In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00154-CR

ANDREW MICHAEL PSYK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law
Polk County, Texas
Trial Cause No. 2013-0683

MEMORANDUM OPINION

A jury convicted Appellant, Andrew Michael Psyk, of the misdemeanor offense of driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04(a) (West Supp. 2017). In five issues on appeal, Psyk argues the trial court: (1) abused its discretion in admitting intoxilyzer evidence because the State failed to prove that the technique was properly applied in accordance with Department of Public Safety rules; (2) erroneously precluded cross-examination concerning the accuracy and

reliability of the intoxilyzer; (3) abused its discretion in admitting unfairly prejudicial evidence that Appellant was on his way to work as an emergency room doctor at the time of his arrest; (4) violated article 38.23(a) of the Texas Code of Criminal Procedure in refusing to provide a jury instruction concerning a factual dispute material to the admissibility of the intoxilyzer results; and (5) erred in providing jury instructions concerning intoxication by substances other than alcohol because the instructions were not supported by the evidence. We overrule these issues and affirm the trial court's judgment.

Background

At around 6:00 a.m. on the morning of October 20, 2013, at least two witnesses contacted 911 after observing a dark SUV driving erratically on Interstate 59 northbound. One witness stayed on the phone with the 911 operator and followed behind the vehicle until a state trooper arrived on the scene.

When the trooper located the vehicle, he followed it for a short period of time and observed the vehicle drifting from lane to lane without signaling, which was a traffic violation. The trooper testified that he pulled the vehicle over because he was concerned the driver was either falling asleep, had medical problems, or was intoxicated. When the trooper made contact with Psyk, he noticed the odor of beer on Psyk's breath, that he had bloodshot and glassy eyes, his face was flushed, and

his speech was slurred. Based on those factors and the manner in which Psyk was driving, the trooper formed a belief that Psyk was possibly intoxicated. After exiting the vehicle, Psyk appeared unsteady on his feet and confused.

The trooper subsequently administered several standardized field sobriety tests (SFSTs) and found numerous indicators that Psyk was intoxicated. The trooper then placed Psyk under arrest for driving while intoxicated. After his arrest, the trooper read Psyk his *Miranda*[1] rights and the DIC-24 form requesting a sample of his breath. When the trooper went through the DWI interview with Psyk, Psyk admitted to driving a motor vehicle, and he admitted he was intoxicated. Psyk told the trooper he had two beers around 8 p.m. and 11 p.m. the evening before. Several times during the traffic stop, Psyk mentioned he was a doctor on his way to work and requested to call the hospital to let them know he would be late.

Psyk consented to provide a breath sample, which was taken at the jail by the trooper, a certified intoxilyzer operator. The trooper testified that prior to administering the breath test, he observed Psyk for the requisite fifteen minute period. Psyk's first breath sample was taken at 8:02 a.m. and measured .081 grams per 210 liters of breath. A second sample measured .074 grams per 210 liters of breath.

[1] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Psyk moved to suppress the intoxilyzer results before trial, arguing the State failed to establish by clear and convincing evidence that the breath test was done in accordance with accepted scientific protocol and procedures. He further objected to the admissibility of the breath test because the trooper who administered the test could not testify to the start and end time of the requisite observation period. The trial judge denied the motion to suppress the results of the breath test.

At trial, Psyk re-urged his objections and the motion to suppress prior to the testimony of Camille Stafford, a technical supervisor for the Texas Department of Public Safety (DPS). Psyk objected to the admissibility of the breath test pursuant to Rule 702, 705(b), *Kelly* and *Daubert*, article 38.23, and article I, section 10 of the Texas Constitution and requested a second hearing outside the presence of the jury. *See* Tex. Const. art. I, § 10; Tex. R. Evid. 702, 705(b); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

During the second hearing on the motion to suppress, Stafford testified regarding the proper use and calibration of the intoxilyzer machine. Stafford was assigned to the region and was in charge of the intoxilyzer instrument used beginning October 4, 2013. The predecessor technical supervisor over the instrument was Glenn Merkord. Stafford testified that she understood Merkord was disciplined for

his failure to follow DPS standard operating guidelines before he ultimately retired. Stafford further testified that the last calibration on the machine prior to Psyk's arrest was performed on May 5, 2011, by Merkord. The calibration of the intoxilyzer was required to be performed in the DPS laboratory per standard operating guidelines. However, records for the last calibration performed by Merkord contained inconsistent information about where the calibration was performed. Stafford indicated that it looked like Merkord forgot to change the heading to "[l]ab," and that it was unlikely Merkord calibrated the machine in the field, as "he would have to take a whole couple of suitcases full of equipment…to perform that calibration." If Merkord had performed a calibration in the field, it would have been a violation of standard operating guidelines.

