COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00120-CR

ALSTON JOSEPH JOHNSON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 9 OF TARRANT COUNTY
TRIAL COURT NO. 1447924

MEMORANDUM OPINION[1]

A jury convicted Appellant Alston Joseph Johnson of driving while intoxicated with a blood alcohol concentration of .15 or more, a Class A misdemeanor, *see* Tex. Penal Code Ann. § 49.04(a), (d) (West Supp. 2017), and the trial court sentenced him to pay a fine of $300 and to serve ninety days in jail but suspended imposition of the confinement portion of the sentence and placed

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

him on sixteen months' community supervision, *see id.* § 12.21 (West 2011). In one issue, Appellant complains of jury charge error. Because we hold that the trial court did not err, we affirm the trial court's judgment.

I. PROCEDURAL AND EVIDENTIARY FACTS

One June 2015 evening, Hillary Green was driving home after a workout. Her windows were down. Stopped in the middle lane of the access road of Interstate 20 at the Green Oaks Boulevard intersection, she was waiting for the traffic signal light to turn green when a Mustang "slammed into the back of [her Tahoe] . . . without any warning." Green had heard "no screech [of] brakes" or "squealing of tires."

After the impact, Green looked in her side mirror and saw Appellant, the driver who hit her, exit the Mustang and walk toward her. She got out of her Tahoe to talk to him. Green, who had tended bar several years, noticed that:

- Appellant's flip-flops were on the wrong feet;
- His speech was very rapid and slurred;
- He "was a little aggressive in his initial interactions with" her; and
- He was standing "uncomfortably close" to her, which she found "unusual for the situation."

Even though she did "not recall" "notic[ing] an odor of alcohol about him," based on Appellant's "initial behaviors and [their] interaction," Green believed he was intoxicated.

Green called 911 “probably 20 seconds after the accident . . . occurred,” and she and Appellant moved their vehicles to a nearby parking lot to wait on the police. Green told one of the officers who arrived that she thought Appellant was intoxicated.

Officer Lynette Hoerig of the Arlington Police Department responded to the scene at approximately 8:00 p.m. She spoke briefly and separately with Appellant and then Green. Officer Hoerig returned to Appellant, stood closer to him than she had in their initial conversation, and noticed a strong “odor of alcohol coming from his person.” He denied that he had been drinking and explained the odor by telling her that he had been with friends who had been drinking. Officer Hoerig directed him to walk towards her. When he did, “[h]e was a little unsteady” and “kind of swaying.” Upon her further questioning, he admitted to drinking a beer at TCU about thirty or forty-five minutes earlier. Based on the accident, the strong odor of alcohol, and Appellant’s poor performance on three standard field sobriety tests—the horizontal-gaze-nystagmus test, the walk-and-turn test, and the one-leg stand, Officer Hoerig arrested him for driving while intoxicated.

Appellant consented to a blood draw, and at almost 10:00 p.m. that night, while Officer Hoerig observed, Paramedic Cassandra Harrison drew his blood. The blood draw occurred about two hours after the accident.

The misdemeanor information charged that Appellant, “operate[d] a motor vehicle in a public place while [he] was intoxicated” and “that the analysis of a

specimen of [his] blood in this case showed an alcohol concentration level of 0.15 or more at the time the analysis was performed."

In addition to witnesses who testified about the accident, Appellant's behavior at the scene of arrest, and the blood draw, Andrew Horsley, a blood alcohol analyst for NMS Labs who tested a sample of Appellant's blood drawn on the night of his arrest, testified at trial that:

- "The ethanol alcohol concentration was 0.171 grams per 100 milliliters of whole blood";
- An alcohol concentration of .171 is greater than a .15 alcohol concentration; and
- "A retrograde extrapolation was not performed with this case."

II. DISCUSSION

A. Appellant Now Complains About the Verdict Form but Did Not Object to It in the Trial Court.

In his sole issue, Appellant complains that "[t]he Jury Charge and Verdict Form, taken as a whole, improperly instruct[ed] the jury on the law of the case, confusing and misleading the jury." Specifically, he argues that the verdict form was erroneous because it "commingle[d]" the issues of per se intoxication (0.08 alcohol concentration at the time of driving) and an alcohol concentration of 0.15 or more at the time of the analysis. Appellant did not object to the verdict form in the trial court. Instead, he objected "to the charge language allowing [the jury] to find intoxication by reason of the .17 result two hours later at the time of testing," clarifying that he was looking at paragraph one of the charge, and the trial court overruled the objection.

