Affirmed and Opinion filed December 30, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00860-CR

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FREDERICK KENT SCOTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 96-30797

O P I N I O N

Frederick Kent Scott, appellant, was charged by information with driving while intoxicated on or about July 16, 1996. The jury found appellant guilty as charged on June 19, 1997 and sentenced him to 75 days in the Harris County Jail, probated for nine months and a fine of $150.00. Appellant filed a motion for new trial which the court denied without a hearing. Appellant now challenges (1) the denial of his motion for a new trial, (2) the factual sufficiency of the evidence, and (3) the admission of testimony of the arresting officer about three different field sobriety tests. We affirm.

Background

Deputy Covarrubias pulled appellant over at 2:25 a.m. on July 16, 1996 for running a flashing red light. Covarrubias reported that appellant smelled strongly of alcohol and had bloodshot eyes and droopy eyelids. Appellant failed the following sobriety tests: the finger count test, Horizontal Gaze Nystagmus test, Rhomberg internal clock and sway test, one leg stand test, and the walk and turn test. Covarrubias determined that appellant was driving while intoxicated; he arrested and took appellant to the police substation. Appellant refused a breath test. Appellant's speech was slurred, and he leaned against the wall during the interview.

We begin by reviewing the facts presented that favor appellant. The traffic light in question usually blinks amber. On July 16, 1996, the light malfunctioned by blinking red on at least three separate occasions. Appellant had only consumed one beer which was corroborated by a witness. Dr. Senft testified that appellant had bad feet and a large abdominal area which would make it very difficult to maintain balance, to not sway while attempting to stand absolutely still, and to walk in a straight line. Appellant has shards of glass in his eyes and was working late which could have caused his bloodshot eyes. Appellant had no difficulty showing the police officer his driver's license and evidence of insurance. Deputy Covarrubias' opinion was not based upon one field sobriety test but upon all of them combined.

Before the start of the trial, appellant challenged the designation of Deputy Covarrubias as an expert. The trial court held a hearing, and the officer was questioned extensively as to his training and experience with respect to the battery of tests that comprise the field sobriety test. At the end of the hearing, the trial court announced that Deputy Covarrubias would be allowed to testify as to all of the tests with the exception of the HGN test. However the next morning, the court announced it was taking judicial notice of the decision in *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994).[1] Therefore, Deputy Covarrubias *would be allowed* to testify as to the results of the HGN test.

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[1] In *Emerson*, the court took judicial notice of the "reliability of both the theory underlying the HGN test and its technique" after it applied the standards announced in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Motion for New Trial

Appellant argues that the trial court erred in overruling his motion for a new trial without a hearing. Appellant alleges jury misconduct based on three affidavits which concern (1) consideration of other evidence by the jury and (2) the failure of the jurors to accurately answer voir dire questions. For the following reasons, we overrule.

The trial court has discretion to grant or deny a motion for new trial. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). An appellate court does not substitute its judgment for that of the trial court but decides whether the trial court's decision was an abuse of discretion. *See id.*; *Buentello v. State*, 826 S.W.2d 610, 613 (Tex. Crim. App. 1992).

A movant is entitled to a hearing on the motion for a new trial when the affidavit demonstrates that reasonable grounds exist for believing that jury misconduct occurred. *See McIntire v. State*, 698 S.W.2d 652, 658 (Tex. Crim. App. 1985). Before the court can determine whether jury misconduct occurred, the court must first determine whether the affidavits improperly impeach the verdict under Rule 606(b) of the Texas Rules of Criminal Evidence. *See Garrett v. State*, 946 S.W.2d 338, 341 (Tex. Crim. App. 1997) (en banc). Generally, "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." TEX. R. CRIM. EVID. 606(b). However, "a juror may testify as to any matter relevant to the validity of the verdict." *Id.*[2] *See also Buentello*, 826 S.W.2d at 614 (discarding the previous test admitting juror testimony only when it was relevant to an overt act of jury misconduct). Whether a matter is "relevant" will be determined on a case by case basis taking into account (1) the court's experiences and observations, (2) the grounds set forth in Rule 30(b) of the Texas Rules of Appellate Procedure [currently known as RULE 21.3], and (3) the case law developed under Rule 30(b)'s predecessor, Article 40.03 V.A.A.C.P. *See Garrett*, 946 S.W.2d at 341 (citing *Buentello*,

[2] We note this case was decided before the current Rules of Evidence took effect. Under the current rules, the exception to when a juror may testify differs.