Psyk argued that the State's evidence revealed the last calibration report made before his arrest arguably shows it was performed in violation of DPS standard operating guidelines. Psyk further asserted that if the State's position was that the records contained only a clerical error on Merkord's part, the State should be required to call Merkord as a witness, and Psyk should be entitled to cross-examine Merkord on that issue. The trial court again denied the motion to suppress. To further preserve his complaint of error, Psyk made a bill of exception in which he elicited

testimony from Stafford about Merkord's history with the DPS and his calibration of the intoxilyzer.

Stafford testified before the jury that she performed a maintenance check on the intoxilyzer at issue on October 15, 2013, five days before Psyk's arrest, and on November 14, 2013.[2] Both maintenance checks showed there were no indications that the calibration of the intoxilyzer was lacking or deficient. It was Stafford's opinion that the machine was working properly on the day of Psyk's arrest. Stafford further indicated the technique used for administering the intoxilyzer test appeared to have been applied correctly on the breath test specimen on the date of Psyk's arrest.

Psyk's five issues on appeal fall into three categories: (1) the trial court's decisions regarding the admission of evidence; (2) the trial court's limitations on cross-examination; and (3) error in the jury charge. As each of these categories has a distinct standard of review, we will address them categorically.

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[2] Stafford explained that a maintenance check of an intoxilyzer is different and a less comprehensive process than calibration.

Issues One and Two:
Admission of Intoxilyzer Results and Limitations on Cross-Examination

A. Standard of Review

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *See Carmouche v. State,* 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We do not engage in our own factual review when examining the trial court's decision. *See Romero v. State,* 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Mullican v. State,* 157 S.W.3d 870, 872 (Tex. App.—Fort Worth 2005, pet. ref'd). At a suppression hearing, the trial court is the sole judge of witnesses' credibility and the weight to be given their testimony. *State v. Ross,* 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). Accordingly, "we give almost total deference to the trial court's rulings on (1) questions of historical fact and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor." *Mullican,* 157 S.W.3d at 872 (citing *Johnson v. State,* 68 S.W.3d 644, 652 (Tex. Crim. App. 2002)). However, mixed questions of law and fact, if they do not turn on the credibility and demeanor of witnesses, we review *de novo*. *Johnson,* 68 S.W.3d at 652–53. Because the trial court's ruling on the motion to suppress in this case was applying the law to the facts that turned on an evaluation of credibility and demeanor of witnesses, we give it almost total deference. *See id.* at 652.

We review a trial court's rulings on admission of evidence for an abuse of discretion. *See Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). We uphold a trial judge's decision to admit evidence as long as the result is not outside the zone of reasonable disagreement. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990, op. on reh'g). Appellate courts must afford a trial court such great discretion in its evidentiary decisions "because the trial court judge is in a superior position to evaluate the impact of the evidence." *Id*. at 379.

B. Analysis

Psyk argues in his first issue that the breath test should be excluded because the State could not establish the reliability of the test by clear and convincing evidence and, in his second issue, that he was precluded from cross-examining the technical supervisor about the former technical supervisor, Glenn Merkord, regarding his involvement in the calibration and maintenance of the intoxilyzer and the discipline imposed by the Department of Public Safety upon him for violating the rules. Because the pertinent facts are intertwined for Psyk's first and second issues and both pertain to the reliability of the breath test, we address them together, giving proper deference to the trial court's conclusions.

Specifically, Psyk asserts that the records showed the last calibration of the intoxilyzer before this incident was not conducted in compliance with DPS

guidelines, and Glenn Merkord, the DPS technical supervisor in charge of calibrating the intoxilyzer prior to Stafford, had a history of violating guidelines.

