In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00086-CR

RODNEY KEITH HAZLIP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 10-04-04149-CR

MEMORANDUM OPINION

Rodney Keith Hazlip raises three issues in an appeal of his conviction for driving while intoxicated, a felony. *See* Tex. Penal Code Ann. §§ 49.04, 49.09 (West Supp. 2012).[1] First, he contends that the trial court abused its discretion by failing to hold a competency hearing just before jury selection and by failing to make an inquiry regarding his competency after a psychologist testified at his trial. In his second issue, Hazlip

[1]We cite to the current sections of the Texas Penal Code because the 2011 amendments do not affect the outcome of this appeal.

complains that his conviction rests on unreliable evidence because the trial court erroneously admitted an expert's estimate of his blood-alcohol level, which the expert related to the time Hazlip was driving. In issue three, Hazlip complains of charge error, asserting the trial court erred by failing to include a beyond-a-reasonable-doubt instruction in the punishment portion of the charge.

We conclude the trial court did not abuse its discretion by refusing to hold a formal competency hearing prior to jury selection or by refusing to conduct an informal inquiry during the punishment phase of Hazlip's trial. With respect to issue two, we conclude the trial court erred in admitting the expert's blood-alcohol estimate, but that the admission of this estimate, in light of the other evidence before the jury showing Hazlip was driving while intoxicated, was not harmful. Regarding issue three, we conclude that the trial court's omission of an additional instruction during punishment, stating the State was required to prove the extraneous crimes it alleged Hazlip committed beyond reasonable doubt before they could be considered, did not deprive Hazlip of his right to a fair and impartial trial. We affirm the trial court's judgment.

Competency Hearing and Inquiry

In issue one, Hazlip advances two arguments that attack the trial court's handling of competency issues that arose after the trial began. In the first of these, Hazlip argues the trial court should have conducted a competency hearing when, just before voir dire, he advised the trial court that he had not gotten his medications and that he was confused.

We review a trial court's failure to conduct a competency trial under an abuse of discretion standard. *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999); *Garcia v. State*, 595 S.W.2d 538, 542 (Tex. Crim. App. [Panel Op.] 1980); *Salahud-din v. State*, 206 S.W.3d 203, 207 (Tex. App.—Corpus Christi 2006, pet. ref'd). A reviewing court gives a trial court's assessment of a defendant's mental competency great deference. *McDaniel v. State*, 98 S.W.3d 704, 713 (Tex. Crim. App. 2003). Therefore, we will not substitute our judgment for that of the trial court; rather, we will determine whether the trial court's decision is arbitrary or unreasonable. *See Montoya v. State*, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009) (noting that the trial court is "in a better position to determine whether [the defendant] was presently competent"). We apply the same standard whether the issue of competency is presented pre-trial or during trial. *Moore*, 999 S.W.2d at 393.

"A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." Tex. Code Crim. Proc. Ann. art. 46B.003(b) (West 2006). A defendant is incompetent to stand trial if he does not have:

- sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, or
- a rational as well as factual understanding of the proceedings against him.

Id. art. 46B.003(a). If a party suggests that a defendant is incompetent to stand trial, the trial court "shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial." *Id.* art. 46B.004(c) (West Supp. 2012).[2] Bona fide doubt is the proper standard for determining whether a trial court should conduct an informal inquiry. *Montoya*, 291 S.W.3d at 425. Evidence capable of creating a bona fide doubt about a defendant's competency may come from the trial court's own observations, known facts, evidence presented, affidavits, motions, or any other claim or reliable source. *LaHood v. State*, 171 S.W.3d 613, 618 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing *Brown v. State*, 129 S.W.3d 762, 765 (Tex. App.—Houston [1st Dist.] 2004, no pet.)). If the defendant exhibits truly bizarre behavior, has a recent history of severe mental illness, or at least moderate mental retardation, a bona fide doubt may exist. *Montoya*, 291 S.W.3d at 425.

[2]In 2011, the Legislature amended article 46B.004, disposing of the bona fide doubt standard for determining whether a trial court should conduct an informal inquiry. *See* Act of May 24, 2011, 82nd Leg., R.S., ch. 822 § 2, 2011 Tex. Sess. Law Serv. 1893, 1893 (West) (codified at Tex. Code Crim. Proc. Ann. art. 46B.004(c-1) (West Supp. 2012)). Because the trial in this case occurred prior to the effective date of the 2011 amendment, the amended statute does not apply here. Accordingly, we apply the law at the time the alleged procedural error occurred.

