

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00162-CR

JABE JASON TULLOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 07-235267

MEMORANDUM OPINION

Jabe Jason Tullos appeals from his conviction for driving while intoxicated (DWI), a Class A misdemeanor. *See* Tex. Penal Code Ann. §§ 49.04, 49.09(a) (West 2011). In his appeal, Tullos raises three issues. In his first issue, Tullos complains the trial court denied his motion requesting that testimony related to Tullos's Horizontal Gaze Nystagmus (HGN) testing be suppressed. In issue two, Tullos argues the trial court committed reversible error by admitting a police officer's testimony that Tullos had become intoxicated by the introduction of a drug, phencyclidine (referred to by the

parties as PCP). In issue three, Tullos argues the evidence is legally and factually insufficient to support the jury's verdict.

Background

In October 2007, Trooper Louis Niklas observed a truck pull across the roadway, strike a curb, return to the truck's proper lane, veer into the oncoming lane of traffic, and then return to its proper lane. At that point, Niklas saw that the truck's right front tire was flat, and he conducted a traffic stop. Tullos told Niklas that he was not aware that he had a flat tire, and Niklas noticed that Tullos was slow to respond to questioning and that his speech was sometimes mumbled or otherwise incoherent. Niklas noticed that Tullos was sweating, trembling, and shaking, and that he was wearing a jacket over some kind of sleeping attire. Niklas felt that Tullos was acting oddly, and at one point, Niklas saw Tullos talking into a television remote. Tullos would not cooperate with Niklas when Niklas attempted to conduct HGN testing. At that point, Niklas requested that another trooper be sent to assist him with the investigation.

During the trial, Niklas testified that he was the arresting officer, and stated that at the time of the arrest, and based upon his expert opinion in the administration of field sobriety tests, it was his opinion that Tullos was intoxicated on drugs. When Niklas offered this opinion, Tullos failed to object to Niklas's opinion about what substance had caused Tullos to become intoxicated.

Trooper Blum responded to Niklas's request for assistance with the stop of Tullos. Initially, Blum thought that some of Tullos's behavior could be the result of a mental health issue or to Tullos being on drugs. After he arrived, Blum observed that Tullos's speech "was kind of erratic and out of place, sometimes mumbling, sometimes speaking clearly but [he] never really acted like he was talking to us." In response to Blum's questions on the night of the stop, Tullos denied having or receiving treatment for a mental disorder. Blum also noticed that Tullos would not make eye contact; instead Tullos just "looked everywhere."

After Blum arrived to assist Niklas with the investigation, Tullos allowed Blum to conduct several field sobriety tests. During the trial, Blum opined, without objection, that Tullos had lost the normal use of his mental and physical faculties. Blum also testified, over Tullos's objection, that the source of Tullos's intoxication was PCP.

Over Tullos's objection to Niklas's qualifications and Niklas's application of the technique followed to identify the drug category in issue, the trial court allowed Niklas to testify as a certified drug recognition expert (DRE). Based upon his expertise and training as a DRE, Niklas opined that Tullos's behavior during the stop indicated that Tullos was intoxicated due to the introduction of a drug from the dissociative anesthetic group, a group that includes PCP, DXM, and Ketamine. Niklas based his opinion on Tullos's poor driving, his speech and behavior during the traffic stop, and his performance on the field sobriety tests. Niklas explained that his investigation of Tullos occurred at the scene of

the stop, but also stated that DREs generally perform drug evaluations in a controlled environment, such as a jail. Niklas also acknowledged that portions of the drug evaluation tests cannot be done on the side of the road. Niklas explained there are twelve steps done in a DRE evaluation, and that he did not perform any of the steps on the night of Tullos's arrest.

The jury found Tullos guilty of driving while intoxicated. The trial court assessed Tullos's punishment at 360 days in county jail, a \$750 fine, and \$1198 in court costs. The trial court also suspended Tullos's driver's license for a period of 180 days. Tullos appealed.

Legal Sufficiency

First, we address Tullos's challenge to the sufficiency of the evidence supporting his conviction. While Tullos asserts legal and factual sufficiency challenges in his brief, the Court of Criminal Appeals has recently determined that the standard of review does not differ in the appellate review of these two types of challenges to a verdict. *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010). 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 that the State is required to prove beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 894; 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). In resolving Tullos’s sufficiency challenge, we apply the *Jackson* standard.

In the case before us, the jury convicted Tullos of driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04. A person commits the offense of driving while intoxicated “if the person is intoxicated while operating a motor vehicle in a public place.” *Id.* 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 2011).