In the prosecution of a DWI offense, the result of a breath test for alcohol concentration is admissible. Tex. Transp. Code Ann. § 724.064 (West 2011). However, a breath specimen must be taken and analyzed under rules of the DPS. *Id*. § 724.016 (West 2011). When a breath specimen is offered in the trial of a DWI defense, 1) the legislature has thereby determined the validity of the underlying scientific theory; 2) the technique applying the theory has been determined by the legislature to be valid when the specimen was taken and analyzed by individuals who are certified by, and were using methods approved by the rules of, DPS; and 3) the trial court must determine whether the technique was properly applied in accordance with the department's rules on the occasion in question. *Reynolds v. State*, 204 S.W.3d 386, 390–91 (Tex. Crim. App. 2006). When the results of a breath test are challenged, the only thing left for the trial court to determine, in light of the legislature's recognition of the validity of the intoxilyzer's theory and technique, is whether the technique was properly applied in accordance with the department's rules on the occasion in question. *Id.* at 391.

Harrell v. State established the predicate for intoxilyzer test results. 725 S.W.2d 208, 209 (Tex. Crim. App. 1986). To introduce intoxilyzer results into

evidence, the State must first show: (1) the machine functioned properly on the day of the test by running a reference sample; (2) the existence of periodic supervision over the machine and operation by one who understands the scientific theory behind it; and (3) proof of the results of the test by a witness qualified to interpret such results. *Id.*; *Rhyne v. State*, 387 S.W.3d 896, 902 (Tex. App.—Fort Worth 2012, no pet.) (mem. op.).

At trial, Psyk argued the technical supervisor preceding Stafford was disciplined for his performance and noted a discrepancy on a calibration report. He moved to suppress the intoxilyzer results. The trial court held two hearings on Psyk's motion to suppress outside the presence of the jury. The first hearing was conducted before opening arguments. The second hearing was conducted immediately before Stafford's trial testimony. Psyk had the opportunity to question DPS technical supervisor Stafford at length regarding the intoxilyzer and the maintenance records of the intoxilyzer while under the supervision of Merkord. Psyk further examined Stafford while making a bill of exception.

Stafford was assigned to the intoxilyzer at issue beginning on October 4, 2013. Merkord was the DPS technical supervisor in charge of the instrument prior to Stafford, and he performed the last calibration on the machine prior to Psyk's arrest. During the hearings on the motion to suppress and the bill of exception, Psyk

acknowledged that the intoxilyzer records indicated that the calibration was performed in Coldspring, Texas, and not in the laboratory. However, Stafford believed that Merkord forgot to change the location in the heading reflecting "Coldspring," and that he actually calibrated the intoxilyzer in the lab. Regardless, Stafford testified that the heading in the paperwork did not have any effect on the calibration or proper operation of the intoxilyzer on the date of Psyk's arrest. Moreover, although Stafford agreed that there were some issues with the work Merkord did, and that he was disciplined and subsequently retired, Stafford was the person responsible for the machine immediately before, during, and after Psyk's arrest.

Stafford testified she performed maintenance on the intoxilyzer at issue on October 15, 2013, five days before Psyk's arrest, and again on November 14, 2013. Stafford maintained there was no indication that the calibration was deficient either before or after Psyk's arrest, and there were no issues with the overall operation of the intoxilyzer. Stafford also indicated that the documentation of the calibration was done in accordance with DPS Breath Alcohol Testing guidelines. Stafford explained the technique for the breath test specimen at issue was properly applied. Thus, Stafford concluded the intoxilyzer tests were valid. We conclude the State laid the necessary predicate for the admission of the intoxilyzer result.

Psyk further argued that without the testimony of Merkord to address the apparent errors in his calibration report, the State had failed to establish the reliability of the breath test evidence by clear and convincing evidence. Specifically, Psyk asserted that the State could not establish the reliability of the evidence by relying on Merkord's records because the records showed that the calibration was not conducted in compliance with DPS guidelines and Merkord had a history of violating guidelines. Psyk argued during the hearing that if the State claimed a clerical error on the part of Merkord, then the State should have had him testify. Psyk asserts the State did not show "[Merkord's] dereliction of his duties did not compromise the reliability of the calibration in question." Psyk contends there was no evidence that the third prong of the *Kelly* test had been met and that on the occasion in question was properly applied. *See Kelly*, 824 S.W.2d at 573. Psyk's counsel advised the judge he wanted to cross-examine Stafford about Merkord in front of the jury because he felt the State opened the door.

