In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00187-CR

CHEYENNE MICHAEL HALLORAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 14-301297

MEMORANDUM OPINION

A jury convicted Appellant, Cheyenne Michael Halloran, of the offense of Driving While Intoxicated ("DWI"). *See* Tex. Pen. Code Ann §§ 49.04(a) (West Supp. 2017). In one issue on appeal, Halloran argues the trial court erred in admitting evidence regarding an unknown substance without any evidence as to the nature of the substance, the effects of the substance, or whether it was in his blood. Halloran

further complains that the admission of such evidence resulted in harm. We affirm the trial court's judgment.

Background

On October 11, 2014, an individual contacted 911 after observing a car drive off the roadway and through a sign. A deputy sheriff was dispatched to the scene. According to the deputy, it appeared the vehicle went off the road, through a directional sign, and became stuck in the mud. The deputy testified that when he arrived on the scene, Halloran was sitting in the vehicle with the lights on. He observed that Halloran was lethargic, confused, and disoriented, with slurred speech and red and glossy eyes. The deputy testified that these signs were indicators of intoxication.

Additionally, the deputy testified that when he approached the vehicle, he observed a small baggy of what he considered to be synthetic marijuana, labeled "Geeked Up," on the ground near the driver's door.[1] According to the officer, Halloran admitted that the package was his and that he had thrown it out the window. The deputy also testified that Halloran admitted he had smoked the substance approximately two hours before operating his vehicle. The deputy found rolling

[1] In the trial court, Halloran's counsel generally referred to the substance not as synthetic marijuana, but as "flavored tobacco potpourri stuff" or simply potpourri.

papers, commonly used to roll synthetic marijuana joints, in the door of the vehicle as well.

The deputy subsequently administered several field sobriety tests and found numerous additional indicators that Halloran was intoxicated. The deputy placed Halloran under arrest for driving while intoxicated, then took him to a hospital to have a blood sample drawn for testing. The sample was ultimately analyzed by the State's crime laboratory in Austin, Texas. Results from the sample revealed the presence of methamphetamine in a concentration of .34 milligrams per liter, as well as amphetamine as a metabolite of the methamphetamine. The sample was not analyzed for the presence of synthetic marijuana, because the State's crime laboratory does not currently have a test for such drugs.[2] The substance in the "Geeked Up" package was also not tested.

The State charged Halloran with misdemeanor driving while intoxicated, alleging that "on or about October 11, 2014, in Montgomery County, Texas, CHEYENNE MICHAEL HALLORAN . . ., while operating a motor vehicle in a public place, was then and there intoxicated[.]" The State further alleged that "prior to the commission of the instant offense alleged . . . [Halloran] was convicted of an

[2] Miller explained that because synthetic marijuana drugs are constantly changing, the crime lab is unable to keep up with the variations, making it financially infeasible to test for synthetic marijuana.

offense relating to the operating of a motor vehicle while intoxicated." The prior conviction enhanced the current offense from a Class B misdemeanor to a Class A misdemeanor. *See* Tex. Penal Code Ann. §§ 49.04(b); 49.09(a) (West Supp. 2017).

At trial, the State presented extensive testimony from Kelsi Miller, a forensic toxicologist. Miller testified that methamphetamine is always active, meaning that if the drug is present in the blood, it is going to have an effect on the body. She also testified that the amphetamine in Halloran's blood was an active metabolite, so it would have an effect on the body, as well. She further opined that the level of methamphetamine found in Halloran's blood was such that it would be very unlikely that he would not be impaired.

Miller also testified that with a methamphetamine high, there is an early phase and a late phase. She explained that during the early phase, an individual would have increased energy and alertness, twitches, rapid speech, and signs of excitability. Miller noted the primary effect of the late phase is extreme fatigue or a "crash." In this stage, an individual coming down from the hyperactive excitability stage could sleep periodically for days and have "nod-offs," and they can also exhibit effects similar to alcohol, including muscle twitching, shaking, dizziness, and slurred speech. She further testified that Halloran falling asleep at the wheel, driving off a

dead-end road, and running over a traffic sign would be consistent with late phase methamphetamine use.

Before trial commenced, Halloran made an oral motion to suppress any mention of synthetic marijuana, arguing that the fact that the substance found at the scene was never tested and Halloran's blood was never tested for synthetic marijuana made any evidence regarding the substance irrelevant. He further objected that the evidence constituted an extraneous bad act that would be inadmissible under rule 404 of the Texas Rules of Evidence. The court denied the motion and overruled the objections. During trial, Halloran re-urged his objections to the testimony and other evidence regarding synthetic marijuana. The trial court overruled the objection and allowed Halloran to have a running objection.[3]

Standard of Review

We review a trial court's rulings on admission of evidence for an abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 378–79 (Tex. Crim. App. 1990) (op. on reh'g). We uphold a trial judge's decision to admit evidence as long as the

[3] In the trial court, Halloran also urged exclusion of the evidence on the grounds that it was unfairly prejudicial under Rule 403 of the Texas Rules of Evidence, and that the State's forensic toxicologist was not qualified to testify under Rule 702 of the Texas Rules of Evidence. However, we address herein only the arguments asserted and briefed on appeal. *See* Tex. R. App. P. 38.1(i); *See Colburn v. State*, 966 S.W.2d 511, 517 n. 5 (Tex. Crim. App. 1998)

result is not outside the zone of reasonable disagreement. *Id*. at 391. 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 378–79.

