**Affirmed and Opinion filed June 21, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-00-00659-CR**

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**BILLY GLENN CLEMENTS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 149th District Court**
**Brazoria County, Texas**
**Trial Court Cause No. 35,289**

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## O P I N I O N

Appellant, Billy Glenn Clements, was charged with felony driving while intoxicated. He stipulated to three prior DWI convictions, and a jury found him guilty. After a pre-sentence investigation report was prepared, appellant received a sentence of four years confinement in the Texas Department of Criminal Justice, Institutional Division. In three points of error, he claims that the evidence was legally and factually insufficient, and that the trial court abused its discretion in failing to declare a mistrial when the jury failed to reach a unanimous verdict after three-and-a-half hours of deliberation. We affirm.

## I. Introduction

In the early morning hours of March 28, 1998, Varon Snelgrove, a Patrol Deputy with the Brazoria County Sheriff's Department, observed the taillights of a vehicle traveling ahead of him. He noticed the car veering into the lane of oncoming traffic and began to follow it. The vehicle began weaving in and out of the right lane, and Snelgrove decided to pull it over and investigate. Appellant was operating the vehicle. The State's only witness, Snelgrove, testified that, when he approached the vehicle, he noticed appellant had the odor of alcohol on his breath. Appellant candidly told Snelgrove he had "a few" drinks during the evening. Snelgrove decided to perform a field sobriety test upon appellant, including a Horizontal Gaze Nystagmus test, a walk-and-turn test, and a one-leg stand test. Snelgrove testified that appellant's eyes were "jerky and staggered," that while performing the walk-and-turn, appellant had to stop and catch his balance, stepped off the line seven times, and failed to walk toe to heel as instructed, and that appellant's balance was too poor to begin the one-leg test without stumbling. Snelgrove placed appellant under arrest. At the station, Snelgrove testified that appellant refused to take a breath test and also refused to sign a form acknowledging that Snelgrove provided appellant verbal and written statutory warnings of the consequences of refusing to submit to a blood or breath test.[1]

The only evidence offered by appellant was his own testimony, which refuted much of Snelgrove's testimony, and the testimony of Cynthia Clements, appellant's ex-wife.[2] She testified that appellant drove her home around 9:00 the night before, after they had gone to the funeral of Debbie Fugate. He then went over to the home of Burt Fugate, the husband of the deceased, and returned home around 11:00 that same night with Steven Marchant, a former neighbor who was visiting from Ohio. After the coupled visited with Marchant for one to one-and-a-half hours, appellant left with Marchant to take him to

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[1] TEX. TRANS. CODE ANN. § 724.015 (Vernon 1999).

[2] The couple were married at the time of the arrest but divorced by the time of trial.

Marchant's mother's house. Cynthia testified that during the entire evening, she never saw her husband drink nor did he appear impaired, and that she would not have allowed him to drive Marchant home in the family's new truck had she believed he was drunk. Finally, she testified that, when appellant called from the station after he was arrested, he did not sound drunk, although she admitted on cross that he was not bonded out until the next morning.

## II. Sufficiency of the Evidence

In his first two points of error, appellant claims that the evidence is legally and factually insufficient to support the jury's verdict. The law on reviewing claims based on legal and factual sufficiency is well settled. *See, e.g., Wesbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000) (legal); *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (factual). Appellant's claims that the evidence is legally insufficient is not well founded. First, he claims that Snelgrove never "clearly stated" he was certified to perform the horizontal gaze nystagmus. This argument is simply inconsistent with Snelgrove's testimony that he "attended a standardized field sobriety testing school" and is "a certified practitioner" in that area. Second, he implies that Snelgrove's testimony that appellant's inability to perform well the walk-and-turn test and the one-leg test is not legally sufficient evidence.[3] Finally, he suggests that the remaining evidence of appellant's intoxication—(1) appellant's admission to Snelgrove, "Look, I know I'm drunk, but give me a break. Charge me with P.I. or let [Cynthia] come get me or take me home" and (2) that Snelgrove "did not ask appellant to take a blood test and apparently did not explain appellant's rights to obtain an additional analysis under section 724.019 of the Transportation Code." A blood test is not necessary to convict a person of driving while intoxicated. And "[t]he failure or inability to obtain an additional specimen or analysis under this section does not preclude the admission of evidence relating to the analysis of

[3] He also mischaracterizes the evidence as it pertains to the one-leg test, claiming Snelgrove did not have appellant perform the same. This is not how Snelgrove testified. Rather, he testified that "the test had to be *terminated* for [appellant's] safety." (Emphasis our own.)

the specimen taken at the request or order of the peace officer." TEX. TRANS. CODE ANN. § 724.019 (Vernon 1999). The evidence is legally sufficient. Appellant's first point of error is overruled.