Stafford testified in front of the jury that she performed maintenance on the intoxilyzer five days before Psyk's arrest, and it was in working condition. She indicated she checked the instrument again approximately a month after Psyk's arrest and found it to be working properly. It was her opinion the machine worked

properly on the date of Psyk's arrest. Stafford indicated to the jury that the results of the two breath tests were .081 grams and .074 grams per 210 liters of breath.

Psyk preserved this issue by making a bill of exception. During Psyk's bill of exception, he questioned Stafford regarding the calibration records prepared by Merkord. Stafford testified during the bill of exception that Merkord was disciplined by the DPS for not following standard operating guidelines. Stafford would not agree that the record showed the calibration was done in Coldspring, Texas. As explained above, it was her belief that he had forgotten to change the designation on the document, which was not a violation of the standard operating guidelines.

Stafford personally verified the machine was working properly before and after Psyk's arrest by conducting routine maintenance. Stafford's checks of the intoxilyzer were done *after* Merkord's calibration, and she testified there was nothing deficient about the intoxilyzer's calibration when she tested it prior to Psyk's arrest. Moreover, the trooper who operated the machine testified that he followed the requisite procedures for administering the test. Accordingly, a reasonable fact finder could have found the test reliable by clear and convincing evidence, and the trial judge did not abuse his discretion by determining the intoxilyzer technique was properly applied in this situation and the results were admissible. *See Johnson*, 68 S.W.3d at 652–53; *Ross*, 32 S.W.3d at 855. We overrule Psyk's first issue.

In his second issue, Psyk argues the trial court improperly precluded cross-examination concerning the accuracy and reliability of the intoxilyzer.

The United States Constitution and the Texas Constitution provide that an accused will have the right to confront witnesses against him. *See* U.S. CONST. amend. VI; Tex. Const. art. I, § 10. It is well settled that the Sixth Amendment right to confront witnesses includes

> the right to cross-examine witnesses to attack their general credibility or to show their possible bias, self-interest, or motives in testifying. This right is not unqualified, however; the trial judge has wide discretion in limiting the scope and extent of cross-examination. Generally, the right to present evidence and to cross-examine witnesses under the Sixth Amendment does not conflict with the corresponding rights under state evidentiary rules.

Hammer v. State, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009) (citations omitted). Indeed, the constitutional right to present a defense includes the right to compulsory process and the rights to confront and cross-examine witnesses. *See Holmes v. State*, 323 S.W.3d 163, 173 (Tex. Crim. App. 2009) (op. on reh'g) (citing *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)). A trial court violates a defendant's right of confrontation if it improperly limits appropriate cross-examination. *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996).

A defendant does not have an unqualified right to cross-examination, however. *Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016) A

defendant "is not entitled to cross-examination that is effective in whatever way, and to whatever extent, he might wish." *Id.* at 909–10 (internal quotations and citations omitted). Trial judges have wide latitude to limit the scope of cross-examination by imposing restrictions on cross-examination. *Id.* at 910. Imposing reasonable limits on cross-examination can be based on considerations such as harassment, prejudice, confusion of the issues, a witness's safety, or interrogation that is repetitive or only marginally relevant. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

As long as the limits do not operate to infringe upon the Confrontation Clause's guarantee of "'an opportunity for effective cross-examination,'" a trial judge may limit the scope. *Johnson*, 490 S.W.3d at 909 (quoting *Van Arsdall*, 475 U.S. at 679). A trial court has discretion as to the extent of cross-examination of a witness, and its decision is not subject to reversal on appeal absent a clear abuse of discretion. *Cantu v. State*, 939 S.W.2d 627, 635 (Tex. Crim. App. 1997). The constitutionally improper denial of a defendant's opportunity to impeach a witness is subject to a harmless-error analysis. *Van Arsdall*, 475 U.S. at 684.

