Affirmed and Opinion filed June 15, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-00460-CR

———————————

DANIEL BASURTO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 795,033

O P I N I O N

Appellant, Daniel Basurto, appeals his felony conviction of driving while intoxicated (DWI). He asserts two instances of trial court error on appeal, claiming that the trial court erred in overruling his motion to suppress videotaped evidence and in overruling his motion for mistrial. He also claims that the evidence was factually insufficient to support his conviction. We affirm.

BACKGROUND

Houston Police Officer David Gutierrez stopped appellant around 11:00 PM after the officer observed him speeding and driving erratically on Interstate 45. Appellant did not immediately stop when signaled by Officer Gutierrez. Instead, he exited the freeway and drove five blocks before halting his vehicle. Once appellant's vehicle was stopped, Officer Gutierrez approached it and immediately noticed a strong odor of some alcoholic beverage emanating from the vehicle's open window. Officer Gutierrez noticed that appellant's eyes were glassy and bloodshot and decided to conduct field sobriety tests in an effort to investigate whether appellant was intoxicated.

Officer Gutierrez asked appellant to exit the vehicle to facilitate the tests. Appellant complied but refused to perform any tests. Officer Gutierrez found appellant's language and mannerism to be combative, and he also noticed that appellant had to lean against his vehicle to keep from falling. Based on what he observed, Officer Gutierrez arrested appellant and transported him to the station for further investigation and detention. Appellant remained belligerent throughout the trip to the station.

Appellant's behavior at the station did little to change Officer Gutierrez's conclusion that appellant was intoxicated. HPD Officer Ed Sanders and HPD Police Service Officer Kimberly Preadom both attempted to test appellant's sobriety. After Officer Sanders gave him the statutory warnings prior to submitting appellant to a breath test, appellant refused to take the test. Officer Sanders also noticed a strong odor of alcoholic beverage emanating from appellant, and also found appellant's language belligerent. PSO Preadom, a civilian employee of HPD, videotaped her attempt to have appellant perform sobriety tests. After she read appellant his rights, appellant also refused to perform these tests without consulting with his attorney. PSO Preadom likewise found appellant to exhibit signs of alcohol-induced intoxication.

Appellant claimed that on the date of his arrest, he had been working as a car painter from 8:00 AM until around 11:00 PM. He testified that he had been inhaling paint fumes

throughout the day and smelling the fumes might have affected his motor skills at the time he was stopped by Officer Gutierrez. He also claimed that he had consumed no alcoholic beverages on the night he was arrested. Appellant finally asserted that he did not want to take the breath test because he was unsure if the paint fumes he had been breathing all day would register as alcohol.

ANALYSIS

Appellant first claims that the trial court erred in overruling his motion to suppress and admitting the audio portion of the videotape taken at the station by PSO Preadom. Appellant claims that he had exercised his *Miranda* right to terminate the interview during the course of the videotaping, making it appropriate for the trial court to suppress the audio portion of the tape after the point he exercised his rights. While appellant concedes that the admission of routine booking questions is generally permitted, he argues that PSO Preadom's attempts to advise appellant of his rights is "far beyond" general booking questions and constitutes a "sophisticated form of interrogation." We disagree.

We review a trial court's ruling on a motion to suppress based on an abuse of discretion standard. *See Long v. State*, 823 S.W.2d 259, 277 (Tex. Crim. App.1991). At a hearing on a motion to suppress, the trial court is the sole trier of fact and judge of the witnesses' credibility, as well as the weight to be given their testimony. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). The trial judge may choose to believe or disbelieve any or all of a witness's testimony. *See Green v. State*, 934 S.W.2d 92, 98 (Tex. Crim. App.1996). We must afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We also afford nearly complete deference to the trial court's rulings on "mixed questions of law and fact," such as probable cause and reasonable suspicion, where the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *See*

id. Further, the evidence is viewed in the light most favorable to the trial court's ruling. *See Whitten v. State*, 828 S.W.2d 817, 820 (Tex. App.–Houston [1st Dist.] 1992, pet. ref'd).

We have reviewed the videotape and find the admission of the audio portion of the tape is consistent with our holding in *State v. Davis*, 792 S.W.2d 751, 752-53 (Tex. App.–Houston [14th Dist.] 1990, no pet.). There, when faced with a similar challenge to the admission of the audio portions of a videotape in a DWI prosecution, we held:

> audio tracks from DWI videotapes should not be suppressed unless the police conduct depicted expressly or impliedly calls for a testimonial response not normally incident to arrest and custody or is conduct the police should know is reasonably likely to elicit such a response. Police requests that suspects perform the sobriety tests and directions on how suspects are to do the tests do not constitute "interrogation;" neither do queries concerning a suspect's understanding of her rights.

