COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00022-CR

JUAN CARLOS BAIRES — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1384549D

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Juan Carlos Baires appeals his conviction for driving while intoxicated (DWI), felony repetition. He raises three points claiming that the trial court abused its discretion by permitting the arresting officer to testify as a medical expert and by limiting cross-examination of the State's forensic scientist

[1]*See* Tex. R. App. P. 47.4.

and erred by failing to order preparation of a presentence investigation (PSI) report. Because we agree with the State's assertion that error was not preserved regarding the arresting officer's alleged medical expert testimony, because the trial court did not abuse its discretion concerning Baires's cross-examination of the State's forensic scientist, and because Baires did not timely request preparation of a PSI report, we affirm the trial court's judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

After witnessing multiple traffic code violations by a Ford Explorer, Officer Stacie Brown with the Arlington Police Department activated her overhead lights and initiated a traffic stop. When Officer Brown approached the driver and sole occupant of the Ford Explorer—Baires—she immediately smelled the odor of alcohol and marijuana coming from the vehicle. She saw a Corona bottle with a small amount of liquid left in it and noticed that Baires had bloodshot eyes, slurred speech, and the odor of alcohol on his breath. Officer Brown asked Baires for his identification. Baires had difficulty removing his driver's license from his wallet. When Officer Brown asked Baires to step out of the Ford Explorer, he was unsteady and leaned against the vehicle. Officer Brown later found a second bottle of Corona, which was empty, and an empty bottle of vodka in the vehicle.

[2]Because Baires does not challenge the sufficiency of the evidence, we limit our recitation of the facts to those necessary to dispose of his three points.

Officer Brown questioned Baires, and he admitted that he had consumed two or three beers. Officer Brown asked whether Baires had any medical or physical issues, and he disclosed that he was diabetic and that he had recently undergone heart surgery. After Baires indicated that he had no prior head injuries or head trauma and did not wear contact lenses, Officer Brown began to administer the standardized field sobriety tests, beginning with the horizontal gaze nystagmus (HGN) test. Officer Brown testified that Baires exhibited six out of six clues on the HGN test.

During the HGN test, Baires said that he felt dizzy and grabbed his chest. Officer Brown discontinued the field-sobriety tests and allowed Baires to sit down while they waited for an ambulance to arrive. Medics arrived and determined that Baires had an elevated heart rate and that his blood-sugar level was high. Baires agreed to go to the hospital for treatment.

After Baires was medically cleared at the hospital of any heart or diabetic issues, Officer Brown arrested Baires. Officer Brown requested a blood specimen from Baires, and he provided one.

The blood sample obtained from Baires was initially tested for its blood-alcohol concentration (BAC) by Alexandria Bliss, a lab technician with Integrated Forensic Laboratories (IFL), and the results were analyzed by Elizabeth Feller, a forensic scientist with IFL.[3] The blood sample obtained from Baires was

[3]Prior to trial, however, the State filed a *Brady* notice informing Baires that the State would not sponsor Feller as a witness due to an issue regarding her

subsequently tested by forensic scientist Andrew Horsley of IFL, and Horsley's analysis showed Baires's BAC to be .206.

At trial, Baires called one witness: a licensed interpreter. The interpreter reviewed the video of the traffic stop and testified that Baires, who is originally from El Salvador, did not slur his words but instead spoke with a very heavy accent as he answered the officer's questions in English. The interpreter further testified that it appeared Baires's delay in answering the officer's questions was due to not understanding what the officer was saying.

After hearing the above evidence, the jury found Baires guilty. The trial court conducted a hearing on punishment and sentenced Baires to four years' imprisonment. Baires then perfected this appeal.

III. ANY ERROR IN ADMITTING OFFICER BROWN'S TESTIMONY REGARDING DIABETES WAS NOT PRESERVED

In his first point, Baires argues that the trial court abused its discretion when it allowed Officer Brown to testify as an expert regarding the medical effect of diabetes on him. Baires's argument stems from the following line of questioning that occurred during the direct examination of Officer Brown:

> Q. (BY [PROSECUTOR]) Do you believe that the defendant and the signs of intoxication that he was showing had anything to do with him having diabetes?

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credibility. The State's *Brady* notice stated that in 2013, Feller had been terminated from a prior job as a lab analyst at a different laboratory in Dallas for violating lab procedures and was later untruthful about the reasons for this termination in a disclosure she made to the Tarrant County Criminal District Attorney's Office.

A. No.

[DEFENSE COUNSEL]: Objection, Your Honor. She hasn't been qualified as a physician to testify about the effects of diabetes.