In this case, based on their observations of Tullos, Troopers Niklas and Blum both testified that Tullos had lost the normal use of his mental and physical faculties, and these opinions were admitted without objection. With respect to the loss of normal use prong relevant to the offense of driving while intoxicated, the jury had before it Niklas’s

description of Tullos's erratic driving before the stop, Niklas's testimony about Tullos's abnormal behavior after the stop, the troopers' opinions, admitted without objection, that Tullos did not have the normal use of his mental and physical faculties, the video of the stop, the troopers' testimony about Tullos's exhibiting positive signs of intoxication on the field sobriety tests, Blum's testimony that Tullos had clues showing intoxication in both eyes on all three portions of the HGN test, Blum's testimony that Tullos could not properly perform the finger count test, and Blum's testimony that Tullos refused to provide a blood specimen. Further, the jury could draw its own conclusions from observing Tullos's behavior in the videotape 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.").

The State contends that when the evidence is reviewed in the light most favorable to the jury's verdict, it is sufficient to support Tullos's conviction. We agree that the evidence properly admitted during the trial is sufficient to support the jury's determination that Tullos had lost the normal use of his mental and physical faculties. *See Paschall v. State*, 285 S.W.3d 166, 177-78 & n.5 (Tex. App.—Fort Worth 2009, pet. ref'd) (relying on circumstantial evidence in rejecting a legal and factual sufficiency challenge claiming the State failed to prove the defendant was intoxicated by reason of his ingestion of a drug, and inferring that the specific drug the defendant ingested need

not be proven); *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").

On appeal, Tullos argues that the State was required to prove, due to the ingestion of a drug, that he had lost the normal use of his faculties. However, the State was entitled to prove that Tullos was on drugs by using circumstantial evidence, and was not required to prove the specific drug that Tullos had ingested. *See Gray v. State*, 152 S.W.3d 125, 131-32 (Tex. Crim. App. 2004) (explaining that the intoxicant is not an element of the offense); *Paschall*, 285 S.W.3d at 177-78 & n.5. We note that the Complaint and the Information charging Tullos with driving while intoxicated did not allege the means by which the State intended to show that Tullos had become intoxicated.

In Tullos's case, the jury had before it evidence showing that Tullos's speech was erratic, his responses to questions were slow and unreasonable, his behavior was odd and, at times, combative, and that he was sweating, trembling, and unable to make eye contact. The jury also heard testimony from Deputy Michael Weinzettle of the Montgomery County Sheriff's Office, who testified that during the booking process, Tullos was placed in a "violent cell[,] " which is a padded cell that is used to protect the inmate and anyone else in the facility. Edsel West, the Montgomery County Sheriff's Department jail medical supervisor, testified that over the course of Tullos's confinement, Tullos was prescribed Baclofen. According to West, "Baclofen is actually a

muscle relaxant. The standing treatment directive issued by our jail medical director for people suspected of detoxification from drugs, it's a drug that we use in a drug treatment -- in a detoxing protocol." Additionally, the jury heard testimony from Officer Blum that Tullos rejected his request for a blood specimen. Rejecting requests for testing to determine the presence of a drug or alcohol is an additional circumstance that the jury may consider. *See* Tex. Transp. Code Ann. § 724.061 (West 2011) (providing that a person's refusal of a request by an officer to submit to the taking of a specimen of breath or blood may be introduced into evidence); *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). Significantly, the jury heard Officer Niklas opine, without objection, that Tullos was on drugs.

Having carefully reviewed the evidence properly admitted by the trial court before the jury, we hold that the evidence before the jury was sufficient to allow the jury to infer that Tullos had lost the normal use of his mental and physical faculties based on the introduction of a drug into his body. *See Jackson*, 443 U.S. at 319; *Paschall*, 285 S.W.3d at 178. We conclude that based on the record before us, a rational trier of fact could find beyond a reasonable doubt that Tullos was driving while intoxicated. *See Brooks*, 323 S.W.3d at 894; *Jackson*, 443 U.S. at 319. We overrule Tullos' third issue.

Alleged Errors in Admitting Evidence

In issue one, Tullos complains that the trial court erred when it denied his motion to suppress and admitted Trooper Blum's testimony concerning the smooth pursuit portion of the HGN test. According to Tullos, testimony concerning his performance of the smooth pursuit portion of the HGN test was inadmissible because Blum failed to spend at least sixteen seconds performing that portion of the test. We review a trial court's ruling on a motion to suppress by applying a bifurcated standard of review. *Wilson v. State*, 311 S.W.3d 452, 457-58 (Tex. Crim. App. 2010). We give almost total deference to the trial court's determination of historical facts and review de novo the trial court's application of the law. *Id.* at 458. We will uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Amador v. State*, 275 S.W.3d 872, 878-79 (Tex. Crim. App. 2009).

