Affirmed and Opinion filed April 12, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00385-CR

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BRIAN BAKKE KILPATRICK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court of Law No. 9
Harris County, Texas
Trial Court Cause No. 0984687

O P I N I O N

Appellant, Brian Bakke Kilpatrick, appeals the denial of pretrial habeas corpus relief. Appellant entered a plea of not guilty to the offense of driving while intoxicated ("DWI"). Appellant's trial ended when the trial court granted a mistrial on its own motion. Appellant subsequently filed an application seeking pretrial habeas corpus relief contending retrial was jeopardy barred. After a hearing, the trial court denied appellant relief. This appeal ensued. We affirm.

In his first issue on appeal, appellant contends the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial of his DWI offense because the "State's functional equivalent of intentional overreaching forced a mistrial sua sponte." Appellant made only one reference to the Double Jeopardy Clause under the federal constitution in his application for writ of habeas corpus and offered no arguments or authority on the issue in the same. Furthermore, appellant did not allege in his application that the prosecutor engaged in intentional misconduct that necessitated a mistrial under either the state or federal constitution.[1] Consequently, appellant failed to preserve the issue for appellate review. TEX. R. APP. P. 33.1.

In his second issue, appellant contends a retrial is barred by the Double Jeopardy Clause of the Texas Constitution because the State recklessly provoked a mistrial. Appellant complains in his third and fourth issues that the trial court erred in (1) finding the State acted negligently, and not recklessly, in provoking a mistrial and (2) failing to assess the question of recklessness in connection with all of the events that preceded the event that triggered the mistrial. For the sake of judicial economy, we consider appellant's second, third, and fourth issues together.

This court views evidence in the habeas record in the light most favorable to the trial court's ruling and accords great deference to the trial court's findings and conclusions. *Brashear v. State*, 985 S.W.2d 474, 476 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). Absent a clear abuse of discretion, we affirm the trial court's ruling on the requested relief. *Id.* A trial court abuses its discretion if it acts without reference to any guiding rules or

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[1] The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution bars retrial if the trial court, with the defendant's consent, grants a mistrial as a result of intentional prosecutorial misconduct. *See Ex parte Mitchell*, 977 S.W.2d 575, 581 (Tex. Crim. App. 1997) (citing *Oregon v. Kennedy*, 456 U.S. 667 (1982)). A prosecutor engages in intentional misconduct when he "purposefully forces a termination of a trial in order to repeat it later under more favorable conditions." *Bauder v. State*, 921 S.W.2d 696, 698-69 (Tex. Crim. App.1996) (*Bauder I*). A prosecutor engages in intentional misconduct under the Texas Constitution in the same manner that he does under its federal counterpart. *Id.* at 698.

principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990).

The Texas Constitution bars retrial if the trial court, with the defendant's consent, grants a mistrial as a result of reckless prosecutorial misconduct. *Bauder v. State*, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996) (*Bauder I*). A prosecutor engages in reckless misconduct under the Texas Constitution when: (1) he is aware but consciously disregards the risk that an objectionable event for which he or she is responsible requires a mistrial at the defendant's expense, (2) he is aware that his conduct is reasonably certain to result in a mistrial; or (3) he is aware that his conduct creates a risk that a mistrial is reasonably certain to occur, but consciously disregards that risk. *State v. Lee*, 15 S.W.3d 921, 925 (Tex. Crim. App. 2000).

Whether jeopardy bars a retrial when a mistrial is granted with the defendant's consent turns on whether the defendant truly consented to the mistrial. *See Ex parte Bauder*, 974 S.W.2d 729, 731-32 (Tex. Crim. App. 1998) (*Bauder II).* Whether a defendant truly consented depends upon whether the motion was simply a choice he made in response to ordinary reversible error to avoid conviction, appeal, reversal, and retrial or whether it was required because of the prosecutor's deliberate or reckless conduct "that rendered the trial incurably unfair." *Id.* at 732.

> If the circumstances prompting the mistrial were attributable to a prosecutor's using "manifestly improper methods . . . deliberately or recklessly" which "render trial before the jury unfair to such a degree that no judicial admonishment can cure it, an ensuing motion for mistrial by the defendant cannot fairly be described as the result of his free election."

