**Affirmed and Opinion filed October 11, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-01188-CR**

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**MATTHEW RAY BAUMGARTON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from County Criminal Court at Law No. 1**
**Harris County, Texas**
**Trial Court Cause No. 99-25841**

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## O P I N I O N

Matthew Ray Baumgarton appeals a misdemeanor conviction for driving while intoxicated ("DWI") on the grounds that: (1) the trial court erred in denying his motion to quash the State's information; (2) appellant was denied due process of law when the State lost exculpatory evidence; (3) the trial court erred in excluding evidence of involuntary intoxication at the guilt-innocence phase of trial; (4) there was a fatal variance between the information and the proof offered by the State at trial. We affirm.

## Background

Appellant was charged with DWI and filed a motion to quash the information, which was denied by the trial court. A jury found appellant guilty, and the trial court assessed punishment of 180 days confinement, probated for one year, and a $600 fine.

## Motion to Quash Information

Appellant's first issue contends that the trial court erred in denying his motion to quash the information, which states that appellant was intoxicated due to the introduction of alcohol, an "unknown drug," or a combination of alcohol and an unknown drug into his body.[1] He argues that this allegation failed to give him constitutionally required notice of the offense with which he was charged because it failed to state what intoxicant(s) the State intended to prove as the unknown drug.[2] Appellant further argues that the information does not state an offense when it alleges intoxication from an unknown drug because the Texas Penal Code only prohibits driving while being intoxicated by known drugs.

A defendant has a constitutional right to be informed of the nature of the charges against him. *Curry v. State*, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000). Generally, an information provides sufficient notice if it follows the language of the statute defining the offense. *Id.* However, when a statute defines the manner or means of committing an offense in several alternative ways, an indictment will fail for lack of specificity if it neglects to identify which of the statutory means is alleged. *Id*.

To overcome a motion to quash, an information in a DWI prosecution must specifically allege which type(s) of intoxicant, among those listed in the statute, the

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[1] "Intoxicated" means: (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a combination of the two or more of those substances, or any other substances into the body; or (B) having an alcohol concentration of 0.08 or more. TEX. PEN. CODE ANN. § 49.01(2)(A)(B) (Vernon Supp. 2001).

[2] Appellant claims that he was unable to undertake an effective defense without knowing what substance he was charged with consuming but does not state how his defense might have changed if that information had been provided.

defendant allegedly used, *i.e.*, alcohol, a controlled substance, a drug, a dangerous drug, or a combination of these substances. TEX. PEN. CODE ANN. § 49.01(2)(A) (Vernon Supp. 2001)*; State v. Carter*, 810 S.W.2d 197, 200 (Tex. Crim. App. 1991); *State v. Cordell*, 34 S.W.3d 719, 721 (Tex. App.—Fort Worth 2000, pet. ref'd). Therefore, to give adequate notice, the charging instrument need not specify which particular substance caused the accused's intoxication as long as an intoxicant listed in section 49.01(2)(A) is alleged. *Cordell*, 34 S.W.3d at 721-22.

Moreover, contrary to appellant's argument, the list of intoxicants for DWI is not limited, but extends to any substance, other than food, which affects the body's structure or function. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.002(16) (Vernon Supp. 2001) (defining "drug"). Therefore, the allegation of intoxication from an unknown drug was not defective either for lack of specificity or failure to state an offense, and appellant's first issue is overruled.

**Lost Evidence**

Appellant's second issue alleges that he was denied due process of law when the State lost exculpatory evidence in the form of a videotape, taken of him while he was at the police station. He claims that the video would have shown that he did not behave in an intoxicated manner because he tested below the *per se* legal limit on the intoxilyzer.