Turning to appellant's second point of error, he claims that "without any blood or breath test evidence or any videotape evidence, the trial was a swearing match." So? Many trials are. And appellant will not be allowed to benefit from the want of a breath test when he is the reason no such evidence exists. Appellant points out that his ex-wife's testimony is consistent with his denial that he was driving while intoxicated. At best, her testimony established that appellant was not drunk when he left the house with Marchant around midnight. But her testimony was obviously unable to shed any light on appellant's whereabouts or goings-on between that time and the time he called her after his arrest.[4] The only other evidence produced by appellant was his own testimony, in which he told jurors on direct he had not been weaving; he did not tell Snelgrove he was drunk; he was not asked to perform a walk-and-turn test; it was too windy to perform the one-leg test; Marchant was drunk, which is why the truck smelled of alcohol; he was able to produce his driver's license, which "is evidence of sobriety;" and because he has Hepatitis-C, he does not drink, although he also testified he had "one beer earlier in the evening that he didn't quite finish." On cross, he admitted there was a partially emptied 12-pack of beer in the truck at the time of his arrest, although he explained those had been drunk by Marchant.

The evidence is neither so weak as to undermine our confidence in the jury's determination nor is it greatly outweighed by contrary proof such that it is against the great weight and preponderance of the evidence. *Johnson*, 23 S.W.3d at 10–11. Appellant's second point of error is overruled.

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[4] A call summary was entered into evidence showing appellant was arrested at 2:45 a.m., or at a minimum, more than two hours after Cynthia testified she last saw him. This report was generated at the time of the traffic stop and the testimony does not indicate how much time elapsed between the making of this summary and the time appellant called his wife.

## III. Mistrial

In his final point of error, appellant complains that the trial court abused its discretion in not declaring a mistrial where the jury deliberated for approximately three-and-a-half hours, given that they only heard "a total of two hours and thirty minutes of testimony."[5]

The Texas Code of Criminal Procedure provides that "[a]fter the cause is submitted to the jury, it may be discharged when it cannot agree and both parties consent to its discharge; or the court may in its discretion discharge it where it has been kept together for such time as to render it altogether improbable that it can agree." TEX. CODE CRIM. PROC. ANN. art. 36.31 (Vernon 1981). It is within the trial court's discretion to determine when a jury has been together for so long that it is "altogether improbable that it can agree." The trial court's exercise of this discretion is determined by the amount of time the jury has deliberated considered in light of the nature of the case and the evidence. *Patterson v. State*, 598 S.W.2d 265, 268 (Tex. Crim. App. 1980). Whether it is improbable the jury would render a verdict may also be evidenced by how long the jury was deadlocked, and whether the margin of disagreement had changed during the course of deliberations. *Beeman v. State*, 533 S.W.2d 799, 800–01 (Tex. Crim. App. 1976).

The record reflects that, after deliberating approximately three hours, the foreman sent a note to the judge that jury were deadlocked 11 to 1. The court replied that the jury should continue deliberating until 5:00 p.m., about one-half hour more, and if they were still deadlocked, deliberations would resume in the morning. No *Allen* Charge was given. The jury remained deadlocked, returned the next morning, and found appellant guilty after 43 minutes of deliberating the next day. As appellant previously pointed out, this case was essentially a "swearing match." It was not an abuse of discretion for the trial court to allow

[5] The State agrees with appellant's time estimates.

the jury to continue its deliberations.[6] Appellant's final point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Fowler, Wittig, and Draughn.[7]

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

[6] At least one other appellate court found no abuse of discretion by the trial court's denial of a motion for mistrial on similar facts. *Hernandez v. State*, 867 S.W.2d 900, 910 (Tex. App.—Texarkana 1993, no pet.) (jury deliberated seven hours on evidence that took between six and seven hours to present).

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