Analysis

"Generally, all relevant evidence is admissible." *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009); 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. When determining whether evidence is relevant, it is important for courts to examine the purpose for which the evidence is being introduced. *See Moreno v. State*, 858 S.W.2d 453, 464 (Tex. Crim. App. 1993). In determining whether a particular piece of evidence is relevant, the trial judge should ask if a reasonable person would believe that the evidence is helpful in determining the truth or falsity of any fact of consequence. *Montgomery*, 810 S.W.2d at 376.

In the present case, Halloran argues that there is no evidence as to the composition of the substance referred to as synthetic marijuana, because the package found at the scene was not submitted to the crime lab for testing. The officer acknowledged that he did not know the composition of what was found in the

package at the scene. However, he testified that the package was, based on his experience in law enforcement, what is commonly known as synthetic marijuana. Moreover, according to the officer, Halloran admitted the package found at the scene was his, he threw it out his window, and he smoked it a couple of hours before he ran his car off the road.

Halloran relies heavily on *Layton*, for the proposition that in order for a substance, other than alcohol or marijuana, to be relevant in a driving while intoxicated case, there must be evidence of the presence of the intoxicant in the defendant and competent scientific evidence of the effect of each substance. However, that case is distinguishable in that the Appellant in *Layton* was charged specifically with alcohol intoxication. 280 S.W.3d at 241. The relevant inquiry in that case was whether the Appellant was intoxicated by alcohol, not another substance combined with alcohol. *Id*. The Court held that without expert testimony establishing the relevance of the appellant's prescription medication to the charge of alcohol intoxication, testimony regarding the use of prescription medications was not admissible. *Id*. at 241–42. We find the present case more analogous to *Ashby v. State*, 527 S.W.3d 356 (Tex. App.—Houston [1st Dist.] 2017, pet. filed). In that case, our sister court in Houston distinguished a matter on appeal from *Layton* on the basis

that the DWI charge at issue was—as in this case— not limited to intoxication by consumption of alcohol. *See Ashby*, 527 S.W.3d at 364–65.

The State charged Halloran with "operating a motor vehicle in a public place, [and] was then and there intoxicated[.]" As defined in the jury charge, "'[i]ntoxicated' means not having the normal use of mental or physical faculties by reason of the introduction of alcohol, or a controlled substance, or a drug, or a dangerous drug, or a combination of two or more of those substances, or any other substance into the body . . . ."

The fact that Halloran admitted the package was his, admitted that he threw it out of the vehicle, and admitted that he smoked it a couple of hours before the incident would certainly have a tendency to make a fact more or less probable. *See* Tex. R. Evid. 401(a). This, in light of the jury charge which indicates that intoxication can occur by introducing a combination of two or more substances or any other substance into the body, without specifying what kind of substance, makes the evidence relevant. *See* Tex. R. Evid. 401, 402.

Halloran further argues that the evidence of synthetic marijuana is inadmissible under 404(b)(1), which provides that evidence of a person's bad acts are not admissible to prove a person's character in order to show that a person acted in accordance with the character. Tex. R. Evid. 404(b)(1). We find this argument

unpersuasive, as Halloran does not articulate any character trait with which the evidence arguably shows conformance. Rather, it appears to have been offered to show that, by Halloran's own admission, he smoked the substance within a couple of hours prior to operating his vehicle. *See* Tex. R. Evid. 404(b)(2). Halloran's admission that he had smoked the substance recently contributed to the deputy's belief that a DWI investigation was warranted. Accordingly, it was within the zone of reasonable disagreement for the trial court to determine that the admission of evidence regarding synthetic marijuana was relevant for a purpose other than to show character conformance. *See Montgomery*, 810 S.W.2d at 391; Tex. R. Evid. 404(b)(2).

Identification of the substance that causes intoxication is not an element of the DWI offense. *Gray v. State*, 152 S.W.3d 125, 132 (Tex. Crim. App. 2004). "Instead, it is an evidentiary matter." *Id.* Even if the exact chemical compound is unknown, evidence regarding synthetic marijuana found at the scene —especially in light of Halloran's admission that he smoked it within a couple of hours of his arrest—is relevant, and we find that the trial judge did not abuse his discretion by admitting this evidence.

Moreover, any nonconstitutional error that does not affect a substantial right must be disregarded. Tex. R. App. P. 44.2(b). Substantial rights are not affected by

the erroneous admission of evidence if, after examining the record as a whole, the appellate court "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)). In making this determination, the reviewing court may consider the jury instructions, the State's theory and any defensive theories, closing arguments, and even voir dire, if applicable, and should calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence. *Id.* at 355–56.

In addition to the evidence regarding synthetic marijuana, there was evidence of the presence of methamphetamine in Halloran's blood at a level of .34 milligrams per liter. The State's forensic toxicologist explained that it would be unlikely an individual would not be impaired with a level of methamphetamine that high. Assuming, *arguendo*, that the admission of synthetic marijuana evidence was error, there was sufficient evidence offered at trial that the level of methamphetamine Halloran had in his system would have been intoxicating and that if Halloran fell asleep at the wheel, went off the road and ran over a traffic sign, that behavior would be consistent with late phase methamphetamine use. Additionally, the arresting deputy testified at length and in detail regarding the number of indicators of impairment Halloran exhibited at the time of his arrest. In light of the substantial

evidence that Halloran was intoxicated while operating his vehicle, any error in the admission of evidence regarding synthetic marijuana was harmless. *See Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000) (holding that "the presence of overwhelming evidence supporting the finding in question can be a factor in the evaluation of harmless error").

Conclusion

In light of the foregoing, we find that the trial court did not abuse its discretion in admitting evidence of synthetic marijuana. Therefore, we overrule Halloran's issue and affirm the trial court's judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on October 20, 2017
Opinion Delivered January 31, 2018
Do Not Publish

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