Id. (quoting *Bauder I*, 921 S.W.2d at 700). But, "[w]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *Id.* (quoting *U. S. v. Jorn*, 400 U.S. 470, 485 (1971)).

Appellant alleged in his application that he consented to the mistrial because the

prosecutor was aware but disregarded the consequences of allowing the State's principal witness, Officer Craig Bellamy, to give unresponsive answers and to advocate for the State in violation of the trial court's admonishments and threat to declare a mistrial. Appellant further alleged that the State continued its reckless disregard by failing to advise its second witness, Officer Vince Vargas, not to testify about the reliability of the horizontal gaze nystagmus (HGN) test or otherwise violate a motion in limine.[2] Appellant bore the burden of persuasion in his application for writ of habeas corpus to prove by a preponderance of the evidence that he consented to the mistrial as a result of the prosecutor's recklessness. *See Ex parte Lafon*, 977 S.W.2d 865, 867 (Tex. App.—Dallas 1998, no pet.) (stating burden of proof); *Crow v. State*, 984 S.W.2d 260, 262 (Tex. Crim. App. 1998) (Baird, J., dissenting) (noting purpose of habeas hearing is to determine whether prosecutor acted intentionally or recklessly). After hearing argument on these allegations at the habeas hearing, the trial court found the State acted negligently in failing to advise Officer Vargas, and denied appellant's application.

On appeal, appellant claims the prosecutor engaged in reckless misconduct through its representatives who "worked a 'backdoor' jab" in violation of appellant's motion in limine not to introduce evidence quantifying the HGN test with any blood alcohol numbers. Appellant supports his allegations by quoting various excerpts from the record where the trial court admonished Officer Bellamy but omits other evidence that places the admonishments in context. The record reflects that the trial court admonished both Bellamy and appellant's trial counsel about offering evidence quantifying the results of the HGN test,[3] and at one point

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[2] The record is void of any such motion in limine although in his application for writ of habeas corpus, appellant referred to the "ground rules" agreed to before trial, one of which was that the State would not equate the HGN test with a quantitative analysis or blood alcohol level or legal limit. The parties stipulate in their briefs on appeal that the trial court granted appellant's oral motion in limine, which prohibited the State from making "any attempt to quantify the HGN (Horizontal Gaze Nystagmus) test by correlating it with any blood-alcohol numbers or the legal limits in the State of Texas."

[3] When asked on direct examination how his instructors verified whether he correctly assessed intoxication using the HGN test, Bellamy answered, "By a breath test." Appellant objected that Bellamy quantified the results of the alleged tests and the trial court sustained the objection. The trial court did not admonish Bellamy but advised appellant's trial counsel that he was bolstering the witness in making his

affirmatively stated that Bellamy did not violate the motion in limine.[4] The trial court admonished Bellamy often and threatened to declare a mistrial because Bellamy's answers were unresponsive to questions posed primarily by appellant's trial attorney.[5] The record does

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objection. Later, outside the jury's presence, Bellamy testified to his qualifications as an expert on the HGN test. Bellamy attested that results of the test he administered were verified every time somebody who had been arrested gave a breath sample. After Bellamy completed his testimony and the State asked the court to admit evidence for the administration for the HGN test, appellant's trial counsel objected "to any testimony that he [Bellamy] is trying directly or indirectly to quantify – in other words, whatever he observed means a certain amount of blood alcohol in the way they tried to do awhile ago." The trial court sustained the objection and added, "I thought they were going to get into it at that time. They didn't." When appellant's trial counsel voiced another objection to Bellamy's anticipated testimony about the HGN, the trial court refused to generally rule on it. Instead, the trial court indicated that Bellamy's testimony was admissible.

Later, the prosecutor questioned Bellamy about the difference between onset of nystagmus at thirty-five degrees, which appellant exhibited in each eye, and onset at forty-five degrees, which is the maximum number of degrees per eye. Bellamy attested, "Once enough alcohol is reached to cause 45–degree–" and appellant's trial counsel objected and asked the court to instruct jurors to disregard the question and "purported attempted answer." The trial court sustained the objection and instructed the jury to disregard.