While the calibration history of the intoxilyzer machine in this case may be relevant to the foundation for the admissibility of the breath-test results, documents prepared in the regular course of equipment maintenance may be nontestimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) (declining,

expressly, to hold that anyone whose testimony that may be relevant to establishing the chain of custody, authenticity of a sample, or accuracy of a testing device must appear in person and further noting "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records"). As a general rule, the State is not required to produce every conceivable witness with knowledge of the case. *See Shelvin v. State*, 884 S.W.2d 874, 877 (Tex. App.—Austin 1994, pet. ref'd). The State was not constitutionally obligated to call Merkord as a witness merely because he was the technical supervisor who performed the last calibration before Psyk's breath was tested. *See Alcaraz v. State*, 401 S.W.3d 277, 280 (Tex. App.—San Antonio 2013, no pet.) (explaining that the appellant's right to confrontation was not violated because while admitting the breathalyzer report that demonstrated the appellant's BAC, he had the opportunity to confront both the operator of the intoxilyzer machine at the time the test was administered and the analyst who was qualified to give her opinion based on her review of maintenance and inspection records regarding the machine's accuracy and whether the instrument was working properly on the day the appellant's test was administered, even though she was not the person in charge of maintaining the intoxilyzer machine at the time of the breathalyzer test).

The testimony elicited from Stafford during Psyk's bill of exception was that a failure to change a name on a form did not constitute a failure to follow DPS standard operating guidelines. Moreover, there was no evidence in the record to indicate the intoxilyzer at issue was not working properly at the time of Psyk's arrest. The fact that Merkord was in charge of the instrument at some point prior to Psyk's arrest and was disciplined by the DPS is marginally relevant at best, particularly in light of the evidence indicating another technical supervisor took over the equipment and verified it was working properly before Psyk's arrest. Allowing cross-examination regarding Merkord would have likely been unfairly prejudicial and resulted in confusion of the issues. The trial court's refusal to allow Psyk to cross-examine Stafford regarding Merkord's history with the DPS and the discrepancy in the records fell within the zone of reasonable disagreement and did not constitute an abuse of discretion. We overrule issue number two.

Issue Three: Admission of Unfairly Prejudicial Evidence

In his third issue, Psyk argues that any mention in front of the jury of him being a doctor on his way to work was unfairly prejudicial and harmful to his defense. Based on Texas Rules of Evidence 401 and 403, Psyk filed a motion in limine regarding this evidence. *See* Tex. R. Evid. 401, 403. Psyk argued any probative value would be substantially outweighed by the prejudicial effect on the

jury. The judge granted the motion as to specific statements regarding Psyk being a doctor on his way to work, stating "[t]hat one fact is the prejudicial part of it." However, while a video recording of the stop was being played to the jury, a comment of that nature was inadvertently played to the jury.

Generally, all relevant evidence is admissible. Tex. R. Evid. 402. Relevant evidence is that which has any tendency to make the existence of any consequential fact more or less probable than it would be without the evidence. Tex. R. Evid. 401(a). In determining whether a particular piece of evidence is relevant, the trial judge should ask whether a reasonable person would consider the evidence helpful in determining the truth or falsity of any fact of consequence. *Montgomery*, 810 S.W.2d at 376. Nevertheless, a trial court may still exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect. Tex. R. Evid. 403.

Appellate courts must afford a trial court great discretion in its evidentiary decisions. *Montgomery*, 810 S.W.2d at 376. However, we will find a trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to guiding rules or principles. *See Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993); *Montgomery*, 810 S.W.2d at 380 (citations omitted).

The trial court specifically denied Psyk's motion in limine of the video recording between 19:09 and 19:30, where Psyk states he is "[s]upposed to be at work[.]" However, later during the hearing, the court explained "Dr. Psyk going to work in whatever condition he was in, I think that is the prejudicial part of this. The fact that he is a doctor, that's admissible." The trial judge also reasoned

> "[t]he issue is not whether he's a doctor or not or whether he works in an emergency room or not; the issue is that he is a doctor who works in an emergency room and was on his way to work at the time. That one fact is the prejudicial part of it."