In Hazlip's case, both parties acknowledge that a psychologist found Hazlip competent for trial approximately two months before the trial began,[3] and the trial judge could properly presume that Hazlip was competent on the morning the trial began. *See id.* When Hazlip claimed he had not received his prescription medications, the trial court questioned Hazlip. However, the trial court was not required to believe Hazlip's claim that he had not been given his medications. The record reflects that prior to voir dire, Hazlip answered questions in the trial court's presence, explaining that the role of the jurors, the judge, and the prosecutor was to "figure out what is going on." Importantly, Hazlip presented no experts to show that he was incompetent, and no witnesses except

[3]The trial court advised the parties that it reviewed the psychologist's report in chambers just before denying Hazlip's request for a competency trial; no one objected to the trial court's decision to do so. However, the report was not formally marked and admitted as an exhibit. Because the report was not formally admitted, it cannot be used to support the trial court's ruling. *See Garcia v. State*, 595 S.W.2d 538, 542 (Tex. Crim. App. [Panel Op.] 1980) (holding that the trial court erred in relying on a psychiatric report that was not offered and admitted into evidence). Nevertheless, when the Court of Criminal Appeals decided *Garcia*, the Court was not following the Texas Rules of Appellate Procedure, as they had not yet been enacted. One of the provisions in the current Rules of Appellate Procedure requires that appellate courts allow the trial court the opportunity to correct errors still capable of correction. *Compare* Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 44.23-.24, 1965 Tex. Gen. Laws 317, 516 (providing no procedure for abatement to correct remediable error), *repealed by* Act of May 27, 1985, 69th Leg., R.S., ch. 685, § 4, 1985 Tex. Gen. Laws2472, 2472-73, *with* Tex. R. App. P. 44.4 (allowing the trial court to correct certain errors that prevent a proper presentation of the case on appeal). Based on that Rule, we asked the district clerk to supplement the record with the expert's report so that we could determine if the trial court's error could be corrected. *See* Tex. R. Evid. 201 (Judicial Notice of Adjudicative Facts). Subsequently, the district clerk provided the report to us. However, given our resolution of Hazlip's first issue, we have determined that the trial court did not need to conduct further proceedings before we could resolve Hazlip's appellate issues.

for Hazlip testified that he had not received his medications on the morning of trial. *Compare Clark v. State*, 47 S.W.3d 211, 218 (Tex. App.—Beaumont 2001, no pet.) ("To be entitled to a second competency trial before a jury, there must be new evidence indicating a change in mental condition from the previous finding."), *with Garcia v. State*, 595 S.W.2d 538, 542 (Tex. Crim. App. 1980) (concluding that the trial court erred in failing to conduct a competency trial where the testimony of four witnesses would support a finding of incompetency); *and Thornhill v. State*, 910 S.W.2d 653, 654-55 (Tex. App.—Fort Worth 1995, pet. ref'd) (trial court erred in failing to conduct second competency hearing to allow the defendant to present additional evidence not available at the first hearing).

In the absence of express findings, we imply that the trial court, based on Hazlip's responses in court, reasonably concluded that Hazlip had not been truthful when he claimed to be confused. Based on the information before it, the trial court could reasonably conclude that Hazlip's assertion of incompetence was goal oriented, as he indicated a desire that the trial court appoint another attorney to represent him. We conclude that the trial court did not abuse its discretion by deciding that Hazlip's evidence insufficient to overcome the presumption that he remained competent for trial. *See McDaniel*, 98 S.W.3d at 713 (stating that a reviewing court gives a trial court's assessment of a defendant's mental competency great deference).

Hazlip's second argument attacking the trial court's handling of competency issues relates to the testimony of Dr. Quijano, who testified during the punishment phase of the trial. In that phase, Hazlip's attorney never suggested that Hazlip had become incompetent.