Rule 702 of the Rules of Evidence states that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Tex. R. Evid. 702. An expert's testimony regarding novel scientific evidence must be reliable to be admissible under Rule 702. *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992). HGN evidence is reliable, scientific evidence under Rule 702 when the testing is performed by a police officer who is certified by the National Highway Transportation

Safety Administration (NHTSA) and who applies the proper technique. *Emerson v. State*, 880 S.W.2d 759, 768 (Tex. Crim. App. 1994). The HGN technique is applied properly when the officer follows the standardized procedures outlined in the DWI Detection Manual published by NHTSA. *See id.*

The DWI Detection Manual only provides approximations of the time that is required to properly administer HGN tests, and “it would be unreasonable to conclude that any variation in administering the tests, no matter how slight, could automatically undermine the admissibility of an individual’s performance of the tests.” *Plouff v. State*, 192 S.W.3d 213, 221 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (citing *Compton v. State*, 120 S.W.3d 375, 378 (Tex. App.—Texarkana 2003, pet ref’d)). Slight variations in the administration of the HGN test may affect the weight to be given to the testimony, but they do not render the evidence inadmissible or unreliable. *See Kamen v. State*, 305 S.W.3d 192, 196-99 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d); *Plouff*, 192 S.W.3d at 221; *Compton*, 120 S.W.3d at 378-79.

Here, the evidence shows that Blum is certified to conduct standardized field sobriety tests, including the HGN test. Blum explained the procedure for conducting the smooth pursuit portion of the HGN test, which consists of two passes totaling sixteen seconds. According to Blum, one complete pass in the lack of smooth pursuit portion of the HGN test involves “moving the stimulus in front of the individual’s face at a pace of approximately two seconds out, two seconds back to the middle and then two seconds out

and two seconds back to the middle[.]” The complete pass is repeated twice to see if the individual has nystagmus.

While viewing the videotape of the stop in front of the jury, Blum testified that it was hard for him to affirmatively state how long it took him to perform the lack of smooth pursuit test because of the poor quality of the video. Although Blum indicated that he was unable to determine the length of time he spent conducting the smooth pursuit test, he also testified that he administered the test correctly. The trial court viewed the videotape during the suppression hearing. Having viewed the videotape, we conclude that the trial court could have reasonably found that Officer Blum spent approximately sixteen seconds in administering the challenged portion of the HGN test procedure. In overruling Tullos’s motion to suppress the HGN test, the trial judge stated that he was

comfortable that this HGN was done properly or at least any variations were minor, coupled with the difficulty the trooper had with . . . any difficulty the trooper had with the defendant as far as timing goes. The timing that I saw on the video seems to be at least somewhat conforming to what is required of NHTSA. Any nonconformity would be minor variations.

Because the videotape does not conclusively show that the trial court’s determination regarding the length of time Officer Blum spent on this portion of the HGN test is wrong, we are required to defer to the trial court’s finding that Blum spent a sufficient period of time on this portion of the test to comply with standard test procedures. Given the evidence before the trial court, we conclude the trial court could reasonably determine that the length of time Blum spent was either sufficient, or that any deviation was minor

and did not affect the result. *See Plouff*, 192 S.W.3d at 221. Because we find no abuse of discretion, we overrule issue one.

In issue two, Tullos complains the trial court erred in admitting Niklas's and Blum's testimony that Tullos was intoxicated due to the introduction of PCP. If a defendant claims on appeal that the trial court erred in admitting evidence offered by the State, the error must have been preserved by making a timely, specific objection at trial and obtaining a ruling on that objection. *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003); *see* Tex. R. App. P. 33.1. With two exceptions, Texas law requires a party to object every time allegedly inadmissible evidence is offered. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). "The two exceptions require counsel to either (1) obtain a running objection, or (2) request a hearing outside the presence of the jury." *Martinez*, 98 S.W.3d at 193. Additionally, an error in admission of evidence is cured where the same evidence comes in elsewhere without objection. *Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984).

Regarding the testimony of Blum, the record shows that Tullos did not object each time Blum testified that he suspected Tullos was acting under the influence of PCP, Tullos did not obtain a running objection to Blum's testimony regarding Tullos being on PCP, and Tullos did not request a hearing outside the presence of the jury until after Blum's testimony had already been admitted into evidence without objection. Because the record shows that Blum stated, without objection, that Tullos was under the influence

of PCP, Tullos's complaint that Blum was allowed to testify over his objection that he believed Tullos was acting under the influence of PCP is not properly preserved for our review. *See* Tex. R. App. P. 33.1(a)(1); *Martinez*, 98 S.W.3d at 193 (citing *Ethington*, 819 S.W.2d at 858) (explaining that under Texas law, a proper objection "requires a party to continue to object each time inadmissible evidence is offered"); *Hudson*, 675 S.W.2d at 511.