Assuming, without finding, the trial court abused its discretion in admitting Psyk's statement that he is "'[s]upposed to be at work,'" we look to whether the error affected Psyk's "substantial rights" in this case. *See* Tex. R. App. P. 44.2(b). If it did not, we must disregard the error. *See id.* "[S]ubstantial rights are not affected by the erroneous admission of evidence 'if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect.'" *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) (quoting *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)). To determine whether the jury's decision was adversely affected by the error, we should consider

> everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it

> might be considered in connection with other evidence in the case. The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments and even voir dire, if applicable.

Id. at 355–56 (citations omitted).

Upon examining the record, we cannot conclude that the error affected Psyk's substantial rights. The State did not argue or emphasize to the jury that Psyk was a physician on his way to work. The only mention of Psyk being a physician was made by his own attorney during opening statements. Moreover, there was overwhelming evidence of Psyk's guilt, including multiple failed field sobriety tests, a video recording of the traffic stop, witnesses who observed him driving erratically, and his admission on video that he was intoxicated. We cannot conclude that one statement that Psyk was on his way to work had any impact on the jury's deliberations. *See Motilla*, 78 S.W.3d at 355–56. We overrule issue three.

Issues Four and Five: Jury Charge Error

At the charge conference, Psyk argued there was at least some evidence that the fifteen minute observation period before the intoxilyzer test was performed was not conducted, and the jury should receive a limiting instruction based on article 38.23. *See* Tex. Code Crim. Proc. Ann. art. 38.23 (West 2005). The judge denied Psyk's proposed instruction. Further, the definition of intoxication contained in the court's charge to the jury included drugs, controlled substances, and dangerous

drugs. Psyk objected to the inclusion of this language and argued there was no evidence that he was intoxicated by anything other than alcohol. Even though the trial judge agreed, the language was included in the charge.

A. Standard of Review

When reviewing allegations of charge error, we must first determine if error actually exists. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we find there was error in the charge, we must then determine if it resulted in sufficient harm to require reversal. *See id.* at 744. Because Psyk preserved the alleged errors at trial, any harm is sufficient to require a reversal. *See Gibson v. State*, 726 S.W.2d 129, 133 (Tex. Crim. App. 1987).

B. Analysis

In his fourth issue, Psyk argues the trial court violated article 38.23 of the Texas Code of Criminal Procedure in refusing to provide a jury instruction concerning a factual dispute material to the admissibility of the intoxilyzer results. *See* Tex. Code Crim. Proc. Ann. art 38.23(a). Article 38.23(a) provides that any evidence obtained by an officer in violation of the laws or Constitution shall not be used at trial, and "[i]n any case where the legal evidence raises an issue . . . the jury shall be instructed that if it believes, or has reasonable doubt, that the evidence was

obtained in violation of the provisions of this Article, . . . the jury shall disregard any such evidence[.]" *Id.*

Psyk timely requested an instruction under article 38.23 during the charge conference. *See id.* He argued that there was some evidence that the requisite fifteen minute observation period was not conducted prior to the administration of the intoxilyzer test, because the trooper could not tell the jury when the test started or when the test finished. We disagree.

At trial, the trooper testified he observed Psyk for the required fifteen minutes, but he could not provide an exact time the observation period began or ended. This testimony was elicited both from the trooper during the motion to suppress hearing and in front of the jury.

The trooper testified he administered the breath test to Psyk according to the procedures required. A breath specimen must be taken and analyzed under the rules of the department. Tex. Transp. Code Ann. § 724.016. Texas Department of Public Safety rules require that the breath test operator remain in the continuous presence of the subject for at least fifteen minutes before administering the breath test. 37 Tex. Admin. Code § 19.3(a)(1) (Tex. Dep't Pub. Safety, Techniques and Methods).[3]

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[3] The fifteen minute observation requirement was previously contained in section 19.4(c)(1) of the Texas Administrative Code. *See* 37 Tex. Admin. Code §

"A defendant's right to the submission of jury instructions under Article 38.23(a) is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible." *Madden v. State*, 242 S.W.3d 504, 509–10 (Tex. Crim. App. 2007). There are three requirements that a defendant must meet to be entitled to a jury instruction under 38.23(a). *Id.* at 510. First, the evidence must raise an issue of fact; second, the evidence on that fact must be affirmatively contested; and third, that contested factual issue must be material to the lawfulness of the challenged conduct in obtaining it. *Id.* For purposes of an article 38.23(a) instruction, the cross-examiner cannot create a factual dispute merely by his questions. *Id.* at 514. Only the answers are evidence which may create a dispute. *Id.* When there is a fact issue raised regarding the fifteen minute observation requirement, a defendant is entitled to an instruction that the jury disregard the test if it believes or has a reasonable doubt as to whether the fifteen minute observation requirement was followed. *See Howes v. State*, 120 S.W.3d 903, 907 (Tex. App.—Texarkana 2003, pet ref'd).