THE COURT: You may answer if you know, but you may not speculate about something you don't know.

A. Based on my experience and what I've seen with other people that I've come across with diabetes, some high, some low, I did not believe in this case it was due to the diabetes.

Q. (BY [PROSECUTOR]) Did you believe that it was solely due to the introduction of alcohol in his system?

[DEFENSE COUNSEL]: Objection, Your Honor. Yet again, I don't believe the officer is qualified to testify as a physician about the cause. It causes her to speculate as to the cause. She's not been qualified as an expert.

THE COURT: And once again, you may not speculate, but if you have personal knowledge, you may testify from that.

A. I believe he's intoxicated on the alcohol.

Q. (BY [PROSECUTOR]) The HGN test that we talked about earlier, can the clues that you saw, the six out of six clues, can those be caused or can you see those with someone having diabetes?

A. Diabetes does not cause the eyes to jerk involuntarily.

Q. What causes the eyes to jerk unvoluntarily (sic)?

A. Alcohol is one of those drugs. There's several drugs, but alcohol is one that does cause it.

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request,

objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016). Additionally, a defendant must obtain an adverse ruling on his objection. *Ramirez v. State*, 815 S.W.2d 636, 643 (Tex. Crim. App. 1991); *Darty v. State*, 709 S.W.2d 652, 655 (Tex. Crim. App. 1986). To avoid waiver, a party must continue to object each time the objectionable evidence is offered. *Bailey v. State*, 532 S.W.2d 316, 322 (Tex. Crim. App. 1975). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009).

The State contends that the above error, if any, was forfeited. Based on the record before us, we must agree. Baires's initial objection was made after Officer Brown had already answered the prosecutor's question and was therefore not timely. *See Glover v. State*, 956 S.W.2d 146, 147 (Tex. App.—Beaumont 1997, pet. ref'd) (recognizing that because ground for objection was apparent when question was asked, objection made after answer was given was untimely). And the trial court did not rule on Baires's objections; instead, the trial court instructed Officer Brown to answer the prosecutor's question if she had personal knowledge of the answer. This instruction by the trial court does not constitute a ruling on Baires's objection. *See Ramirez*, 815 S.W.2d at 643 (holding error waived because trial court's response of "[i]f she knows[]" to appellant's speculation objection did not constitute adverse ruling on objection). Moreover, Baires did not continue to object when the State asked Officer Brown about

whether diabetes would cause Baires to exhibit all six clues on the HGN test. *See Ethington v*. *State*, 819 S.W.2d 854, 859–60 (Tex. Crim. App. 1991) (holding single objection to first question did not preserve error as to subsequent detailed testimony in absence of grant of running objection). Accordingly, the error asserted in Baires's first point was not preserved for appeal. We overrule Baires's first point.

IV. No Violation of Due-Process Right to Present a Defense

In his second point, Baires argues that the trial court violated his due-process right to present a defense by allegedly excluding evidence of Feller's involvement with Baires's blood sample.

A. Standard of Review and the Law Applicable to the Due-Process Right to Present a Defense

A trial court's decisions concerning the admission or exclusion of evidence and concerning the extent of cross-examination are reviewed under an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011) (concerning the admission or exclusion of evidence); *Cantu v. State*, 939 S.W.2d 627, 635 (Tex. Crim. App.) (concerning the extent of cross-examination), *cert. denied*, 522 U.S. 994 (1997); *Walker v. State*, 300 S.W.3d 836, 843 (Tex. App.—Fort Worth 2009, pet. ref'd) (concerning the extent of cross-examination). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1200 (1997).

B. The Allegedly Excluded Evidence

During his cross-examination of Horsley, Baires sought to introduce into evidence Feller's BAC analysis. The State objected based on relevance, hearsay, and lack of authentication, and the trial court sustained the State's hearsay and authentication objections. Baires continued to urge the trial court to allow him to mention that Horsley's BAC analysis was not the first one. After further discussion,[4] the trial court ruled that Baires would be permitted to cross-examine Horsley about the chain of custody and about his answer during direct that he "didn't come across anything unusual" with regard to the testing of Baires's blood sample.

Subsequently, during cross-examination, Baires asked Horsley why he had tested Baires's blood sample over a year after the offense had occurred. Horsley explained that the departures of various employees from IFL had caused Baires's blood sample to be retested. Horsley said that Bliss, the lab technician, performed the initial testing, and Feller wrote the report. After Feller left IFL, Horsley performed a reinterpretation of Feller's report. But when Bliss later left IFL, Horsley performed a retest—a complete new test—of Baires's blood sample because at that point, neither Bliss nor Feller were available to testify. Horsley had no personal knowledge of the reasons why Bliss and Feller were no longer working for IFL. Baires asked Horsley whether he was aware that his company

[4]The trial court asked whether Baires had subpoenaed Feller to testify; Baires's trial counsel admitted that she had not.

had been the subject of "some controversy" recently; Horsley answered, "No, I was not."

