NO. 12-24-00257-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

LAGARETT FORD, APPELLANT	*§*	***APPEAL FROM THE***
V.	*§*	***COUNTY COURT AT LAW***
THE STATE OF TEXAS, APPELLEE	*§*	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Lagarett Ford appeals his conviction for driving while intoxicated. In two issues, he contends that the trial court erred in permitting the State's expert witness to remain in the courtroom during trial and challenges the sufficiency of the evidence to support his conviction. We affirm.

BACKGROUND

On the evening of October 8, 2023, Appellant was driving on Farm to Market Road (FM) 2767 in Smith County, Texas. As he patrolled the area, Trooper Sean Smith of the Texas Department of Public Safety (DPS) used radar to determine that Appellant exceeded the 60 miles per hour speed limit, traveling at 94 miles per hour, and initiated a traffic stop. Smith noticed the odor of alcohol, observed that Appellant slurred his speech, and began conducting a DWI

investigation. Appellant admitted to consuming alcohol that evening, but claimed it was not much. When Appellant exited the vehicle, Smith observed that he swayed on his feet and leaned on the tailgate of his truck for support. Appellant complained of medical issues with his knees and informed Smith he could not stop leaning on the vehicle.

Smith attempted to administer standardized field sobriety tests, beginning with the horizontal gaze nystagmus. During the test, Appellant exhibited "lack of smooth pursuit," distinct and sustained nystagmus at maximum deviation, and onset nystagmus prior to 45 degrees in both eyes. In total, Appellant displayed six out of six possible "clues" that indicated intoxication. Appellant refused to attempt the other two standardized field sobriety tests, the walk-and-turn and one-leg stand, "due to his legs." After a preliminary breath test detected alcohol present in Appellant's breath, Smith arrested Appellant for DWI and placed him in the front seat of the patrol vehicle. On the way to the Smith County Jail, Appellant appeared to fall asleep multiple times, and at one point began singing a hymn. Smith described Appellant's overall demeanor as "very nonchalant … like he had lost his faculties a little bit." Appellant consented to provide a breath specimen after receiving the statutory warning. Upon arrival at the jail, approximately one hour after the initial traffic stop, Smith used an "Intoxilyzer 9000" machine to obtain two breath specimens from Appellant.

The State charged Appellant with the offense of driving while intoxicated. The information alleged that on July 28, 1997, in the Smith County Court at Law, Appellant was convicted of an offense relating to operating a motor vehicle while intoxicated. Appellant pleaded "not guilty," and the case proceeded to a jury trial.

At trial, Trooper Smith recounted the events of the traffic stop, arrest, and breath test. Thereafter, Scott Brown, a forensic scientist employed at the DPS lab in Smith County, testified that he supervises Intoxilyzer machines, including the one used for Appellant's breath test, and that the maintenance and inspection records for the machine indicated that it was working properly on October 8. For Appellant's two breath samples, the machine reported breath alcohol concentrations of 0.065 and 0.063 grams of alcohol per 210 liters of breath, respectively. Brown testified that the American Medical Association "holds .05 as their level where they believe everyone's intoxicated," but based on his training and experience, alcohol concentrations "as low as .03" can result in a person losing "normal use of mental and physical faculties." He affirmed that a person with an alcohol concentration of .063 could also lose the normal use of those

faculties. Finally, he opined that for an average man, the "elimination rate" at which the liver breaks down alcohol in the body is approximately ".01 to .03 per hour."

Subsequently, the jury found Appellant "guilty" of the charged offense. Appellant chose to have the trial court determine punishment. The trial court imposed a sentence of 200 days' imprisonment in the county jail. This appeal followed.

LEGAL SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant challenges the sufficiency of the evidence to establish that he was intoxicated while operating a motor vehicle.