The intoxilyzer test form indicated Psyk's first breath test occurred at 8:02 a.m. The trooper testified consistently during the motion to suppress hearing and in

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19.4(c)(1) (2014) (Tex. Dep't Pub. Safety, Approval of Techniques, Methods, and Programs), *repealed by* 40 Tex. Reg. 129, 255 (2015).

front of the jury that he followed the requisite fifteen minute observation period. There was no testimony from any witness denying or disputing this. The total time on the traffic stop video was 1:19:41. This includes several minutes of the trooper following Psyk before he is pulled over, and the video ends when they arrive at the jail.

Based on the testimony of the 911 operators and the length of the audio recording on the 911 call, including some of the comments made on video, the evidence reveals Psyk was pulled over sometime after 6 a.m. Psyk asserts that the timing of the arrival at the jail, as shown by the traffic stop video, contradicted the trooper's testimony that he completed all the necessary tasks, like finishing paperwork and storing his gun, preceding the test. However, the Texas Administrative Code explicitly states direct observation is not required to show presence. 37 Tex. Admin. Code § 19.3(a)(1); *see State v. Reed*, 888 S.W.2d 117, 121 (Tex. App.—San Antonio 1994, no pet.) (explaining the 1990 Code amendment removing the requirement that operator continuously observe subject in favor of current requirement that the operator merely remain in the subject's "presence"). Psyk's argument assumes that the tasks the trooper completed upon arrival at the jail could not have occurred once the observation period began; such an argument is in

direct opposition to the Administrative Code. *See* 37 Tex. Admin. Code § 19.3(a)(1); *Reed*, 888 S.W.2d at 121.

This case is distinguishable from *Howes*, where a factual question arose regarding the intoxilyzer operator's completion of the fifteen minute observation period based on the timeline of events. *See* 120 S.W.3d at 907–08. In that case, the testimony of the officer regarding the arrival time at the jail where the observation commenced indicated they would have traveled thirteen to sixteen miles in eight minutes or less, which would have been nearly impossible. *Id.* at 906–07. There, our sister court in Texarkana held that the trial court committed error by not issuing an article 38.23(a) instruction; however, when conducting its harm analysis, the court ultimately held that the error did not result in harm. *Id.* at 908.

In this case, the testimony of the trooper, coupled with the comments on the video recording of the traffic stop indicated the trooper had time to conduct the requisite fifteen minute observation period. The video of the traffic stop ran approximately one hour and nineteen minutes and concluded with their arrival at the jail. Indeed, the trooper stated on the video recording of the stop at approximately twenty minutes in that it was 6:47 a.m., which would have put their arrival at the jail at approximately 7:46 a.m. This would have allowed the trooper to conduct the

fifteen minute observation period for the first breath test, which was recorded by the machine at 8:02 a.m.

To raise a disputed fact issue requiring an article 38.23 instruction, affirmative evidence is required that puts the fact into question. *Madden*, 242 S.W.3d at 513. Although the trooper could not recall the exact start and end time of the observation period, he insisted he observed Psyk for fifteen minutes. Defense counsel's cross-examination did not create a conflict in the evidence nor did the trooper's answers to those questions. *See id.* In light of the foregoing, we conclude the trial court did not err when it failed to provide Psyk's requested article 38.23 instruction to the jury. *See Serrano v. State*, 464 S.W.3d 1, 7–8 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (holding defendant failed to raise a fact issue about observation period and was not entitled to 38.23 instruction where officer did not remember observing defendant for fifteen minutes, but testified she must have observed defendant while he was in the holding cell, because she followed standard procedures); *see also Patel v. State*, No. 01–14–00575–CR, 2015 WL 5821439, at *2–3 (Tex. App.—Houston [1st Dist.] Sept. 29, 2015, pet. ref'd) (mem. op., not designated for publication) (upholding trial court's refusal to give article 38.23 instruction where defendant argued the officer did not have time to comply with the requisite fifteen minute observation period, noting the officer's unequivocal testimony and reasoning there