Dr. Quijano, a psychologist, had examined Hazlip prior to trial and prior to the trial reported that Hazlip was competent. During the punishment phase of Hazlip's trial, Dr. Quijano explained that Hazlip had been mentally ill since he was sixteen; since then, various institutions had provided occasional treatment for him. Dr. Quijano stated that Hazlip suffers from a bipolar disorder with psychotic features, but was in partial remission due to the medications he received awaiting trial. Although Dr. Quijano explained that Hazlip had not received all of the various types of medication he was prescribed, he believed that Hazlip had done well on the two medications that he had received. Dr. Quijano further testified that Hazlip's behavior in jail had been "generally good[,]" and he noted that Hazlip had served as a jail trustee. According to Dr. Quijano, Hazlip understood why he was incarcerated, that his blood alcohol level when he committed the offense exceeded the legal limit, and that he had several prior convictions.

On appeal, Hazlip argues that Dr. Quijano's testimony raises a bona fide doubt regarding his competency to stand trial. We disagree. Dr. Quijano's testimony supports the State's claim that Hazlip was competent. Although Hazlip focuses on the fact that Hazlip had not been given all of the medications he was prescribed, the record does not

reflect what those medications were or what they were used to treat. Instead, Dr. Quijano discussed the medications Hazlip received while in jail, an antipsychotic and a mood stabilizer. Dr. Quijano never stated that the medications Hazlip did not receive were needed to treat Hazlip for mental illness.

We conclude that Dr. Quijano's testimony did not create a bona fide doubt regarding whether Hazlip met the test of legal competence; therefore, the trial court did not abuse its discretion by failing to inquire into Hazlip's competency after Dr. Quijano testified. *See Moore*, 999 S.W.2d at 396 ("It is within the purview of the trial judge to distinguish evidence showing only impairment from that indicating incompetency as contemplated by the law."). Having addressed all of Hazlip's issue one arguments, we overrule issue one.

Estimate of Hazlip's Blood-Alcohol Level

In issue two, Hazlip contends the trial court erred by allowing Camille Stafford, a forensic scientist, to estimate Hazlip's blood-alcohol level based on a blood test that the State obtained several hours after Hazlip's arrest. According to Hazlip, the estimate provided by Stafford is unreliable because she did not have sufficient facts to conduct a proper retrograde extrapolation analysis and to form an opinion based on one test taken hours after Hazlip's arrest.

We review the trial court's decision to admit scientific evidence under an abuse of discretion standard. *Mata v. State*, 46 S.W.3d 902, 908 (Tex. Crim. App. 2001). It is the

trial court's responsibility to determine whether the scientific evidence offered is sufficiently reliable, as well as relevant, to help the jury in reaching accurate results. *Id.* In *Mata*, the Court of Criminal Appeals suggested that a court evaluating the reliability of a retrograde extrapolation is to consider:

- the length of time between the offense and the test administered,
- the number of tests given and the length of time between each test, and
- the extent any individual characteristics of the defendant were known to the expert in providing the extrapolation.

Id. at 916. According to *Mata*, "a single test conducted some time after the offense could result in a reliable extrapolation only if the expert had knowledge of many personal characteristics and behaviors of the defendant." *Id.*

Here, the State did not show that Stafford had knowledge of the many facts she needed to provide a reasonably accurate estimate of Hazlip's blood-alcohol level as related to when Hazlip drove the SUV. The record shows that Stafford utilized a single blood test obtained several hours after Hazlip's arrest, which showed that Hazlip's blood-alcohol level at the time of the draw was .26. Stafford acknowledged that she did not know when Hazlip stopped drinking. Stafford also stated that she could not determine conclusively whether Hazlip was in an absorption or an elimination phase in metabolizing the alcohol he consumed. Stafford also admitted that she did not know how much Hazlip weighed, how much alcohol he consumed, when he had his last drink, or

whether he had eaten that day. Regardless of not having the knowledge of these many facts, the trial court allowed Stafford to testify that Hazlip's blood-alcohol level would have been "anywhere from .06 to .10 higher" than the 0.26 at the time of the accident.

We conclude that the State did not show that Stafford had sufficient facts regarding Hazlip's characteristics and behaviors to make a reasonably accurate estimate of Hazlip's blood-alcohol level at the time he was driving. *See id.* at 916-17; *Burns v. State*, 298 S.W.3d 697, 701-02 (Tex. App.—San Antonio 2009, no pet.) (applying the *Mata* factors, determined that trial court erred in permitting expert to estimate defendant's blood-alcohol level). The trial court erred in admitting Stafford's testimony over Hazlip's objection that it was not admissible.