Standard of Review

The standard of review for sufficiency of the evidence is whether any rational finder of fact could have found the appellant guilty beyond a reasonable doubt. *See* ***Jackson v. Virginia***, 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2786–87, 61 L.Ed.2d 560 (1979); ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). We consider all the evidence in the light most favorable to the verdict and determine whether any rational factfinder could have found the essential elements of the crime beyond a reasonable doubt based on the evidence and reasonable inferences from that evidence. ***Whatley v. State***, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); ***Brooks***, 323 S.W.3d at 898–99. A reviewing court must give full deference to the factfinder's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). If the record contains conflicting inferences, we must presume that the factfinder resolved such facts in favor of the verdict and defer to that resolution. ***Brooks***, 323 S.W.3d at 899 n.13; ***Clayton v. State***, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). In addition, we determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. ***Clayton***, 235 S.W.3d at 778. "Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt." ***Rodriguez v. State***, 521 S.W.3d 822, 827 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing ***Sorrells v. State***, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011)). Each fact need not point directly and independently to the appellant's guilt, provided that the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper***, 214 S.W.3d at 13.

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." ***Id.***

Applicable Law

A person commits the offense of driving while intoxicated if he (1) operates a motor vehicle in a public place, and (2) is intoxicated. TEX. PENAL CODE ANN. § 49.04(a) (West 2023). The offense is a Class A misdemeanor if the person (1) is found "guilty" of DWI and (2) was previously convicted one time of an offense relating to operating a motor vehicle while intoxicated. ***Id***. § 49.09(a).

As is relevant here, "intoxicated" is defined as either: (1) "not having the normal use of mental or physical faculties by reason of the introduction of alcohol ... into the body" or (2) "having an alcohol concentration of 0.08 or more." ***Id***. § 49.01(2). These separate definitions "set forth alternate means by which the State may prove intoxication." ***Bagheri v. State***, 119 S.W.3d 755, 762 (Tex. Crim. App. 2003). "Circumstantial evidence may prove that a person has lost the normal use of his mental or physical faculties by reason of introduction of a controlled substance or drug into his body." ***Kiffe v. State***, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). Any sign of impairment in the defendant's ability to speak is circumstantially relevant to whether he was legally intoxicated while driving. *See* ***Griffith v. State***, 55 S.W.3d 598, 601 (Tex. Crim. App. 2001) (quoting TEX. PENAL CODE ANN. § 49.01(2)(A) (West 2023)) (footnotes omitted). Speeding is another factor to be considered, because it can indicate impaired judgment. ***Zill v. State***, 355 S.W.3d 778, 786 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Other evidence that may logically raise an inference of intoxication at the time of driving (as well as at the time of the alcohol content test) "includes, inter alia, erratic driving, post-driving behavior such as stumbling, swaying, slurring or mumbling words, inability to perform field sobriety tests or follow directions, bloodshot eyes, any admission by the defendant concerning what, when, and how much he had been drinking—in short, any and all of the usual indicia of intoxication." ***Kirsch v. State***, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010).

Analysis

Because Appellant did not have an alcohol concentration of 0.08 or more at the time of the breath test, the State was required to prove that (while operating a motor vehicle in a public place) Appellant did not have the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body.

Smith testified that Appellant exceeded the speed limit by more than 30 miles per hour, and that he had to drive over 100 miles per hour to catch up to Appellant. *See* ***Zill***, 355 S.W.3d at 786. During the traffic stop, Smith smelled the odor of alcohol, and noticed Appellant slurring his speech, swaying on his feet, and lacking the ability to stand independently. *See* ***Griffith***, 55 S.W.3d at 601; ***Kirsch***, 306 S.W.3d at 745. When questioned, Appellant admitted to consuming alcohol, and the preliminary breath test was positive for the presence of alcohol. ***Kirsch***, 306 S.W.3d at 745. Appellant was slow to respond to Smith's instructions, failed the one field sobriety test he completed, and refused to attempt the tests involving walking or standing. ***Id.*** Additionally, the State offered videos taken from (1) the dash camera in Smith's patrol vehicle, (2) Smith's body camera, and (3) the interior camera in Smith's patrol vehicle showing Smith's encounter with Appellant, Appellant's performance of the field sobriety test, and Appellant's demeanor and actions while alone in the patrol vehicle (all of which were admitted into evidence and published to the jury). *See* ***Lacy v. State***, No. 12-17-00379-CR, 2019 WL 210838, at *3 (Tex. App.—Tyler Jan. 16, 2019, no pet.) (mem. op., not designated for publication). Ultimately, based on his training, experience, and observations of Appellant, Smith concluded that Appellant did not have the normal use of his mental and physical faculties and was intoxicated while operating a motor vehicle. *See* ***Watson v. State***, No. 12-18-00136-CR, 2019 WL 1416671, at *3 (Tex. App.—Tyler Mar. 29, 2019, no pet.) (mem. op., not designated for publication) (citing ***Annis v. State***, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979)).

