

Affirmed and Opinion filed February 3, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01083-CR

KIMBERLIE C. JAMES, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from County Criminal Court #5
Harris County, Texas
Trial Court Cause No. 98-03947**

OPINION

Kimberlie C. James appeals a conviction for driving while intoxicated (“DWI”) on the grounds that: (1) the trial court violated her Sixth Amendment right to trial by jury by failing to excuse a sleeping juror; (2) the trial court abused its discretion by refusing to allow defense counsel to perfect a bill of exceptions by questioning the sleeping juror; and (3) the trial court committed reversible error by limiting appellant’s cross-examination of the State’s intoxilyzer expert in violation of the Sixth Amendment. We affirm.

Background

Appellant was pulled over by a Houston Police officer for speeding and weaving in and out of her lane. Appellant admitted to the officer that she had been drinking. After failing several field sobriety tests, appellant was arrested. She was convicted by a jury of the misdemeanor offense of DWI and the court assessed punishment at thirty days confinement.

Sleeping Juror

The first of appellant's three points of error argues that the trial court violated her Sixth Amendment right to a trial by jury by failing to excuse a sleeping juror. Appellant's second point of error argues that the trial court abused its discretion by refusing to allow defense counsel to perfect a bill of exceptions with testimony from the sleeping juror.

Inattention of a juror, whether by sleeping or otherwise, is juror misconduct.¹ The proper method to preserve error regarding jury misconduct is by filing a motion for new trial. *See* TEX. R. APP. P. 21.2, 21.3(g); *Trout v. State*, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985).

In this case, appellant's attorney made a motion after the first day of trial that the "sleeping" juror be removed and that they proceed with five jurors. Specifically, counsel stated: "I have observed her sleeping during testimony and during the voir dire. Judge Anderson [the judge who had conducted voir dire] had to wake her up. She now continues to sleep during the evidence phase of the trial." The trial judge then requested that the record reflect that he had observed the particular juror and "when the Court observed her, she was not sleeping." The next day, at the close of appellant's case, defense counsel again complained about the sleeping juror and "in support of his motion," called two witnesses, the appellant and the bailiff. Appellant testified that she had seen the juror sleeping on more than one occasion. The bailiff testified that sometimes it appeared that the juror's eyes were closed, but he could not say for sure if the juror had been sleeping. The trial judge then interjected, "I'd like the record to

¹ *See Zamora v. State*, 647 S.W.2d 90, 94 (Tex. App.—San Antonio 1983, no writ); *Zani v. State*, 679 S.W.2d 144, 152 (Tex. App.—Texarkana 1984), *pet. granted, judgm't vacated on other grounds* 758 S.W.2d 233 (Tex. Crim. App. 1988).

reflect that I've observed the same juror and she was not sleeping every time I observed her.” At that point, defense counsel attempted to call the juror for questioning, but the trial judge stated, “At this time you're not.” Defense counsel concluded by stating that he had nothing further.

Because appellant failed to file a motion for new trial asserting jury misconduct and to develop evidence on that contention at a hearing on the motion, this point of error presents nothing for our review. Further, appellant has not cited, nor have we found, any authority which would have required the trial judge to dismiss the sleeping juror, even had the record revealed that she was sleeping. Therefore, appellant's points of error one and two are overruled.

Limitation on Cross-Examination

Appellant's third point of error argues that the trial judge erred in limiting counsel's cross-examination of the intoxilyzer expert in violation of her Sixth Amendment right to confront witnesses.

Insofar as the Confrontation Clause is concerned, trial judges have wide latitude to impose reasonable limits on cross-examination based on considerations such as harassment, prejudice, confusion of the issues, a witness's safety, or interrogation that is repetitive or only marginally relevant. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Carroll v. State*, 916 S.W.2d 494, 498 (Tex. Crim. App. 1996). A trial court's decision to limit cross-examination is reviewed for abuse of discretion. *See Love v. State*, 861 S.W.2d 899, 902-03 (Tex. Crim. App. 1993). As long as the trial court's ruling regarding the evidence was at least within the zone of reasonable disagreement, an appellate court will not interfere. *See Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

In this case, appellant made a bill of exception whereby he questioned the expert witness as follows:

[COUNSEL]: Mr. Viser, you and I were talking about light waves and radio waves. My question to you is, the fact that the Intoxilyzer 5000 device reads alcohol concentration via light waves, is it the reason that radio waves affect the result is because they are waves also and can

interrupt the peaks and valleys of waves that are reading the alcohol concentration?

[WITNESS]: It's a possibility, sure. It is not likely because when we're talking about I R waves and radio waves, they're so far from each spectrum but it's a possibility that it could interfere with the test, not necessarily affect the results of the test but it could cause an interference. In other words, if you would not have a detector on the Intoxilyzer 5000 it could be like a surge where it would invalidate the test.

Prior to this, the witness had testified that if radio waves are within twelve feet of the instrument, it has a detector that would invalidate the result of the test. Defense counsel reiterated that testimony by asking if radio waves could affect the result, to which the witness responded: "It could affect the circuitry of the instrument . . ." After this, the following testimony was elicited on re-direct:

[PROSECUTOR]: Let's give Ms. James the benefit of the doubt and say there were some radio waves within eight feet. Those radio waves might affect the circuitry of the machine, wouldn't that be correct?

[WITNESS]: Very Possible.

[PROSECUTOR]: And what would happen to the test result if that were the case?

[PROSECUTOR]: If radio waves were detected the instrument would invalidate the test. It would print out radio R F I frequency and would invalidate the test with no results.

Because the testimony elicited in the bill of exception had previously been testified to by the witness, the excluded testimony was repetitive. In addition, the excluded testimony was of marginal relevance in challenging the positive result of the intoxilyzer test in light of the uncontroverted testimony that radio wave interference, where present, could only cause the intoxilyzer to register *no* result. In light of this, the trial court was within its discretion in

limiting appellant's cross-examination of this witness,² and appellant's third point of error is overruled. Accordingly, the judgment of the trial court is affirmed.

Richard H. Edelman
Justice

Judgment rendered and Opinion filed February 3, 2000.

Panel consists of Justices Edelman, Draughn, and Lee.³

Do not publish — TEX. R. APP. P. 47.3(b).

² Because of our conclusion, we do not proceed with the three-prong harm analysis argued by appellant. *See Love*, 861 S.W.2d at 905.

³ Senior Justices Joe L. Draughn, and Norman R. Lee sitting by assignment.