B. We Nevertheless Review the Charge.

Verdict forms are a part of the jury charge. *Jennings v. State*, 302 S.W.3d 306, 307 (Tex. Crim. App. 2010). "[A]ll alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Id.*

C. Appellant Admits that Key Parts of the Jury Charge Are Correct.

The abstract portion of the jury charge provided,

> A person commits the offense of driving while intoxicated with an alcohol concentration level of 0.15 or more if that person is intoxicated while operating a motor vehicle in a public place and an analysis of a specimen of the person's blood showed an alcohol concentration level of 0.15 or more at the time the analysis was performed.

The charge defined "Intoxicated" as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol into the body or by having an alcohol concentration of 0.08 or more." Tex. Penal Code Ann. § 49.01(2) (West 2011). The application paragraph of the jury charge provided,

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 29th day of June, 2015, in Tarrant County, Texas, [Appellant] did then and there operate a motor vehicle in a public place while intoxicated and that an analysis of a specimen of [his] blood showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, then you will find [him] guilty of driving while intoxicated as charged.

Finally, the verdict form gave the jury the option of finding Appellant not guilty or guilty "of the offense of driving while intoxicated with a specimen showing an alcohol concentration level of 0.15 or more."

Appellant concedes that:

- "Intoxicated" was properly defined in the charge;
- A Class A misdemeanor under section 49.04 of the penal code was properly charged; and
- The application paragraph properly applied the law to the facts.

He complains, however, that the verdict form did not first require the jury to decide guilt of driving while intoxicated, *see* Tex. Penal Code Ann. § 49.04(a), and then, only if they found guilt, require them to separately answer whether they found an analysis of a specimen of his blood showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, *see id.* § 49.04(d). He argues that having just one question could make a jury believe that the 0.15 finding either satisfies the per se theory of intoxication or eliminates "the requirement that Appellant's BAC was 0.08 or greater at the time of the operation of the vehicle."

D. The Trial Court Did Not Err by Requiring a General Verdict on the Offense's Elements.

Appellant points to no evidence in the record that the jury was confused. Further, the jury was not required to find that Appellant was intoxicated under the per se theory at all because the jury was charged on both the per se and impairment (or subjective) theories of intoxication. *See* Tex. Penal Code Ann.

§ 49.01(2); *Kirsch v. State*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010). Appellant does not complain that the jury should not have been charged on only one of the alternative means available to the State of proving intoxication. *See Burnett v. State*, 541 S.W.3d 77, 84 (Tex. Crim. App 2017) ("[T]he trial court must submit to the jury only the portions of the statutory definition of 'intoxicated' that are supported by the evidence. To do otherwise is error.").

Additionally, the Class B offense of driving while intoxicated and the Class A offense of driving while intoxicated at issue in this case are two separate offenses with different elements. *See* Tex. Penal Code Ann. § 49.04(a), (d); *Navarro v. State*, 469 S.W.3d 687, 696 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). The 0.15 alcohol concentration element differentiates the two offenses. *See* Tex. Penal Code Ann. § 49.04(a), (d); *Navarro*, 469 S.W.3d at 696. While at least one court has held that submitting the question whether a defendant's alcohol concentration exceeds 0.15 as a special issue is harmless, *Madrid v. State*, No. 01-15-00977-CR, 2017 WL 1629515, at *11–13 (Tex. App.—Houston [1st Dist.] May 2, 2017, no pet.), Appellant does not direct us to any law, nor have we found any, requiring that element to be separately charged. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 1(a) (West Supp. 2017) ("The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue."); *Moore v. State*, No. 10-09-00386-CR, 2010 WL 3272398, at *2 (Tex. App.—Waco Aug. 18, 2010, pet. ref'd) (mem. op.,

not designated for publication) (holding that submitting jurisdictional elements of felony assault with bodily injury on a family member as special issues was error).

Finally, the jury charge, including the verdict form, properly tracks the statute under which Appellant was charged. *See Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994) (stating general rule that "[a] jury charge which tracks the language of a particular statute is a proper charge on the statutory issue"), *cert. denied*, 514 U.S. 1068 (1995). We therefore hold that the trial court did not err, and we overrule Appellant's sole issue.

III. CONCLUSION

Having overruled Appellant' sole issue, we affirm the trial court's judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: WALKER and PITTMAN, JJ., and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

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

DELIVERED: May 24, 2018