IN THE
TENTH COURT OF APPEALS

No. 10-10-00164-CR

BALDEMAR DELGADO,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the County Court at Law No. 1
Johnson County, Texas
Trial Court No. M200802517

MEMORANDUM OPINION

The jury convicted Baldemar Delgado of driving while intoxicated. The trial court assessed punishment at one year confinement and a $1500 fine. The trial court suspended imposition of the confinement portion of the sentence and placed Delgado on community supervision for one year. We affirm.

Background Facts

Delgado and his former wife, Theresa, went out to dinner and then to her mother's house. Theresa testified that Delgado had been drinking. When they returned

home, Delgado and Theresa got into an argument. Delgado left the house, and Theresa called 911. Theresa told dispatch that Delgado had been drinking, and she gave a description of his vehicle.

The police located the vehicle and initiated a stop of the vehicle. The officer attempted to administer field sobriety tests to Delgado, but he was argumentative and uncooperative. Delgado was placed under arrest and taken to the Johnson County Jail where he refused to give a breath specimen. An officer applied for and received a search warrant to obtain a blood sample from Delgado. The blood sample showed that Delgado had a blood alcohol concentration of 0.18.

On October 5, 2010, a jury was impaneled to determine Delgado's guilt or innocence for the offense of driving while intoxicated. During the testimony of one of the State's witnesses, Delgado's attorney moved for a mistrial, and the trial court granted the motion for mistrial. On April 5, 2011, a second trial began, and Delgado was convicted for the offense of driving while intoxicated.

Double Jeopardy

In his first issue on appeal, Delgado argues that the trial court erred in allowing a second prosecution because it violated the double jeopardy clause of the United States and Texas Constitutions. During the direct examination of Corporal Charles Bond, the State questioned Corporal Bond about Delgado's performance on the field sobriety tests given at the county jail. The State then sought to introduce a video recording from the "intoxilyzer room." The State asked Corporal Bond if he recognized the video. Corporal Bond responded, "That's a DWI 2nd intoxilyzer room video." After a

conference and arguments outside the presence of the jury, the trial court granted Delgado's motion for mistrial.

The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. *United States v. Dinitz*, 424 U.S. 600, 606 (1976). Double jeopardy principles do not forbid multiple trials of a single criminal charge if the first trial resulted in a mistrial that: (1) was justified under the manifest necessity doctrine; or (2) was requested or consented to by the defense, absent prosecutorial misconduct which forced the mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982); *Ex Parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007). Double jeopardy will bar retrial only when it is shown that the prosecutor engaged in conduct intended to provoke the defendant into moving for a mistrial. *See Oregon v. Kennedy*, 456 U.S. at 672.

Delgado contends that the State provoked him into moving for mistrial and that the second trial violated double jeopardy. The State sought to introduce a video of Delgado taken after his arrest. In introducing the video, Corporal Bond stated in front of the jury that it was for a second DWI offense. There is nothing to indicate that the State engaged in conduct to provoke Delgado into moving for a mistrial. The second trial was not barred by double jeopardy. We overrule the first issue on appeal.

Requested Jury Instruction

Delgado argues in his second issue that the trial court erred in denying his requested jury instruction. Delgado requested an instruction to disregard evidence pursuant to TEX. CRIM. PRO. ANN. art 38.23 (a) (West 2005). In his brief, Delgado states that his requests were set out in "Defendant's Requested Charge under Number 5."

The record includes Delgado's argument to the court concerning the requested instruction; however, the requested instruction is not included in the record. Therefore, Delgado's complaint has not been preserved for appeal. *Murillo v. State*, 839 S.W.2d 485, 493 (Tex. App.—El Paso 1992, no pet.).[1] We overrule the second issue on appeal.

Sufficiency of the Evidence

In his third issue on appeal, Delgado complains that the evidence is insufficient to support his conviction. We will review Delgado's sufficiency challenge under the sufficiency standard set forth in *Jackson v. Virginia*. Under this standard, we must review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010).

Delgado specifically argues that the evidence is insufficient to show that he was intoxicated because the State never introduced the actual blood into evidence as the blood from Delgado. In order for the results of a blood test to be admitted into evidence, a proper chain of custody of the blood sample that was drawn from the accused and later tested must be established. *Durrett v. State*, 36 S.W.3d 205, 208 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Proof of the beginning and the end of the chain will support admission of the evidence barring any showing of tampering or

[1] We note that as in *Murillo*, the record reflects that the trial court reviewed a draft of the requested charge and indicated that it would be filed with the papers in this case. The court found that it is not the duty of the Court to investigate the absence of the instruction from the record. *Murillo v. State*, 839 S.W.2d at FN7.

alteration. *Id.* Any gaps in the chain go to the weight of the evidence rather than to its admissibility. *Id.*

Angela Hudson, a nurse for Johnson County, testified that she drew Delgado's blood on December 2, 2008. Hudson drew the blood in the presence of a police officer. Hudson testified that after she drew the blood, she sealed the vials. Hudson labeled the seals on the vials with Delgado's name, her name, and the date and time the blood was taken.