826 S.W.2d at 614).

First, we consider the case in light of the trial court's experiences and observations. In this case, the affidavits claim to demonstrate that certain jurors considered evidence other than what was presented at trial. The affidavit of defense counsel's intern concerns a conversation between affiant and a juror. The affidavit states that the juror felt the defendant was guilty because he did not take the stand. The affidavits of defense counsel and the private investigator concern the reasons certain jurors reached their conclusions. However, no evidence was brought forth to show that any of the jurors shared his thoughts with the other jurors or that the thoughts were the result of inappropriate contact with someone or something outside the jury room.

The affidavits also claim to demonstrate that certain jurors failed to truthfully answer questions on voir dire concerning whether they would consider appellant's failure to take a breath or blood test as evidence of his guilt. However, the affidavits do not state that during voir dire, either juror heard questions from counsel concerning these issues or understood them. The trial court did not find the affidavits relevant.

Second, we consider this case in light of the grounds set out in Rule 21.3. Rule 21.3 provides that a defendant must be granted a new trial when the jury receives other evidence or engages "in such misconduct that the defendant did not receive a fair and impartial trial." TEX. R. APP. P. 21.3(f) & (g).

Third, we consider this case in light of the case law developed under Article 40.03. The Court of Criminal Appeals has held that a new trial is not warranted due to a juror's feelings that defendant was guilty because he did not take the stand. *See Luna v. State*, 461 S.W.2d 600 (Tex. Crim. App. 1970). The Court has also held that a verdict cannot be impeached by showing the reason for the jury's conclusion. *See Daniels v. State*, 600 S.W.2d 813 (Tex. Crim. App. [Panel Op.] 1980). Appellant cites no case, and we have found none, in which an affidavit describing the thoughts of a single juror, unexpressed in the jury room and not the result of inappropriate contact with someone or something outside the jury room, has been found to be a reasonable ground for a new trial.

The cases regarding the failure of jurors to accurately answer voir dire questions which warrant a new trial involve situations in which the juror *intentionally* misrepresented material information in the voir

dire process. *See Von January v. State*, 576 S.W.2d 43 (Tex. Crim. App. 1978) (knew family of victim); *Norwood v. State*, 123 Tex. Crim. 134, 58 S.W.2d 100 (1933) (knew someone who has been the victim of the kind of act the defendant did); *Bolt v. State*, 112 Tex. Crim. 267, 16 S.W.2d 235 (1929) (interested in the prosecution of any person for the violation of the same laws); *Adams v. State*, 92 Tex. Crim. 264, 243 S.W. 474 (1921), *vacated on other grounds*, 453 U.S. 902 (1981), (knew of defendant's previous conviction). Appellant cites no cases, and we have found none, in which an affidavit alleging a juror misrepresented material information in the voir dire process, but not alleging it was intentional, has been found to be a reasonable ground for a new trial.

Considering the trial court did not find the affidavits relevant and the case law does not allow impeachment of the verdict for the reasons stated in the affidavits, we cannot find that the matters discussed in the affidavits are relevant to the validity of the verdict. No evidence supports that any ground under Rule 21.3 applies here. Because the affidavits improperly impeach the jury's verdict, the decision of the trial court was not an abuse of discretion. Therefore, appellant's first point of error is overruled.

Factual Sufficiency

In his second point of error, appellant argues that the evidence is factually insufficient to support the verdict. For the following reasons, we overrule.

When reviewing the factual sufficiency of the evidence, we consider *all* of the evidence "without the prism of 'in the light most favorable to the prosecution'" and "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Three major principles should guide courts of appeals when conducting a factual sufficiency review. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997) (construing *Clewis*, 922 S.W.2d at 129). The first principle is deference to the jury's findings. *See id*. Courts of appeals "'are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable.'" *Clewis*, 922 S.W.2d at 135 (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986) (quoting *Dyson v. Olin Corp.*, 692 S.W.2d 456, 458 (Tex. 1985) (Robertson, J. concurring)). The second principle is that a detailed explanation of a

finding of factual insufficiency must be provided. *See Cain*, 958 S.W.2d at 407. The final principle is that the court of appeals must review all the evidence. *See id*. If there is sufficient competent evidence of probative force to support the finding, a factual sufficiency challenge cannot succeed. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex. App.—El Paso 1996, no pet.).

Appellant bases his factual sufficiency argument upon *Perkins v. State*, 940 S.W.2d 365 (Tex. App.—Waco 1997, pet. granted. January 28, 1998) which has facts similar to this case. The Court of Criminal Appeals has since vacated this decision and remanded it to the Court of Appeals to re-evaluate the case in light of *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997). *See Perkins v. State*, 993 S.W.2d 116 (Tex. Crim. App. 1999). Therefore, we are hesitant to follow the case.