To establish a due process violation arising from destruction of evidence by the State, an appellant must show that the evidence was material and favorable in that it both possessed an exculpatory value that was apparent before the destruction, and was of such a nature that the accused would be unable to obtain comparable evidence elsewhere. *California v. Trombetta*, 104 S.Ct. 2528, 2534 (1984); *San Miguel v. State*, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993). Where the loss of potentially favorable evidence precludes such a showing, a due process claim requires proof that the State acted in bad faith when it failed

to preserve the potentially useful evidence. *Arizona v. Youngblood*, 109 S.Ct. 333, 337 (1988).[3]

In this case, appellant does not point to any testimony or other evidence establishing that the videotape was favorable or material or that the State acted in bad faith in failing to preserve it. The mere fact that the breathalyzer revealed a 0.07 alcohol concentration does not show how appellant would have appeared on the videotape because a person can be legally intoxicated even if their alcohol level is below the *per se* legal limit. *See* TEX. PEN. CODE ANN. § 49.01(2)(A)(B) (Vernon Supp. 2001); *see also Dahl v. State*, 707 S.W.2d 694, 701-702 (Tex. App.—Austin 1986, pet. ref'd). Moreover, because an intoxilyzer measures only blood alcohol, it is not probative of the presence of, or intoxication from, other intoxicants. *See Cordell*, 34 S.W.3d at 721. Absent a showing that the videotape was favorable and material or that the State acted in bad faith in failing to preserve it, appellant's second issue fails to demonstrate a due process violation and is, accordingly, overruled.

**Evidence of Involuntary Intoxication**

Appellant's third issue contends that the trial court erred in denying his request to introduce evidence of involuntary intoxication at the guilt/innocence phase, and in granting the State's motion to suppress such evidence. He asserts that this error was preserved, despite the fact that no such motion or ruling can be found in the record, because the trial court later acknowledged during the punishment phase that it had overruled his request and granted the State's motion. Moreover, appellant argues that the trial court's failure to admit testimony regarding involuntary intoxication was constitutional error because it deprived him of his due process right to present a defense.

Before an appellate court may consider a complaint concerning the exclusion of evidence, the proponent must have perfected an offer of proof or a bill of exceptions. TEX.

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[3] The existence of bad faith on the part of police would turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. *Youngblood*, 109 S.Ct. at 336-37 n.* (asterisk used in place of number in original).

R. EVID. 103(b); *Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999). Absent a showing of what such evidence would have been or shown, nothing is preserved for review. *Id*. In this case, because appellant has presented no record of what the allegedly excluded evidence would have shown,[4] his third point of error presents nothing for our review and is overruled.

**Variance Between Information and Proof**

Appellant's fourth issue claims that there is a fatal variance between the information and the proof offered by the State at trial in that the information alleged, in part, intoxication from an unknown drug but the State failed to prove whether the drug was unknown and whether the investigative authorities used due diligence to ascertain it.

A material variance between the proof offered at trial and the allegations of the charging instrument is treated as an insufficiency of the evidence. *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001). However, when a jury is charged in the disjunctive and returns a general verdict on an information charging alternative theories of committing the offense, the verdict stands so long as evidence supports any of the theories alleged. *Rosales v. State*, 4 S.W.3d 228, 231 (Tex. Crim. App. 1999). In this case, the information alleged, in the alternative, that appellant was intoxicated due to alcohol, an unknown drug, or a combination of the two. The jury returned a verdict of guilty as charged in the information. Because appellant fails to challenge the sufficiency of the evidence supporting his conviction for DWI due to alcohol alone, any insufficiency of the evidence to support conviction under the alternative theories would not overturn the judgment.

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[4] Appellant's argument, that his testimony given during the punishment phase sufficed as an offer of proof, is without merit because such a record must have been developed before the charge on guilt was read to the jury. TEX. R. EVID. 103(b); *see Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998). Obviously, allowing evidence adduced in the punishment phase to suffice as an offer of proof regarding the guilt stage would preclude the trial court from reconsidering the guilt stage ruling in light of the actual evidence and thereby defeat an important purpose of the offer of proof. *See Ludlow v. DeBerry*, 959 S.W.2d 265, 270 (Tex. App.—Houston [14th Dist.] 1997 no pet.).

Accordingly, appellant's fourth issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 11, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.[5]

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

[5] Senior Justice Don Wittig sitting by assignment.