Because the erroneous admission of retrograde extrapolation testimony is non-constitutional error, we will reverse only if the error affected Hazlip's substantial rights. *See* Tex. R. App. P. 44.2(b); *Bagheri v. State*, 119 S.W.3d 755, 763 (Tex. Crim. App. 2003); *Burns*, 298 S.W.3d at 703. In considering non-constitutional error, we must disregard the error if, after examining the record as a whole, we have fair assurance that the error did not influence the jury, or had but a slight effect. *Bagheri*, 119 S.W.3d at 763 (quoting *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001)). The important factors that we will consider are (1) the nature of the evidence supporting the verdict, and (2) the character of the alleged error and how it might be considered in connection with other evidence in the case. *See id.* (quoting *Motilla v. State*, 78 S.W.3d 352, 355 (Tex.

Crim. App. 2002)). We also consider whether (1) the State emphasized the error, (2) the erroneously admitted evidence was cumulative, and (3) the testimony was elicited from an expert. *See id.*

First, we note the jury charge defines the term "intoxicated" as "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, or a combination of at least two or more of those substances, or any other substance into the body." *See* Tex. Penal Code Ann. § 49.01(2)(A) (West 2011). The jury charge used in Hazlip's case did not include a charge on "*per se* theory," as it did not define the term "intoxicated" as having an "alcohol concentration of 0.08 or more." *See id.* § 49.01(2)(B) (West 2011). Because the trial court charged the jury solely under an "impairment theory," the jury relied upon the impairment definition of intoxicated when it convicted Hazlip of the offense. *Cf. Bagheri*, 119 S.W.3d at 762-63.

During the case, the State did not significantly emphasize the objected-to estimate of Hazlip's blood-alcohol level while driving. For example, the estimate was not mentioned by the State during voir dire or in opening statements. During opening statement, the State explained that its evidence, which included 911 telephone conversations and multiple witnesses, would prove that Hazlip was intoxicated. During final argument, the State relied primarily on testimony about Hazlip's erratic driving and testimony about how he acted shortly after he encountered the police in arguing that

Hazlip was intoxicated, rather than Stafford's estimate. While the State briefly referenced Stafford's estimate twice during rebuttal, the State did not emphasize Stafford's credentials. Additionally, Hazlip did not offer evidence that undermined the results of the sole blood-alcohol test the trial court admitted before the jury.

Other evidence admitted during Hazlip's trial shows that he was guilty of driving while intoxicated. For example, there was testimony that a SUV like Hazlip's had been seen driven erratically shortly before Hazlip's arrest later that same evening. There was evidence that Hazlip crashed into some bushes in front of a home shortly before he was arrested. After the SUV crashed, Hazlip asked a person he saw nearby, G.O., to help him pull the SUV out of the bushes. When G.O. declined, Hazlip threatened to kill him. In response, G.O. "called 911." Shortly after the crash, when the police responded to G.O.'s call, the investigating officer who encountered Hazlip testified at trial that he thought Hazlip was intoxicated. According to Trooper Martin, when he first encountered Hazlip, he was belligerent, irate, uncooperative, and unable to answer questions. Hazlip showed many signs of intoxication, including slurred speech. Specifically, Trooper Martin testified that he believed Hazlip was intoxicated because Hazlip was swaying, had a blank stare, had alcohol on his breath, gave deceptive answers, seemed unsure about what was going on at the scene, and gave conflicting statements about what happened. Hazlip informed Trooper Martin that he had taken several prescription medications. Although Hazlip claimed that the SUV was not his vehicle, Trooper Martin found Hazlip's personal

items inside the SUV. Trooper Martin also found beer in the SUV. Trooper Martin testified that based on what he saw, he felt sure that Hazlip was intoxicated. Hazlip refused Trooper Martin's request for a blood sample.

The evidence before the jury demonstrates that Hazlip had ingested both alcohol and prescription medications on the evening he was arrested. Several witnesses saw Hazlip driving in a manner consistent with intoxication. Hazlip appeared intoxicated to Trooper Martin, exhibited behavior consistent with intoxication, and Hazlip attempted to avoid being detected for driving while intoxicated by refusing Trooper Martin's request for a blood sample. Having carefully reviewed the record, we conclude that substantial evidence, unrelated to Stafford's estimate, allowed the jury to find Hazlip guilty beyond reasonable doubt. *See Burns*, 298 S.W.3d at 704-05 (finding that retrograde extrapolation was cumulative of other evidence of intoxication). We conclude that the erroneous admission of Stafford's estimate had but a slight effect on the jury, and we overrule issue two.