Id. at 754.

Here, PSO Preadom's conduct does not rise to the level of "interrogation." Rather, she was advising appellant of his rights and the purpose of the sobriety tests. Her comments were not designed to elicit an incriminating testimonial response from appellant, thereby mooting appellant's argument that he was "interrogated" under *Miranda*. Because the audio portion of the videotape was not a product of interrogation, we overrule appellant's first point of error.

In his second point of error, appellant complains that the trial court erred in overruling his motion for a mistrial following the prosecutor's question regarding an extraneous offense. The State alleged two prior DWI convictions in the indictment as elements of felony DWI, one occurring in November of 1987 and one in March of 1990. The State originally alleged a conviction in December of 1988, but substituted the November 1987 conviction before trial. During the State's cross-examination of appellant, however, the following exchange occurred:

> Prosecutor: Is it true that on November 17, 1987 — Excuse Me. On December 13, 1998 [sic], in the 176th District Court —

Defense Counsel:	Object based on remoteness, your Honor, more than ten years ago.
Court:	Overruled.
Prosecutor:	In the 176th District Court of Harris County in 427053 that you were convicted of the offense of driving while intoxicated, of driving and operating a motor vehicle while intoxicated?
Appellant:	When was that?
Prosecutor:	1988.
Appellant:	In the 176th district Court of Harris County, Texas?
Court:	I'm sorry. That objection is sustained.

At that point, appellant's counsel asked for and received an instruction to disregard the State's questions. His motion for mistrial was denied by the trial court, however.

Appellant contends that the State's question alluding to a prior DWI conviction was so inflammatory that the court's instruction to disregard did not sufficiently cure any error. References to extraneous offenses allegedly committed by the defendant can be rendered harmless by an instruction to disregard from the trial judge. *See Davis v. State*, 642 S.W.2d 510, 512 (Tex. Crim. App.1982). Furthermore, the Court of Criminal Appeals has held that mistrials are an extreme remedy and are available only when the prejudicial statement is so emotionally inflammatory that an instruction is unlikely to cure the prejudice caused by the statement. *See Bauder v. State* 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). Here, we do not find the prosecutor's unanswered question regarding a DWI conviction with an uncertain date so prejudicial that a mistrial was warranted. We overrule appellant's second point of error.

In his third point of error, appellant claims that the evidence supporting his conviction was factually insufficient to support his conviction for DWI. He claims that the evidence supporting the intoxication element is insufficient because there is no direct evidence of intoxication, largely due to the fact that appellant refused to take the breath and sobriety tests

offered to him by HPD officers. He also claims that, while there is some evidence that his behavior was erratic, this behavior is explained by his testimony that he was a painter and had been smelling paint fumes all day.

In reviewing factual sufficiency challenges, we must view all of the evidence without the prism of "in the light most favorable to the prosecution." *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We accomplish this by examining all of the evidence presented at trial and applying just enough deference so that we do not substitute our own judgment for that of the trial court. Under this standard of review, evidence is factually insufficient if it is so weak as to be clearly wrong or unjust or the finding is against the great weight or preponderance of the evidence. *See Johnson v. State*, No. 1915-98, 2000 WL 140257, *8 (Tex. Crim. App. February 9, 2000).

Weighing the evidence, we find it to be factually sufficient. Here, two HPD officers testified that appellant smelled of alcohol. Officer Gutierrez testified that appellant had glassy, bloodshot eyes, swayed when he walked, and needed to lean on his car for support. Officer Gutierrez also testified that he had been trained in recognizing different types of intoxication and, based on that training, he found appellant's behavior and physical symptoms far more consistent with alcohol intoxication that intoxication from breathing paint fumes. Appellant's intoxicated state is supported by the videotape of his refusal to perform sobriety tests at the station. Contradicting this evidence is appellant's testimony that he did not drink any alcoholic substances, that he had been breathing paint fumes at work, and the absence of physical evidence of intoxication. Based on this record, we do not find appellant's conviction to be against the overwhelming weight of the evidence or to be based on evidence so weak that the conviction is unjust.

We overrule appellant's third point of error and affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed June 15, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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