 S.W.3d 147, 154 (Tex. Crim. App. 2008);[1] *see Hess v. State*, 224 S.W.3d 511, 515 (Tex. App.—Fort Worth 2007, pet. ref'd). While the instruction given to the jury did not misstate the law in this case, trial courts are not authorized to highlight the defendant's refusal to submit to alcohol testing from the other evidence in the case by instructing the jury to consider the refusal as evidence. *Hess*, 224 S.W.3d at 515. "By singling out that evidence, the trial court violate[s] Articles 36.14, 38.04, and 38.05 of the Code of Criminal Procedure and commit[s] a jury-charge error." *Bartlett*, 270 S.W.3d at 154.; *see* Tex. Code Crim. Proc. Ann. § 36.14 (West 2007) (specifying that the judge shall not express any opinion as to the weight of the evidence in the charge of court), § 38.04 (West 1979) (specifying that the jury is the exclusive judge of the facts proved except where the law directs that a certain degree of weight is to be attached to a certain species of evidence), § 38.05 (West 1979) (recognizing that the judge shall not comment upon the weight of the evidence or make any remark calculated to convey to the jury his opinion of the case).

We conclude the trial court did not have the discretion to submit the instruction in issue. *Bartlett*, 270 S.W.3d at 154. Having found error, we next address harm.

[1]In *Bartlett v. State*, 270 S.W.3d 147, 154 (Tex. Crim. App. 2008), the Court of Criminal Appeals reversed the judgment of the Corpus Christi Court of Appeals and remanded the case for a harm analysis. On remand, the court of appeals held that the trial court's instruction was harmless. *Bartlett v. State*, No. 13-06-00344-CR, 2009 Tex. App. LEXIS 6883, at *11 (Tex. App.—Corpus Christi Aug. 28, 2009, pet. ref'd) (mem. op., not designated for publication).

Huckabay argues that the issue of whether he was intoxicated was strongly contested, and by highlighting his refusal to submit to testing, the court gave the jury the impression that his refusal to submit to alcohol testing was important. Huckabay made a timely objection to the instruction about his refusal to submit to testing on the ground that it was an improper comment on the weight of the evidence. "Error properly preserved by an objection to the charge will require reversal 'as long as the error is not harmless.'" *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)).

In assessing whether the instruction caused harm, we consider (1) the charge as a whole; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record. *Hutch*, 922 S.W.2d at 171. The defendant has the burden to persuade the reviewing court that he suffered some actual harm as a consequence of an error in the charge. *LaPoint v. State*, 750 S.W.2d 180, 191 (Tex. Crim. App. 1986) (op. on reh'g).

In considering the charge as a whole, we note that there is no error with respect to any of the other parts of the charge. The charge properly placed the burden of proof of beyond a reasonable doubt on the State. Because we assume that the jury followed the trial court's instructions, the erroneous instruction did not harm Huckabay by reducing

the State's burden of proof. *See Hess*, 224 S.W.3d at 516 (citing *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998)).

We also consider the state of the evidence and the weight of the probative evidence in evaluating whether the error was harmless. In this case, three of the witnesses, Roy, Officer Foley, and Trooper Hinton, expressed the opinion that Huckabay was intoxicated and described conduct consistent with the conclusion that Huckabay was intoxicated. Additionally, Sergeant Denton's description of a near-miss collision supports the jury's conclusion that Huckabay was intoxicated. Huckabay admitted to drinking on the evening he was stopped and to backing into another vehicle just before being stopped, but he disputes that he had lost the normal use of his mental and physical faculties. His refusal to submit to testing under the circumstances also offers significant support to the jury's conclusion. While Huckabay and his step-son disputed that he was intoxicated, the jury was entitled to conclude that their testimony was not credible. Even were we to exclude consideration of Huckabay's refusal to submit to testing, there remains substantial evidence that supports the jury's finding that Huckabay was intoxicated. In light of all of the evidence showing that Huckabay was intoxicated, we conclude the trial court's instruction about Huckabay's refusal was not harmful. *See Hess*, 224 S.W.3d at 516.

We also consider how the erroneous instruction was utilized by the attorneys during their arguments. We note that once the trial court admitted testimony about

Huckabay's refusal to submit to testing, both parties were free to argue that fact to the jury. *See id.* In the State's closing argument, the prosecutor briefly reviewed each paragraph of the charge with the jury. With respect to paragraph three, which is the paragraph containing the instruction about Huckabay's refusal to test, the prosecutor read the instruction and then said: "That's here in your charge." The prosecutor later argued that a finding of not guilty would reward drivers who drank and then refused to be tested, and that Huckabay refused to be tested because he knew he would not pass the tests. Finally, the prosecutor asked the jury not to award Huckabay for hiding the evidence by refusing to submit to the tests. However, the prosecutor did not mention paragraph three of the charge during this portion of the closing argument. In summary, the prosecutor referred to the trial court's instruction only once during closing argument. We conclude the record demonstrates that the prosecutor did not emphasize the court's instruction, focus the jury on the court's instruction, or exploit the instruction by placing the weight of the trial court behind it. *See id.* at 517.

Finally, with respect to other relevant information, we note that Huckabay had been twice convicted of felonies for driving while intoxicated. These convictions negatively impact Huckabay's claim that he was not intoxicated. *See* Tex. R. Evid. 609. After examining the entire record, we conclude the trial court's error was harmless. We overrule issues one and two.

## Mistrial

In issue three, Huckabay argues the trial court erred when it denied his motion for mistrial. Huckabay asked for a mistrial after the prosecutor attempted to ask Huckabay the following question: "And if those medical records with respect to that accident in 1992 suggested that you were intoxicated at the time that you were involved in that accident . . . ." At that point, Huckabay's attorney asked to approach the bench, and then objected to the prosecutor's suggestion that Huckabay had been intoxicated at the time of the 1992 accident. The trial court sustained Huckabay's objection. Huckabay then requested an instruction to disregard the prosecutor's question. At that point, the trial court instructed the jury to "disregard the last question by the State." When Huckabay then moved for a mistrial, his motion was denied.

The denial of a motion for mistrial is reviewed under an abuse of discretion standard. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Because granting a mistrial is considered to be an extreme remedy, "a mistrial should be granted 'only when residual prejudice remains' after less drastic alternatives are explored." *Ocon*, 284 S.W.3d at 884-85 (quoting *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. Crim. App. 2005)). The determination of whether a given error necessitates a mistrial is determined by examining the particular facts of the case. *Ladd*, 3 S.W.3d at 567. Because harm can generally be cured by instructing the jury

to disregard questions, asking an improper question seldom requires a trial court to declare a mistrial. *Id.*

The question to which Huckabay objected does not assert that Huckabay was driving, and he testified earlier that he was a passenger when that accident occurred. Additionally, the trial court instructed the jury to disregard the question, and we generally presume that the jury followed the judge's instruction to disregard objectionable testimony. *See Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987). Whatever harm the prosecutor created by implying that medical records showed Huckabay was intoxicated in a prior accident was cured by the trial court's instruction. We hold the trial court did not abuse its discretion in denying Huckabay's motion requesting the trial court to declare a mistrial. We overrule issue three.

Having considered and overruled all of Huckabay's issues, we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on January 5, 2011
Opinion Delivered March 16, 2011
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.