Appellant failed six field sobriety tests. He smelled of alcohol and had run a flashing red light. There is sufficient competent evidence of probative force to support the finding of guilt. Point two of error is overruled.

Officer as Expert

In his third, fourth, and fifth points, appellant complains the trial court erred by allowing Deputy Covarrubias to testify that the various field sobriety tests administered indicated appellant was in fact intoxicated. The main thrust of appellant's argument is that because the officer had no knowledge of the underlying scientific bases of the of the tests, Deputy Covarrubias was not qualified under Rule 702 of the Texas Rules of Evidence or under the standard announced in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).[3] For the following reasons, we overrule.

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[3] The standard announced by the Texas Court of Criminal Appeals is identical to the standard announced by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585-87 (1993). In order for scientific evidence to be admissible, it must be both relevant and reliable. *See Kelly*, 824 S.W.2d at 572. The question of relevancy asks whether the evidence offered is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591-93. (citation omitted). The question of reliability looks at the validity of the underlying theory, the technique applying the theory and whether the technique was properly applied on the occasion in question. *See Kelly*, 824 S.W.2d at 573. Several factors can be used by the trial court to determine the validity of the underlying scientific theory and technique. *See id*.

Whether a witness is qualified to testify as an expert is within the discretion of the trial court; therefore, the trial court's ruling will not be disturbed unless an abuse of discretion can be shown. *See Sterling v. State*, 800 S.W.2d 513, 521 (Tex. Crim. App. 1990). However, where the witness is a police officer testifying to the results of a field sobriety test, Texas courts have consistently upheld DWI convictions based on the *opinion testimony* of the police officers who observed the defendant's performance. *See Cockerham v. State*, 401 S.W.2d 839, 840 (Tex. Crim. App. 1966); *Finley v. State*, 809 S.W.2d 909, 914 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd); *Watkins v. State*, 741 S.W.2d 546, 549 (Tex. App.—Dallas 1987, pet. ref'd); *Barraza v. State*, 733 S.W.2d 379, 380 (Tex. App.—Corpus Christi 1987), *aff'd*, 790 S.W.2d 654 (Tex. Crim. App. 1990); *Lewis v. State*, 708 S.W.2d 561, 562 (Tex. App.—Houston [1st Dist.] 1986, no pet.); *Irion v. State*, 703 S.W.2d 362, 363 (Tex. App.—Austin 1986, no pet.).[4] Therefore, we find the trial court did not abuse its discretion by allowing Deputy Covarrubias to give his opinion as to appellant's performance on the Rhomberg balance test, the finger count test, the one leg stand test, and the walk and turn test. For the following reasons, we also find no abuse of discretion in allowing Deputy Covarrubias to testify as to the results of the HGN test.

The HGN test has been treated separately by the Courts. Because of the scientific nature of the test, the testifying officer must be qualified as an expert in both the administration and technique of the test. *See Emerson*, 880 S.W.2d 759, 769 (Tex. Crim. App. 1994). However, for a police officer to qualify as an expert, he only has to show he is state certified to administer the test. *See id.*; *Held v. State*, 948 S.W.2d 45, 51 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). Additionally, the court must determine if the HGN technique was applied properly. *See Emerson*, 880 S.W.2d at 769. In this case, Deputy Covarrubias testified that he was state certified in the administration of the HGN test. In announcing its decision to allow Covarrubias to testify as to the HGN test, the trial court found that he was an expert on the administration of the HGN test. The trial court further found that the test had been properly administered on the occasion in question. Based on these findings, the trial court admitted

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[4] We note that none of the cases cited specifically state whether the testimony is allowed in under Rule 701 or 702. In the absence of a Rule 702 analysis, we feel confident that a police officer does not have to qualify as an expert to testify to most field sobriety tests with the notable exception being the HGN test. *See Emerson v. State*, 880 S.W.2d 759, 763-64 (Tex. Crim. App. 1994).

Covarrubias' testimony as to the HGN test except as an indicator of specific blood alcohol level.[5] We do not find this to be an abuse of discretion. Appellant's third, fourth, and fifth points of error are overruled.

The judgment is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed December 30, 1999.

Panel consists of Justices Yates, Fowler and Draughn.[6]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[5] *Emerson* specifically refused to take judicial notice of the scientific reliability of the HGN test as an indicator of precise blood alcohol level. 880 S.W.2d at 769.

[6] Senior Justice Joe L. Draughn sitting by assignment.