The following day, the trial court reminded Bellamy that "we are not going to get into numbers on the HGN at all no matter what you are asked." Yet, on cross-examination, appellant's trial attorney questioned Bellamy about the charges that the State might bring against a person twenty-one and younger if he submitted to a breath test and the test showed a negligible amount of alcohol in his body. The State objected and the trial court cleared the jury and Bellamy from the courtroom. Appellant's trial counsel then explained that he was trying to prove that the police department had a general policy not to release a person who blows .01 or less on a breath test. The State responded that the policy was irrelevant to the case because appellant did not submit to the breath test and the State did not anticipate this line of questioning. The prosecutor argued, "[W]e anticipated him to go down the road of quantifying with a number in any manner that the defendant's blood alcohol or breath alcohol concentration on that night." Appellant's trial counsel denied the allegation and the prosecutor continued that he did not have a problem with the word negligible. He said, "My problem is in using quantifying or numerical numbers period. That isn't with just Officer Bellamy. We have a Motion in Limine on file that includes this entire trial, that it's irrelevant to this case because the Information in the case doesn't contain a blood or breath paragraph." The trial court indicated that it understood both arguments and reminded both parties that "we are not getting into the quantity amount at all."

[4] The trial court responded to appellant's objection, "I thought they were going to get into it at that time. They didn't."

[5] Earlier, during cross-examination appellant's trial attorney questioned Bellamy about gauging appellant's speed by maintaining a constant speed behind appellant. At that time, the following exchange occurred:

Q. So if you were not driving imprudently and in excess of the speed neither was he, right?

A. I wasn't drunk, sir.

Appellant's trial attorney objected, "Your Honor, that's nonresponsive. The trial court sustained the objection and appellant's trial counsel requested the jury to be removed "so that the Court can give this officer more stern admonishments. I have been fighting this." The trial court responded, "We don't need to make a speech in front of the jury. You are to disregard the last answer. Reggie, take the jury out for a moment." Appellant's trial counsel continued, "For the record, Your Honor, because of that last blatant attempt to get in a dig and argue his case, I want to move for a mistrial." The trial court announced that it would deal with the motion outside the presence of the jury. When the jury was removed, the trial court denied the motion and admonished Bellamy as follows: "We have already made this emotional at this time. . . . If you do anything else again, I will grant it. Just answer specifically what he is asking you and that's it. If you interject stuff like that not only is it improper in front of the jury but it is not helping the State or your case." After additional discussion, appellant's trial attorney asked the trial court to explain for the record that if Bellamy "did something like that again there is a strong likelihood that a mistrial could be granted. . . [and] [t]here could be double jeopardy implications because of it as well." The trial court responded, "That was basically the implication I was making." Bellamy indicated that he understood and the prosecutor asked for a moment to explain it to him. Another prosecutor asked the trial court to admonish appellant's trial counsel because he disregarded the court's instruction not to move for a mistrial in front of the jury. The trial court ordered appellant's trial attorney not to "showboat" in front of the jury.

Toward the close of cross-examination, appellant's trial attorney asked Bellamy if appellant had participated in all of the field exercises and passed, would Bellamy have let him go? Bellamy responded,

> Probably would have made him get a ride with the girlfriend or if he had passed the other three tests, I would have started looking for either something wrong that had caused the things I had seen up to that point but I can tell you if he had taken them he wouldn't have passed them with that level of intoxication

Appellant's trial counsel queried, "I didn't ask you that, Officer. Is there anything else you want to say that you know that I didn't ask?" The prosecutor objected to the side bar and the trial court admonished appellant's trial counsel as follows: "I understand what the objection is. Instead of asking him that, ask me to disregard it. That's the proper remedy." Appellant's trial counsel responded, "I have tried to avail myself of that proper remedy and he continues to ignore you. I don't think he takes the instructions seriously. I ask again that the jury be removed to take–this is taking too much time to have to go through this. I would ask he be admonished again." Outside the presence of the jury, the trial court once again admonished appellant's trial counsel, as follows:

> If your complaint, Mr. Dickson, is he is not answering the question, then you need to object that he is not being responsive. That way instead of doing a side bar in front of the jury – both of you have kind of been making side bars in front of the jury that are improper.