Michael Fish, a chemist at Integrated Forensic Laboratories, testified that he received the vials of blood and that they were still sealed. The vials had not been tampered with prior to testing. Fish testified that he tested Delgado's blood for alcohol content and that the results were 0.18 grams of ethyl alcohol per 100 milliliters of blood, which is over the legal level of intoxication in the State of Texas. Delgado objected to Fish testifying to the results of the blood test because the blood itself was not admitted into evidence.

Hudson testified that she drew Delgado's blood, sealed the vials, and labeled the vials with Delgado's name. Fish received the vials and testified that they were still sealed and had not been tampered with. The trial court did not err in admitting the results of Delgado's blood test. The evidence is sufficient to support Delgado's conviction for driving while intoxicated. We overrule the third issue.

Admission of Video Tape

In his fourth issue, Delgado argues that the trial court erred in admitting a video in violation of the confrontation clause and without a proper predicate. Officer Hogan

initiated the initial stop of Delgado. Officer Hogan was deceased at the time of the second trial. Officer Kevin Dupre went to the location to assist Officer Hogan, and he saw that Officer Hogan had detained Delgado outside Delgado's vehicle. Officer Dupre testified that he observed Officer Hogan attempting to administer field sobriety tests, but Delgado would not cooperate. During Officer Dupre's testimony, the State offered into evidence a DVD video taken from Officer Hogan's patrol car. Delgado objected to the admission of the video. The trial court admitted the video and allowed it to be played for the jury. The sound on the video was turned off during first portion of the video prior to Officer Dupre's arrival on the scene and on the portion of the video where Delgado is placed under arrest.

Predicate

We review a trial court's ruling on authentication issues under an abuse of discretion standard. *Angleton v. State*, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998); *Reavis v. State*, 94 S.W.3d 716, 719 (Tex. App.—Fort Worth 2002, no pet.). This standard requires an appellate court to uphold a trial court's admissibility decision when that decision is within the zone of reasonable disagreement. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001); *Reavis v. State*, 94 S.W.3d at 719.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. TEX. R. EVID. 901 (a). Subsection (b) provides a nonexclusive list of methods to authenticate evidence. TEX. R. EVID. 901 (b). One example of authentication is by testimony of a witness with knowledge that a matter is

what it is claimed to be. TEX. R. EVID. 901 (b) (1). Another method is showing "a process or system used to produce a result and showing that the process or system produces an accurate result." TEX. R. EVID. 901 (b) (9). Under Rule 901, it is no longer a necessary predicate to the admission of recorded evidence that the sponsoring witness have personal knowledge of the events on the recording. *See Angleton v. State*, 971 S.W.2d at 69; *Thierry v. State*, 288 S.W.3d 80, FN5 (Tex. App.—Houston [1st Dist.] 2009, pet. den'd).

Officer Dupre testified that he was familiar with the video and that he had viewed the entire video. Officer Dupre stated that there were no additions, deletions, or changes to the video. Officer Dupre was able to identify the people on the video, and he testified that it accurately depicted the events shown on the video. Officer Dupre further testified that the video was from Officer Hogan's car, that it was made on an instrument capable of making an accurate recording, and that Officer Hogan was trained and competent in operating the equipment. We find that the trial court did not abuse its discretion in finding that the video was authenticated.

Confrontation Clause

The Confrontation Clause of the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010). Testimonial hearsay statements of a person who does not appear at a defendant's trial are inadmissible unless that person was unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68

(2004). We review *Crawford* issues de novo. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006). In determining whether a statement is "testimonial," we use the standard of an objectively reasonable declarant standing in the shoes of the actual declarant. *Wall v. State*, 184 S.W.3d at 742-43. Generally speaking, an out-of-court statement is testimonial when the surrounding circumstances objectively indicate that the primary purpose of the interview or interrogation is to establish or prove past facts or events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Langham v. State*, 305 S.W.3d at 577.

The jury only heard the audio portion of the video for approximately four minutes when Officer Dupre was also present at scene. Therefore, we must determine whether Officer Hogan's statements during that four minute time frame were testimonial. During that time frame, Officer Hogan asks Delgado whether he has had anything to drink. Officer Hogan gives Delgado instructions and attempts to administer a field sobriety test.

Officer Hogan's statements and instructions were routine in a stop for suspicion of driving while intoxicated. He did not express an opinion, observation, or conclusion about whether Delgado was driving while intoxicated. We do not find that Officer Hogan's statements and instructions were testimony implicating the Confrontation Clause. The trial court did not err in admitting the video. We overrule Delgado's fourth issue.

Conclusion

We affirm the trial court's judgment.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed September 21, 2011
Do not publish
[CR25]