On redirect, the State admitted into evidence Feller's analysis of Baires's blood sample, which showed a BAC of .228. Horsley explained that when he reinterpreted Feller's results, he did not have any issue with the quality controls or the sample and reached the same result as Feller—a BAC of .228.

On recross, Baires questioned Horsley specifically about Feller's analysis. Baires asked whether Horsley's file contained information about any misconduct committed by Feller, and Horsley responded, "Not that I know of, no." Baires questioned Horsley about why his retest showed a BAC of .206 while Feller's report showed a BAC of .228 for the same blood sample, and he explained that it was common to see the amount of ethanol decline over time due to evaporation. At a bench conference outside the hearing of the jury, Baires requested that he be allowed to introduce the State's *Brady* notice for the jury to "see that there was an issue with a lab tech." The trial court denied the request.

C. The Record Does Not Support Baires's Argument

In the argument portion of this second point, Baires asserts that he should have been allowed to present evidence that "would have demonstrated to the jury that the testing of [his] blood sample was infected with the taint of Elizabeth Feller's participation." According to Baires, his defensive theory—that his behavior was a manifestation of a hypoglycemic episode—relied on the corollary theory that his blood test results "were fatally tainted by the improper testing

procedures utilized at the forensic testing lab," and he argues that the trial court's exclusion of the evidence related to Feller "hamstrung the efficacy of [his] defensive strategy in the minds of the jury."

After reviewing the record and Baires's brief, it is not clear what specific evidence he is asserting that the trial court wrongly prevented him from presenting to the jury. As outlined above, although the trial court initially excluded Feller's analysis and limited Baires's questioning of Horsley to the chain of custody and to exploring his answer during direct that he "didn't come across anything unusual" in testing Baires's blood sample, Feller's analysis was ultimately admitted into evidence, and Baires was ultimately allowed to cross-examine Horsley about Feller's interpretation of the test results. To the extent that Baires may be complaining of his inability to elicit from Horsley the details of Feller's alleged misconduct, such inability was not the result of a trial court ruling; Horsley testified that he did not have any knowledge of misconduct by Feller. If Baires is complaining of the trial court's exclusion of the State's *Brady* notice, he proffered the notice for the jury to "see that there was an issue with a lab tech," and the fact that there was an issue with a lab tech at IFL who had previously analyzed Baires's blood sample was, ultimately, put before the jury to the extent that the jury was told that Feller's and Bliss's departures from IFL required

Horsley to perform a complete retest of Baires's blood sample a year after the offense.[5]

Because the record does not support Baires's contention that he was deprived of his constitutional right to present a meaningful defense, we overrule his second point.

V. ANY ERROR FROM LACK OF PSI REPORT WAS FORFEITED

In his third point, Baires argues that the trial court reversibly erred when it refused his request for the preparation of a PSI report.

After the jury returned its verdict, the trial court took a brief recess and then proceeded directly to a punishment hearing. At the punishment hearing, Baires availed himself of the opportunity to introduce evidence, including a letter from his brother requesting leniency and a copy of Baires's visa showing he could legally work in the United States. Baires also called his brother to testify at the punishment hearing. Baires's brother testified about how Baires had come to the United States seeking to provide a better life for his family and said that Baires could work in construction with him to provide for his wife and four children, that he would keep Baires from drinking and driving because Baires and his family would live with him, and that he would help Baires succeed on community

[5]Moreover, the trial court did not abuse its discretion by excluding the *Brady* notice based on the State's hearsay objection. *See Stevens v. State*, 234 S.W.3d 748, 788 (Tex. App.—Fort Worth 2007, no pet.) (holding trial court's exclusion of hearsay did not violate appellant's due-process rights because appellant did not call declarant to testify).

supervision. The State cross-examined Baires's brother, establishing that Baires had previously been arrested on DWI charges in 1995, 1997, 1998, 1999, 2000, 2002, and 2011 and had previously been placed on community supervision and was not able to follow the community supervision terms.

After both sides rested and closed and after both sides presented argument at the punishment hearing, the trial court asked Baires to rise and asked whether there was any legal reason why he should not be sentenced at that time. In response, defense counsel for the first time mentioned a PSI report; defense counsel stated, "A presentence report has not been ordered or done by the Court yet." The trial court stated that Baires was not entitled to a PSI report "at this time" and then sentenced him to four years' imprisonment.