was no evidence the patrol car's time stamp was synchronized to the intoxilyzer time stamp); *Stalknecht v. State*, No. 09–06–463 CR, 2007 WL 4991416, at *2 (Tex. App.—Beaumont Mar. 12, 2008, no pet.) (mem. op., not designated for publication) (concluding evidence was sufficient to sustain DWI conviction where officer who operated intoxilyzer testified he "had no independent recollection" of appellant but "was sure he observed [appellant] for fifteen minutes prior to asking him to blow into the intoxilyzer because that was standard procedure"). We overrule issue four.

We now turn to Psyk's fifth issue and examine whether the trial court erred in providing the jury instructions concerning intoxication by substances other than alcohol. During the charge conference, Psyk argued that there was no evidence he was under the influence of a controlled substance, drug, or dangerous drug. The jury charge must set forth the "law applicable to the case[.]" Tex. Code Crim. Proc. art. 36.14 (West 2007); *Gray v. State*, 152 S.W.3d 125, 127 (Tex. Crim. App. 2004). The trial court is required to "fully instruct the jury on the law applicable to the case and to apply that law to the facts presented." *Id.* (quotations and citation omitted) A charge cannot simply incorporate allegations in the charging instrument; it must also apply the law to the facts presented at trial. *Id.* Even though the trial court is required to include statutory definitions in the charge that affect the meaning of the elements of the crime, the charge must be tailored to the facts presented at trial. *See Villareal*

v. State, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009); *Ouellette v. State*, 353 S.W.3d 868, 870 (Tex. Crim. App. 2011); *Kirsch v. State*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010). A "trial court must submit to the jury only the portions of the statutory definition of 'intoxicated' that are supported by the evidence." *Burnett v. State*, No. PD-0576-16, 2017 WL 4158919, at *5 (Tex. Crim. App. Sept. 20, 2017). It is error to do otherwise. *Id.*

In the present case, although the State's amended complaint included allegations of intoxication by "the introduction of alcohol, a controlled substance, a drug, a dangerous drug, or a combination of two or more of these substances[,]" the only evidence presented at trial indicated alcohol intoxication. Accordingly, the trial court erred by including language in the charge regarding intoxication by any substance other than alcohol, because it failed to apply the law to the facts produced at trial. *See id.*

We now must determine if it was harmless. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see also Gibson*, 726 S.W.2d at 133. In determining harm, we must look at the entire charge, the state of the evidence, including the contested issues and weight of probative evidence, the arguments of counsel, and any other relevant information revealed by the trial record. *See Almanza*, 686 S.W.2d at 171.

Unlike *Burnett*, where pill-related evidence became an integral part of the trial, here it was not an important part of the case. *Burnett*, 2017 WL 4158919 at *5 (noting that the charge error caused harm to the defendant but declined reviewing the harm analysis because the Court did not grant review on that issue). Neither the State nor Psyk presented any evidence that showed Psyk had taken any medication. Other than a brief mention during the trooper's testimony where he described asking Psyk if he was sure when Psyk responded that he had not taken any medication, there was no mention of any substance besides alcohol at trial. The only argument from the State during closing regarding medication came on rebuttal in an effort to show that Psyk was thinking about the trooper's questions before he answered them, not for the proposition that Psyk actually took medication. This was after Psyk argued in closing that he misspoke when he answered "yes" when asked if he was intoxicated by the trooper. Additionally, Psyk pointed out to the jury during closing that the case was about alcohol, even though the charge contained information regarding substances other than alcohol. With the testimony of multiple witnesses, a video recording of the traffic stop, and Psyk's admission that he was intoxicated, there was overwhelming evidence to support the jury's guilty verdict. When viewed with the totality of the record, we conclude the charge error was harmless and overrule issue five.

Having overruled all of Psyk's issues, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on August 15, 2017
Opinion Delivered April 18, 2018
Do Not Publish

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