Affirmed and Opinion filed November 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01091-CR

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RICHARD CHARLES ARMIJO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 97-49153

O P I N I O N

A jury found appellant, Richard Charles Armijo, guilty of driving while intoxicated, and the trial court sentenced him to one year's confinement, probated, three days in jail, and a $1,000 fine. Armijo appeals in three points of error, contending that (1) the trial court erred in permitting expert testimony about field sobriety tests; and (2) through (3) the evidence is legally and factually insufficient to show that he was intoxicated. We affirm.

FIELD SOBRIETY TESTS

In his first point of error, Armijo contends that the trial court erred in allowing expert testimony from two sheriff department deputies about field sobriety tests. Deputy Kirby Burton and Deputy Shawn Woelk testified that Armijo failed the horizontal gaze nystagmus (HGN), the walk-and-turn, and one-leg stand tests.

Regarding evidence of the walk-and-turn and one-leg stand tests, Armijo did not object to their admission on the grounds that the scientific reliability of these tests had not been proven. Accordingly, he has not preserved any error for appeal. TEX. R. APP. P. 33.1(a).

Regarding the scientific reliability of the HGN test, Armijo challenges whether the test itself is scientifically valid; whether the technique applying the theory is valid; whether the technique was properly applied; and whether the deputies were qualified to apply it to him. The admissibility of experts' testimony is addressed by Texas Rule of Evidence 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The proponent of scientific evidence must meet three criteria by clear and convincing evidence for it to be considered sufficiently reliable under Rule 702. *See Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). First, the underlying scientific theory must be valid. *See id.* Second, the technique applying the theory must also be valid. *See id.* Third, the technique must have been properly applied on the occasion in question. *See id.*

In *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994) (en banc), the court of criminal appeals took judicial notice of scientific literature regarding the HGN test. It concluded that the HGN test's theory and its technique are sufficiently reliable for admission under Rule 702. *See id.* at 768-69.[1]

[1] *But see Mata v. State*, 13 S.W.3d 1, 12-16 (Tex. App.—San Antonio 1999, pet. granted) (Cadena, J., dissenting) (noting some scientific literature questions the methodology of studies promoting the HGN test; also questioning HGN test as reliable indicator of intoxication given that HGN may be brought about by inner ear problems, influenza, streptococcus infections, vertigo, measles, syphilis, arteriosclerosis, muscular dystrophy, multiple sclerosis, Karsakoff's Syndrome, brain hemorrhage, epilepsy, hypertension, eye strain, motion sickness, sunstroke, eye muscle fatigue, glaucoma, and consumption of caffeine, nicotine, and aspirin).

Following this precedent, we disagree with Armijo that the HGN test's theory and technique are unreliable.

In *Emerson*, the court also held that in the case of a police officer, evidence that the officer has received practitioner certification from the state of Texas suffices to qualify him or her as an expert on administration of the HGN test. *Id*. at 769. The evidence in this case showed that Deputy Burton had been trained in 1997 by Texas A&M University in a forty-hour course to administer the HGN test. He had received certification in performing the standardized field sobriety tests. Deputy Woelk testified that he received training in DWI detection and standard field sobriety from Humble Police Academy. He also received state certification in standardized field sobriety. Thus, both deputies were qualified as experts to testify about the test's administration and technique.

Finally, we address whether the State proved by clear and convincing evidence that the deputies properly applied the HGN test to Armijo. In his testimony, Deputy Burton explained that in the HGN test, a person follows the movement of an object, in this case a ball-point pen, held twelve to fifteen inches before his eyes, without turning his head. The tester looks for three "clues" to intoxication in each eye: (1) lack of smooth pursuit; (2) distinct nystagmus at maximum deviation; and (3) onset of nystagmus before forty-five degrees. Deputy Burton explained how the test is performed and the three clues in detail. Both deputies testified that they administered this test to Armijo, who showed the maximum number of clues in each eye. Although they were unaware of many medical conditions that might affect the performance of the test, they did ask whether Armijo had any head or eye injuries. We find that the State offered clear and convincing evidence that the deputies performed the test correctly on Armijo.

Accordingly, the trial court did not err in allowing the deputies' testimony about the test and about Armijo's performance. We overrule point of error one.

SUFFICIENCY OF THE EVIDENCE

In his second and third points of error, Armijo challenges the legal and factual sufficiency of the evidence showing that he had lost the normal use of his mental and physical faculties by reason of introduction of alcohol into his body. Texas law prohibits operating a motor vehicle in a public place while

intoxicated. *See* TEX. PEN. CODE ANN. § 49.04(a) (Vernon 1994). Armijo only challenges the element of intoxication.

When reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995); *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.], pet ref'd). The trier of fact is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See id.*

When reviewing the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although an appellate court is authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential to avoid our substituting our judgment for that of the fact finder. *See id.* at 133; *Roberts v. State*, 987 S.W.2d at 163. We will reverse for factual insufficiency if our review demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *See Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

The evidence at trial revealed that Armijo left work at 8:00 p.m. and ate dinner with family and friends at around 9:15 p.m. According to testimony, he did not drink any alcoholic beverages with dinner. Before leaving the restaurant, however, he drank a scotch and smoked a cigar. Upon leaving the restaurant at 10:45 p.m., the evidence shows that Armijo's group traveled to an area popular for its restaurants, bars, and clubs. Armijo's friends and family testified that between 11:00 p.m. and 1:45 a.m. (when he retrieved his car from valet parking), he drank an additional two alcoholic beverages and smoked another cigar. According to his friends and family, he was not intoxicated. Armijo drove his car from the valet stand, dropped off a friend at the restaurant where they had eaten dinner, and drove home via the tollway. He exited the tollway at 2:57 a.m.

The deputies testified for the State that they observed Armijo driving at approximately 3:00 a.m. They saw him make several lane changes without signaling and stop for no apparent reason in the middle of a lane. At this point, they turned on the lights of the patrol car. Deputy Burton testified that in response, Armijo pulled off the roadway and almost drove into a ditch, which was thirty feet off the road. Then, Armijo pulled back onto the road, drove an additional 300 feet to an intersection, where he turned right, proceeded another block, and finally came to a stop on the side of the road. Deputy Burton testified that this was approximately one-fourth of a mile from where he first turned on his lights. Deputy Woelk testified that the distance before Armijo stopped was only 200 yards. He recalled Armijo repeatedly saying that he lived just six houses away.

Deputy Burton testified that he smelled the strong odor of alcohol from Armijo's car. According to Deputy Woelk, Armijo had red, bloodshot eyes and slurred speech. When Deputy Burton asked for his license, he could not find the license in his wallet, even though the officers could see it. He shuffled through his car's console, his shirt pocket, pants pocket, and jacket before finding the license in his wallet. Armijo stumbled out of his car after the deputies asked him to step out of it. When he walked to the back of the car, he lightly touched it for balance. According to Deputy Burton, Armijo was unsteady and swaying. He failed two HGN tests, the walk-and-turn test, and the one-leg stand. In the police station, Armijo declined to take the breathalyzer test and appeared "normal" on the videotape made there. However, both deputies opined that Armijo had lost the normal use of his mental and physical faculties by reason of his consumption of alcohol.

On cross-examination, Armijo's attorney pointed out inconsistencies in the deputies' testimony. Although Deputy Burton testified that he smelled alcohol in Armijo's car, the deputies admitted that alcohol itself has no scent. Deputy Burton testified that although he thought Armijo wore a tie, he could not recall the tie's color. Deputy Woelk (and later Armijo) testified that he did not wear a tie. Deputy Burton testified that Armijo denied wearing corrective lenses, but he could not recall that Armijo's driver's license had a restriction for them. Armijo later testified that he told the deputies he was wearing contact lenses. Deputy Burton also denied that Armijo told them that he lived just six houses away.

Armijo testified on his behalf and denied being intoxicated that evening. He testified that he had been up since 7:00 a.m. the previous morning and had eaten very little during the day. While he confirmed that he had three drinks, a scotch and two whiskey-and-colas, he drank the last at 12:30 a.m. Armijo testified that when he first saw the police car's lights, they were 150 yards behind him. He did not immediately stop because he did not realize that the flashing lights were for him. When asked, he told the officers that he wore contact lenses, and his driver's license reflected this restriction. He testified that he was nervous when they stopped him. He also testified that he performed the HGN test just one time, not two. He initially declined to perform other tests because his neighbor's lights came on. However, he changed his mind and performed the one-leg stand exactly as the officer asked him. He denied performing the walk-and-turn test. He also denied swaying or hopping. At the police station, he declined to take the breathalyzer because he did not trust the machine and was unsure whether he would register above the legal limit.

Viewing the evidence in the light most favorable to the verdict, we find that there is legally sufficient evidence to support the jury's verdict that Armijo was intoxicated. Further, after neutrally reviewing all the evidence, we also find factually sufficient evidence that Armijo was intoxicated. Although there is much conflicting evidence about details of the evening and differing accounts about whether Armijo was intoxicated, conflicts in testimony are for the jury's resolution. *See Johnson*, 23 S.W.3d at 7. Additionally, the conflicts are not so contrary to the overwhelming weight of the evidence as to make the verdict clearly wrong and unjust. Accordingly, we overrule points of error two and three.

Having overruled all three points of error, we affirm Armijo's conviction.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed November 2, 2000.

Panel consists of Justices Cannon, Draughn, and Lee.*

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.

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