Tullos also complains that the trial court should not have admitted Niklas's testimony that Tullos was impaired from his ingestion of PCP because Niklas's conclusion was based on unreliable scientific evidence. According to Tullos, at the time of his arrest, Niklas was not certified as a drug recognition expert (DRE) and he failed to properly apply the DRE technique. Tullos contends that Niklas's conclusion fails the third prong in *Kelly*. *See Kelly*, 824 S.W.2d at 573.

Under Rule 702, if a witness possesses scientific, technical, or other specialized knowledge that will assist a trier of fact and the witness is qualified as an expert by knowledge, skill, experience, training, or education, the witness may testify regarding his opinion. *See* Tex. R. Evid. 702. An expert's testimony is admissible if the expert is qualified and the testimony is relevant and based on a reliable foundation. *See Wooten v. State*, 267 S.W.3d 289, 302-03 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). To be reliable, the evidence must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must

have been properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. We review the trial court's determination of whether the *Kelly* requirements are met under an abuse of discretion standard. *Russeau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005); *Wooten*, 267 S.W.3d at 302.

Niklas's trial testimony reflects that he had been with the Texas Department of Public Safety for three and a half years, and that he had been a trained DRE for approximately seven months before the date that Tullos's trial occurred. Niklas summarized the training he received to become a DRE and the twelve-step process he uses to conduct a proper drug recognition evaluation. At the close of the voir dire examination of Niklas, Tullos moved to disqualify Niklas as a DRE, arguing that the underlying scientific theory was not valid, the technique applying the theory was not valid, Niklas was not a DRE at the time of Tullos's arrest, and he did not apply the technique properly. The trial court overruled Tullos's objections.

At trial, Niklas testified as a DRE regarding his training in seven drug categories and the indicators he looks for to identify whether a person is on drugs. Niklas determined that Tullos's behavior during the stop indicated that he was intoxicated due to the introduction of a drug from the dissociative anesthetic group, which includes PCP, DXM, and Ketamine. However, Niklas testified that he was not a DRE at the time he stopped Tullos, and that he did not conduct any of the twelve steps followed in a DRE evaluation.

We conclude that the trial court abused its discretion because the record demonstrates that the technique to identify the presence of a category of drugs was not applied properly in Tullos's case. Niklas did not have the benefit from any of the twelve steps generally used by DREs to form his opinion that Tullos had ingested PCP. Because we conclude the trial court erred to the extent¹ it allowed Niklas to express opinions as a DRE during the trial, we must decide whether that error affected Tullos's substantial rights. *See* Tex. R. App. P. 44.2(b); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010), *cert. denied*, 180 L.Ed.2d 846, 2011 U.S. LEXIS 4622, 79 U.S.L.W. 3710 (2011). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Coble*, 330 S.W.3d at 280. If the improperly admitted evidence "did not influence the jury or had but a slight effect upon its deliberations, such non-constitutional error is harmless." *Id.*

In reviewing a record for harm based on the erroneous admission of evidence, an appellate court must examine the entire trial record and calculate, as much as possible, the probable impact of the error upon the rest of the evidence. *Id.* Here, the State was not required to prove the specific drug or the specific drug group that caused Tullos's intoxication. In light of the unobjected to testimony expressing the view that Tullos was intoxicated due to the ingestion of drugs, Tullos's statement that he was not being treated for a mental condition, the testimony concerning Tullos's erratic behavior immediately

¹Not all of Niklas's opinions that he suspected Tullos to be on drugs were expressed as an expert who was trained in drug recognition.

before and after the stop, Tullos's refusal of blood testing, and Tullos's treatment for detoxification after he was taken to jail, we conclude that the trial court's error in allowing Niklas's testimony that Tullos was intoxicated due to the introduction of a drug from the dissociative anesthetic group would have had only a slight effect on the jury's verdict.

After carefully reviewing the record, we hold that the trial court's error in allowing Niklas to testify that Tullos had taken a drug from the dissociative anesthetic group did not have a substantial and injurious effect upon the jury's decision to find Tullos guilty of driving while intoxicated. Because we conclude that the error was harmless, we overrule issue two. Having considered and overruled all of Tullos's issues, we affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on May 27, 2011
Opinion Delivered August 24, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.