Appellant's trial attorney complained,

> I think we have an officer really used to – what's going on here is he is saying whatever he wants to say regardless of the question and his comment volunteered "I guess he could have taken the breath test but he wouldn't have passed it"–that's a violation of the Motion in Limine. That's getting into the jury knowing what the figures are, getting into numbers, and that's wrong. He has been told about that but more than that he is intelligent. The problem is he is an intelligent person and he is also an advocate and he can't take that hat off his head. That's what gets him in trouble.

Once again the trial court admonished Bellamy to answer the question without volunteering additional information. Bellamy protested that he did not say anything about the breath test. The trial court threatened

not reflect that the State encouraged Bellamy's advocacy or unresponsive answers. Instead, it reflects that the prosecutor warned Bellamy on several occasions against advocating for the State.[6]

The record, however, supports appellant's allegation that the prosecutor failed to advise Officer Vargas about the motion in limine. Consequently, Vargas testified shortly after taking the stand about a study out of Florida, which indicated that the HGN test was ninety-five percent reliable. The trial court granted appellant a running objection to this testimony on the ground that it was hearsay. The prosecutor asked Vargas to continue. Vargas attested, "The studies showed that 95 percent of the subjects when given the HGN and exhibited four clues were at a breath alcohol of .0--" The trial court interjected, "You can't testify to numbers." Vargas attested, "It was 95 percent reliable." The prosecutor then asked, "Ninety-five percent reliable that the subjects were what?" Vargas replied, "At the legal limit, blood alcohol was at the legal limit." After the jury was removed, appellant's trial counsel asked the court to grant a mistrial on its own motion because of cumulative error. After hearing argument, the trial court noted that Vargas was not being belligerent, but that "he misunderstood what was going on." Nevertheless, at appellant's request, the trial court declared a mistrial on its own motion.

At the habeas hearing, the habeas judge recalled that she had instructed the jury to disregard Bellamy's testimony seven to ten times and threatened to hold Bellamy in contempt.

Bellamy saying, "Basically you have done this a couple of times now. If you do it again, interjecting something that advocating for them I will grant a mistrial."

[6] After the last admonishment in discussed in footnote 5, the prosecutor interjected that he thought Bellamy understood, the trial court retorted, "Apparently not." It further advised the State that if Bellamy did not stop, it would be the State's mistrial. Once again, the trial court advised the State to take Bellamy out and talk with him again.

The habeas judge admitted that she[7] and the prosecutors[8] "were relatively negligent" in not clearing the courtroom when Vargas first testified to make sure that Vargas understood not to mention the correlation between the HGN test and alcohol concentration. Once Vargas testified to the correlation, the trial judge lamented, "it was impossible to just order [the jurors] to disregard that as well." When questioned whether jeopardy had attached because of the State's negligence in allowing Vargas to testify without instructing him on the motion in limine, the trial judge responded, "It was unforeseen to the State that the officer would continue that with the second officer because like I said, I would have cleared the jury. I don't think the D.A.'s [sic] had any idea that would happen next."

The habeas court did not make any findings indicating the State acted with reckless disregard by allowing Bellamy to testify or failing to advise Bellamy to behave himself on the stand.[9] Bellamy was the arresting officer; therefore, his testimony was crucial to the State's case. The prosecutors warned Bellamy repeatedly, as did the trial judge, not to advocate for the State and to respond appropriately when questioned. The habeas record clearly reflects that the trial judge felt a mistrial was necessary in large part because of the cumulative effect on jurors from repeated instructions to disregard Bellamy's nonresponsive testimony.

Bellamy's conduct, in this case, whether reckless, sloppy, or negligent, amounts to police misconduct, not prosecutorial misconduct.[10] Police misconduct does not bar a retrial on jeopardy grounds. *Id.* at (citing *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*,

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[7] Outside the jury's presence, the trial judge lamented about Vargas's testimony. She said, "I guess it was my fault or not – it was kind of my understanding that if I said no numbers he would understand that no numbers also means no tie in.