It is within the jury's province to resolve any conflicts and inconsistencies in the evidence and to draw reasonable inference therefrom. *See* ***Tate v. State***, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016). Viewing all the evidence in the light most favorable to the verdict, we conclude that a rational jury could have found, beyond a reasonable doubt, that Appellant operated a motor vehicle in a public place while he was intoxicated to the point that he did not have the normal use of his mental or physical faculties. *See* TEX. PENAL CODE ANN. § 49.01(2)(A), 49.04(a);

Jackson, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Brooks***, 323 S.W.3d at 899. Because the evidence is sufficient to support Appellant's conviction, we overrule his first issue.

WITNESS SEQUESTRATION RULE

In his second issue, Appellant alleges that the trial court abused its discretion by excusing Brown from the Rule and permitting him to remain in the courtroom during Smith's testimony.

Standard of Review and Applicable Law

Under Texas Rule of Evidence 614 (commonly known as "the Rule"), a trial judge, at a party's request, must order witnesses excluded from the courtroom during the testimony of other witnesses. *See* TEX. R. EVID. 614. The Code of Criminal Procedure instructs that witnesses excluded from the courtroom "shall [not] be allowed to hear any testimony in the case." TEX. CODE CRIM. PROC. ANN. art. 36.05 (West 2023). The purpose of excluding witnesses from the courtroom during trial "is to prevent the testimony of one witness from influencing the testimony of another, consciously or not." ***Russell v. State***, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005); ***Bell v. State***, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996).

In criminal cases, certain categories of witnesses may be excluded from the operation of the Rule, including (1) a defendant who is a natural person, or the representative of a defendant that is not a natural person, (2) a person whose presence a party shows to be essential to the presentation of the party's case, and (3) a victim, if the court does not determine that the victim's testimony would be materially affected by hearing other testimony. TEX. R. EVID. 614(c). The party claiming an exemption for its witness bears the burden of showing that the exemption applies. ***Allen v. State***, 436 S.W.3d 815, 822 (Tex. App.—Texarkana 2014, pet. ref'd). Enforcement of the Rule and its exemptions lies within the sound discretion of the trial court. ***Caron v. State***, 162 S.W.3d 614, 618 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Specifically, a trial court's determination that a witness's presence is, in fact, essential is reviewed for an abuse of discretion. ***Bryant v. State***, 282 S.W.3d 156, 161 (Tex. App.—Texarkana 2009, pet. ref'd).

Appellate courts must disregard non-constitutional error (such as violation of an evidentiary rule) unless it affected the appellant's substantial rights. TEX. R. APP. P. 44.2(b); ***Russell***, 155 S.W.3d at 179 (substantial right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict). We need not reverse if, after examining the record as a whole, we have fair assurance that the error did not influence the

jury's deliberations to the appellant's detriment or had but a slight effect. ***Barshaw v. State***, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011).

Analysis

Following jury selection, Appellant's counsel invoked Rule 614. The State's attorney requested that Brown be permitted to remain. Appellant objected to Brown's presence, and the following dialogue occurred:

> Court: …Mr. Brown is being called as expert, right?
>
> State: Yes, Your Honor... And regarding the testimony that will come out through the officer, we think that that is all relevant information for the testimony that our expert will give.
>
> Court: All right. Any objection to Ms. Brown [sic] staying in?
>
> Defense: Judge, I would object to it. I don't think him operating the breath machine has anything to do with what the trooper did on the scene. I don't think it's relevant. It's not any kind of expert testimony he's going to be testifying to what the trooper did on the scene.
>
> Court: I understand what you're saying. I'm going to go ahead and excuse Mr. Brown from the Rule and allow him to stay in the courtroom.

Although the State did not expressly set forth which exemption it claimed excluded Brown from operation of the Rule, as Brown is neither a defendant, a defendant's representative, or a victim, he could only be exempt as a "person whose presence a party shows to be essential to presenting the party's claim or defense." TEX. R. EVID. 614. Appellant contends the State failed to meet its burden because "[t]his was not a BAC case. No reason was articulated to support the idea that Mr. Brown's presence was necessary." We disagree.