Unless certain exceptions apply, a trial court must order preparation of a PSI report in a felony case. *See generally* Tex. Code Crim. Proc. Ann. art. 42.12, § 9(a), (g) (West Supp. 2016); *Jimenez v. State*, 446 S.W.3d 544, 550 (Tex. App.—Houston [1st Dist.] 2014, no pet). A complaint concerning the trial court's error in failing to comply with this statutory duty must be preserved in the trial court by a timely and specific request, objection, or motion that is ruled on by the trial court. *See* Tex. R. App. P. 33.1(a)(1)(A); *Jimenez*, 446 S.W.3d at 551 (holding defendant forfeited trial court's alleged error in failing to order a PSI report under code of criminal procedure article 42.12, section 9A(c) by failing to request a PSI report pursuant to this section). That is, a defendant's statutory right to a PSI report is a waivable right. *See Griffith v. State*, 166 S.W.3d 261,

263–64 (Tex. Crim. App. 2005) (holding defendant's express waiver of right to a PSI report when he pleaded guilty without a plea bargain remained effective when trial court subsequently proceeded to adjudication of guilt and sentencing despite defendant's request for a PSI report after adjudication of guilt and statutory exceptions to felony PSI report requirement did not apply); *Jimenez*, 446 S.W.3d at 551.

At no time prior to the conclusion of the punishment hearing did Baires specifically request a PSI report, object to proceeding with a punishment hearing in the absence of a PSI report, or file a motion seeking a PSI report as required to preserve error for our review. *See* Tex. R. App. P. 33.1(a)(1)(A); *Jimenez*, 446 S.W.3d at 551. Baires's first mention of the lack of a PSI report was stated as a reason why sentence should not be imposed by the trial court[6] after Baires had presented punishment evidence, had rested and closed his case at punishment, and had presented argument to the court concerning punishment. Because Baires did not specifically request a PSI report, object to proceeding with a punishment hearing in the absence of a PSI report, or file a motion seeking a PSI report at any time prior to the conclusion of his punishment hearing, he forfeited his right to complain of any error concerning the trial court's failure to order a PSI report. *See* Tex. R. App. P. 33.1(a)(1)(A); *Jimenez*, 446 S.W.3d at 551; *see also Griffith*, 166 S.W.3d at 263-64.

[6]The lack of a PSI report is not a reason to prevent sentencing. *See* Tex. Code Crim. Proc. Ann. art. 42.07 (West 2006).

Alternatively, we hold that any error stemming from the lack of a PSI report must be disregarded because it did not affect Baires's substantial rights. *See* Tex. R. App. P. 44.2(b); *Whitelaw v. State*, 29 S.W.3d 129, 132 (Tex. Crim. App. 2000) (holding any error in failure to order the preparation of a PSI report is subject to review for harm under rule 44.2(b)), *superseded by statute as stated in Jimenez*, 446 S.W.3d at 550 n.2; *Yarborough v. State*, 57 S.W.3d 611, 618–19 (Tex. App.—Texarkana 2001, pet. ref'd). In assessing the impact an alleged 44.2(b) error may have had on a punishment decision, we consider the entire record, the nature of the evidence supporting the punishment decision, the character of the error, and how it might be considered in connection with other evidence in the case. *See Yarborough*, 57 S.W.3d at 619 (citing *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000)). Given the nature and character of the evidence supporting the trial court's sentence of four years' imprisonment (Baires's driving that triggered the traffic stop; his .206 BAC; his slurred speech, which Baires's expert claimed was a heavy accent; and his brother's punishment testimony about Baires's numerous prior arrests for DWI), and given the character of the error (the lack of a PSI report in a traffic-stop-initiated felony DWI) and how a PSI report might be considered in connection with the other evidence, we hold that if Baires has not forfeited his claims of error in the trial court's failure to order the preparation of a PSI report, nonetheless, such error did not affect his substantial rights. *See Buchanan v. State*, 68 S.W.3d 136, 140 (Tex. App.—Texarkana 2001, no pet.); *Yarborough*, 57 S.W.3d

at 620. Thus, we alternatively hold that even if Baires did not forfeit this complaint, we are required to disregard the error. *See* Tex. R. App. P. 44.2(b). We overrule Baires's third point.

VI. CONCLUSION

Having overruled Baires's three points, we affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: DAUPHINOT, GARDNER, and WALKER, JJ.

DAUPHINOT, J., concurs without opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 6, 2016