[8] Vargas was available to prosecutors approximately one hour the day before he testified. He testified that he talked to prosecutors that day for about a minute, "just to say be on call."

[9] Although the trial record reflects that the judge warned prosecutors that further misconduct by Bellamy would be their mistrial.

[10] The record reflects several instances when the prosecutors took Bellamy aside to warn him about his nonresponsive answers.

514 U.S. 419 (1995)). "[T]he proper remedy for such police actions that, in effect, denied applicant due process of law is retrial." *Id.*

The habeas court found the prosecutor negligent in failing to validate Vargas's expertise and the validity of the HGN test outside the jury's presence. A retrial is not barred by the Double Jeopardy Clause of the Texas Constitution where a mistrial is granted due to the prosecutor's simple negligence or mere sloppiness. *See Ex parte Davis,* 957 S.W.2d 9, 13 (Tex. Crim. App. 1997). The habeas court made no finding regarding the prosecutor's specific question regarding the reliability of the HGN test after the trial court warned Vargas not to mention numbers except to say it did not think the prosecutor knew what would happen next. The record, however, indicates that the prosecutor asked a specific question after the trial court warned about the use of numbers, and then argued, outside the jury's presence, that he did not think that Vargas's testimony violated the motion in limine.

Vargas's testimony did not technically violate the motion in limine[11] or the trial court's warning. The oral motion in limine, according to both parties, prohibited the State from making "any attempt to quantify the HGN (Horizontal Gaze Nystagmus) test by correlating it with any blood-alcohol numbers or the legal limits in the State of Texas." Vargas testified generally to a study in Florida that indicated that ninety-five per cent of subjects who exhibited four clues on the HGN test had blood levels at the legal limit. Although not a technical violation of the motion in limine or the trial court's warning, the response provided information to the jury that the trial court repeatedly sought to exclude.[12] Without forewarning, Vargas unwittingly violated the trial court's previous rulings. Standing alone, the

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[11] *See Emerson v. State*, 880 S.W.2d 759, 769 (Tex. Crim. App. 1994); *Youens v. State*, 988 S.W.2d 404, 406 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (stating rule that "an officer trained in administering the HGN test may give his opinion that a suspect is under the influence of alcohol, but may not testify to that suspect's exact blood alcohol content"); *compare Webster v. State*, 26 S.W.3d 717, 723 (Tex. App.—Waco 2000, pet. ref'd) (expert violates prohibition by testifying that "[f]our clues would give about a [sic] 75 percent test subject being over 0.10 blood alcohol concentration").

[12] The trial court admonished both parties at one point that "we are not getting into the quantity amount at all."

error might have been cured by a proper instruction to disregard. *See Webster v. State*, 26 S.W.3d 717, 723-24 (Tex. App.—Waco, 2000, pet. ref'd). But in light of Bellamy's misconduct, the trial judge reasoned that the error was harmful and granted a mistrial.

We cannot say that Bellamy's misconduct coupled with the prosecutor's failure to advise Vargas and the prosecutor's specific question that elicited the offensive statement were reckless acts that rendered the trial incurably unfair. As the trial judge indicated at the habeas hearing, Vargas's answer was not an attempt to advocate for the State or an unresponsive "dig" at appellant like Bellamy's answers.[13] Even though the prosecutor's question and Vargas's answer triggered the mistrial, the circumstances that necessitated the mistrial were not so much attributable to prosecutorial overreaching as they were to the cumulative effect of repeated instructions to disregard, based largely on Bellamy's misconduct. The record supports a finding that appellant consented to the mistrial in response to ordinary reversible error and not because of prosecutorial or judicial overreaching. Accordingly, the trial court did not abuse its discretion in denying appellant's application for writ of habeas corpus on the ground that double jeopardy barred retrial.

[13] She said, "I don't think this officer is exactly the same situation as the last officer. . . . I want the record to be clear that this officer wasn't – what was the word I used last time? Dig?"

The judgment of the court below is affirmed.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed April 12, 2001.

Panel consists of Justices Edelman, Frost, and Senior Chief Justice Murphy.[14]

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

[14] Senior Chief Justice Murphy sitting by assignment.