While the Rule is generally applicable to expert witnesses, trial courts are vested with discretion and may permit expert witnesses to be exempt so that they may hear other witnesses testify and then base their opinions on such testimony. *See* ***Cayetano v. State***, No. 01-23-00463-CR, 2024 WL 3528449, at *6 (Tex. App.—Houston [1st Dist.] July 25, 2024, pet. ref'd) (mem. op., not designated for publication) (citing ***Lewis v. State***, 486 S.W.2d 104, 106 (Tex. Crim. App. 1972); ***Martinez v. State***, 867 S.W.2d 30, 40 (Tex. Crim. App. 1993)); *see also* ***Garcia v. State***, No. 01-17-00171-CR, 2018 WL 827452, at *6 (Tex. App.—Houston [1st Dist.] Feb. 13, 2018, pet. ref'd) (mem. op., not designated for publication) ("[A] trial court has discretion to conclude that an expert's presence in the courtroom is essential—and thus falls under Rule 614's exemptions—where… the expert plans to base [his] opinion on evidence offered at trial.").

The reason for Brown's exemption articulated by the State, that Trooper Smith's testimony would be relevant to Brown's expert testimony (which included Brown's knowledge regarding the Intoxilyzer testing device used by Smith), is consistent with the exception provided in Rule 614(c). *See* ***Banda v. State***, No. 10-24-00038-CR, 2025 WL 52669, at *4 (Tex. App.—Waco Jan. 9, 2025, pet. ref'd) (mem. op., not designated for publication); ***Gonzales v. State***, Nos. 03-13-00333-CR & 03-13-00334-CR, 2015 WL 3691180, at *2 (Tex. App.—Austin June 11, 2015, no pet.) (mem. op., not designated for publication). We conclude that the trial court's exemption of Brown from the Rule does not amount to an abuse of discretion.

Moreover, even assuming the trial court erred in permitting Brown to remain in the courtroom, Appellant failed to show harm. *See* TEX. R. APP. P. 44.2(b). In deciding whether the error of allowing a witness to remain in the courtroom was harmful, we consider whether (1) the witness actually heard the testimony of other witnesses and (2) the witness's testimony either contradicted the testimony of a witness from the opposing side or corroborated testimony of a witness he heard. ***Allen***, 436 S.W.3d at 824; ***Gonzales***, 2015 WL 3691180 at *3. The appellant bears the burden to demonstrate that the record supports a finding under both prongs. ***Allen***, 436 S.W.3d at 824; ***Gonzales***, 2015 WL 3691180 at *3. Here, the parties do not dispute that Brown heard Smith's testimony, but Appellant alleges: "The only possible reason for observing a law enforcement officer's testimony would be to provide an opinion that the officer was telling the truth… The State's case was based on the credibility of Trooper Smith and therefore anything that bolsters his credibility is harmful."

Appellant does not cite, and we do not find, any legal authority that suggests an expert's presence in the courtroom during a witness's testimony, without more, bolsters that witness's credibility in a manner that impacts the defendant's substantial rights. Our review of the record indicates that Brown did not claim personal knowledge of the factual events of October 8 and did not testify to "corroborate" Smith's testimony regarding same. *See* ***Williams v. State***, No. 07-18-00275-CR, 2019 WL 6973512, at *3 (Tex. App.—Amarillo Dec. 19, 2019, no pet.) (mem. op., not designated for publication). As the State correctly notes, Brown neither referenced Smith's credibility nor opined that Smith was "telling the truth" about any of the facts of this case. Instead, Brown merely confirmed that he "knew" Smith and affirmed Smith was certified to operate the Intoxilyzer machine at the time he did so. The record does not demonstrate that Appellant suffered harm by Brown's presence in the courtroom during Smith's testimony. *See*

TEX. R. APP. P. 44.2(b); ***Gonzales***, 2015 WL 3691180 at *3. We overrule Appellant's second issue.

DISPOSITION

Having overruled both of Appellant's issues, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion May 30, 2025.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 30, 2025

NO. 12-24-00257-CR

LAGARETT FORD,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the County Court at Law
of Smith County, Texas (Tr.Ct.No. 001-80901-24)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED, and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.