Reasonable-Doubt Instruction

In issue three, Hazlip complains that during the punishment phase, the trial court was required, without request, to instruct the jury not to consider evidence regarding any prior bad acts unless that conduct was proven to have occurred beyond reasonable doubt.

See Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1) (West Supp. 2012).[4] The record reflects that the punishment charge did not include a beyond-a-reasonable-doubt instruction. The record further reflects that Hazlip did not request a beyond-a-reasonable-doubt instruction, nor did he object to the punishment charge on the basis that it did not include the instruction. We must first determine whether charge error exists, and if so, determine whether the error harmed the defendant. *Graves v. State*, 310 S.W.3d 924, 929 (Tex. App.—Beaumont 2010, pet. ref'd) (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)).

Evidence relevant to sentencing the defendant may include evidence that the defendant committed other crimes or wrongs. Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1) (providing that evidence may be offered by the State and the defendant as to any matter the court deems relevant to sentencing, including but not limited to evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act). While section 3(a)(1) is silent about submitting jury instructions, an instruction providing the jury with the proper standard of proof is logically required if the

[4]Even though the Legislature amended article 37.07 of the Texas Code of Criminal Procedure in 2011, we cite to the current version because the 2011 amendment does not affect the outcome of this appeal.

jury is to apply the beyond-a-reasonable-doubt standard identified in article 37.07. *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000).

The fact that Hazlip did not request an instruction under article 37.07 section 3(a)(1) does not prevent him from complaining about its omission on appeal. *See id.* A trial court's failure to instruct the jury, absent request or objection under section 3(a)(1), is charge error subject to the egregious harm analysis. *Id.* at 484-85; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g) (explaining that egregious harm requires reversal "only if the error is so egregious and created such harm that [the defendant] 'has not had a fair and impartial trial'"). We review Hazlip's issue to determine whether he suffered egregious harm due to the omitted instruction. *See Huizar*, 12 S.W.3d at 484.

The testimony regarding the other crimes about which Hazlip complains concerns Trooper Martin's testimony about a semi-conscious man found on a porch at a house that Hazlip was seen leaving. Although failing to instruct the jury about the other crime or wrong is charge error, Hazlip is required to prove that the instruction's omission, under the circumstances, caused egregious harm. *See Huizar*, 12 S.W.3d at 484-85; *Almanza*, 686 S.W.2d at 171. According to Hazlip, he was egregiously harmed because the State characterized him as violent, but then introduced weak evidence of an assault to support that claim.

In determining whether the trial court erred under the *Almanza* standard, we review (1) the entire jury charge; (2) the state of the evidence, including the contested issues and the weight of probative evidence; and (3) the argument of counsel and any other relevant information revealed by the record of the trial as a whole. *See Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011) (quoting *Almanza*, 686 S.W.2d at 171). In considering the entire charge, which includes the charge used in the guilt/innocence phase of the trial, we note that the guilt/innocence portion of the charge advised the jury not to

> consider said testimony [about other offenses or bad acts] for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offense(s) or bad act(s), if any were committed, and even then you may only consider the same in determining the intent or motive of the defendant, if any, in connection with the offense, if any, alleged against him in the indictment in this case, and for no other reason.

Additionally, the guilt/innocence portion of the charge instructed the jury that "[t]he burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant." We conclude that as a whole, the jury charge weighs against a conclusion that the trial court's error deprived Hazlip of his right to a fair trial.

Next we consider the evidence as a whole. First, we note that along with the incident involving the man on the porch, the jury also heard other evidence from which it could infer that Hazlip, at times, could be violent. On the night Hazlip was arrested for driving while intoxicated, G.O. indicated that Hazlip threatened to kill him. Another witness, Dr. Quijano, testified that Hazlip reported having a verbal argument with a

neighbor which led to a physical fight. A third witness, T.H., Hazlip's fiancé, testified that Hazlip and her step-father had a "little squabble" and her step-father hit Hazlip. According to T.H., both Hazlip and her step-father suffered injuries, and Hazlip was arrested.

The evidence that Hazlip argues harmed him relates to the testimony of Trooper Martin. According to Trooper Martin, about three months before Hazlip's arrest for driving while intoxicated, he investigated a disturbance at a house. As Trooper Martin approached the house, he noticed a man on the porch, unresponsive, with blood on his head; he also saw a man leaving the house. Another officer arrived and investigated further; that officer told Trooper Martin that a man named Hazlip fled the house. Although Trooper Martin found a nearby SUV matching the description of one that Hazlip had used to leave the scene, Hazlip was not in it. When Trooper Martin returned to the house, he saw Hazlip, in handcuffs, sitting in the back seat of a patrol car. Then, Trooper Martin saw Hazlip attempt to kick out the window of the patrol car, and Trooper Martin observed blood on Hazlip's shoe. Hazlip's attorney did not cross-examine Trooper Martin regarding this encounter.

Trooper Martin's testimony about the investigation into the incident involving the man on the porch appears to concern the same incident that T.H. described involving Hazlip's altercation with her father. Therefore, it appears that Trooper Martin's testimony is cumulative, as T.H.'s testimony about that incident was admitted without objection. In

final argument, the State referenced Trooper Martin's account of the assault as the one that T.H. described. Also, Hazlip had other criminal convictions that were admitted into evidence,[5] so Trooper Martin's testimony about his investigation three months before Hazlip's arrest for driving while intoxicated is not the only evidence that on prior occasions Hazlip had exhibited criminal behavior. Although Trooper Martin explained that Hazlip was arrested at the house, Trooper Martin did not testify that Hazlip was arrested for assault, nor did Trooper Martin otherwise describe the reason for Hazlip's arrest.

Hazlip contends he was harmed by Trooper Martin's testimony about the incident with the man on the porch because it portrayed him as a violent person. However, the testimony about which he complains was cumulative of other testimony about the same incident. There was also other evidence showing that Hazlip could be violent. We conclude that the testimony as a whole does not favor a conclusion that Hazlip suffered egregious harm due to the error in the charge.

We also evaluate the arguments of counsel in determining whether Hazlip was egregiously harmed by Trooper Martin's description of his first encounter with Hazlip.

[5]During punishment, the jury heard evidence that Hazlip had two prior felony convictions and had twice served time in prison. Specifically, the jury heard that Hazlip served three years in prison for having a prohibited substance in a correctional facility and three years for stealing a car. The jury also heard evidence that Hazlip had three prior convictions for driving while intoxicated, as well as a conviction for failing to stop and give information. Additionally, during closing argument, Hazlip's attorney informed the jury that Hazlip had served ten years for burglarizing a habitation.

During closing argument, the prosecutor apparently believed that Trooper Martin's first encounter with Hazlip involved the same incident described by T.H. Thus, the State did not create the impression that the encounter had more value beyond the evidence admitted without objection. Additionally, the prosecutor's comments about Trooper Martin's first encounter with Hazlip were mentioned in the context that when Hazlip drank, he tended to get behind the wheel and assault people, an inference that was available from other evidence. Defense counsel did not dispute that drinking affected Hazlip's behavior, as defense counsel argued that "[t]he only time you heard that [Hazlip] was belligerent is when there was drinking involved." The arguments of counsel do not lead us to believe Hazlip was egregiously harmed by the admission of Trooper Martin's testimony about his first encounter with Hazlip. *See Almanza*, 686 S.W.2d at 171.

Finally, Hazlip's sentence does not indicate that he received an unfair trial. Given the enhancements available from Hazlip's prior convictions, Hazlip faced a punishment of twenty-five to ninety-nine years in prison. The jury assessed a sentence of forty years in prison. In light of Hazlip's other criminal convictions, which include three prior convictions for driving while intoxicated, another punishment hearing is unlikely to lead to a jury imposing a lesser sentence. *See Martinez v. State*, 313 S.W.3d 358, 369 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (finding no egregious harm where jury assessed the maximum sentence because if the jury had been properly instructed, it would likely have reached the same result based on the evidence).

Having considered all of Hazlip's arguments, we reject Hazlip's claim that he was egregiously harmed by the trial court's failure to include a beyond-a-reasonable-doubt instruction in the punishment portion of the charge. We overrule issue three. Having overruled all of Hazlip's issues on appeal, we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on December 27, 2011
Opinion Delivered September 26, 2012
Do Not Publish

Before Gaultney, Kreger and Horton, JJ.