In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00254-CR

LAWRENCE MORGAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th District Court
Bowie County, Texas
Trial Court No. 17F0521-005

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Stevens

MEMORANDUM OPINION

Lawrence Morgan was convicted of driving while intoxicated (DWI) with a child passenger and was sentenced to twenty-four months in state jail. On appeal, Morgan argues that the trial court erred by admitting Morgan's refusal to take a breathalyzer test and testimony about his demeanor following the refusal because events occurring in the intoxilyzer room were not electronically recorded. Morgan also argues that the trial court erred by excluding his wife's testimony after she violated Rule 614. We find that (1) Morgan did not preserve the complaint about his refusal to take a breath test and (2) the trial court did not abuse its discretion in its evidentiary rulings. As a result, we affirm the trial court's judgment.

I. Factual Background

The evidence at trial demonstrated that Morgan crashed into the rear of another vehicle while driving with his three children. Jeremy Sutton, a sergeant with the Texarkana, Texas, Police Department, testified that Morgan had red, glassy eyes and smelled of alcohol. Morgan also misspelled the name of one child and provided the wrong birthdays for all three children. Sutton testified that Morgan did not pass the one-leg stand field sobriety test and that he witnessed four out of six cues of intoxication when administering the horizontal gaze nystagmus test and three of eight cues on the walk-and-turn test. Sutton also opined that Morgan's judgment was impaired because he wanted to drive his vehicle away even though it was not drivable because the radiator was "busted" and "engine coolant was all over the parking lot." Sutton concluded that Morgan was intoxicated and arrested him for DWI.

Sutton testified that he read Morgan his *Miranda*[1] rights and obtained Morgan's confession that he had imbibed "a couple of beers" before getting behind the wheel. While Morgan initially agreed to take a breathalyzer test, he later revoked his consent. After reviewing the recording of Morgan's field sobriety tests, a Bowie County jury convicted him of DWI with a child passenger.

II. Morgan Did Not Preserve the Complaint About His Refusal to Take a Breath Test

In his first point of error, Morgan argues that the trial court erred in admitting his refusal to take a breathalyzer test. Morgan's argument is based on Article 38.22, Section 3, of the Texas Code of Criminal Procedure, which states, "No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless . . . an electronic recording . . . is made of the statement." TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(1). We conclude that his argument on appeal does not comport with the objection made at trial.

The record shows that Morgan believed there was a recording from the intoxilyzer room that was never produced to him because Sutton's police report indicated that such a recording existed. When he objected to the possibility that Sutton would testify about what happened in the intoxilyzer room due to the lack of a recording, the trial court took the matter under advisement because it did not know what was "being offered by the [S]tate" and instructed Morgan to object when the need arose. It then allowed Morgan to take Sutton on voir dire to inquire about the possibility of a recording, but Sutton confirmed that his police report was mistaken and that there was no recording from the intoxilyzer room.

[1]*See Miranda v. Arizona*, 384 U.S. 436 (1966).

The trial court found that there was no recording but again warned that it was not ruling on admissibility of any particular testimony and that Morgan needed to lodge an appropriate objection should the need for one become apparent. Even so, when the State asked whether Morgan refused to provide the breath sample, Morgan's only objection was, "That's inadmissible hearsay." After the hearsay objection was overruled, Sutton testified that Morgan refused to take the breathalyzer test. A short time later, Sutton again testified without any objection that he did not get a breath sample from Morgan.

On appeal, Morgan argues that the trial court erred in admitting Sutton's testimony due to Article 38.22. To preserve a complaint for our review, the trial court must have "ruled on the request, objection, or motion, either expressly or implicitly," or the complaining party must have objected to the trial court's refusal to rule. TEX. R. APP. P. 33.1(a)(2). The record shows that the trial court never ruled on the issue of whether Sutton's testimony about Morgan's refusal to take the breathalyzer test was admissible under Article 38.22. When Sutton testified, Morgan raised only a hearsay objection. "The point of error on appeal must correspond or comport with the objection made at trial." *Wright v. State*, 154 S.W.3d 235, 241 (Tex. App.—Texarkana 2005, pet. ref'd) (citing *Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998) (op. on reh'g)). "If a trial objection does not comport with arguments on appeal, error has not been preserved." *Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016). We overrule Morgan's first complaint because it was not preserved.

III. The Trial Court Did Not Abuse Its Discretion in Its Evidentiary Rulings

Next, Morgan argues that the trial court erred by admitting evidence of Morgan's demeanor after his refusal to provide a breath sample and by disallowing his wife's testimony after she failed to comply with Rule 614. We find no abuse of discretion in these rulings.

A. Standard of Review

"We review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Flowers v. State*, 438 S.W.3d 96, 103 (Tex. App.—Texarkana 2014, pet. ref'd) (citing *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010)). "Abuse of discretion occurs only if the decision is 'so clearly wrong as to lie outside the zone within which reasonable people might disagree.'" *Id.* (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g)). "We may not substitute our own decision for that of the trial court." *Id.* (citing *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003)). "We will uphold an evidentiary ruling if it was correct on any theory of law applicable to the case." *Id.* (citing *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009)).

B. Article 38.22, Section 3, Did Not Apply to Sutton's Testimony About Morgan's Demeanor

Morgan argues that the trial court should not have admitted Sutton's testimony that Morgan was uncooperative.[2] At trial, Sutton testified, without objection, that Morgan refused to follow officers to the book-in desk. When the State asked, "And what was his demeanor and his attitude

[2]Morgan also argues that Sutton should not have testified that he had to "physically place [Morgan] in handcuffs because he would not voluntarily comply with . . . instructions," but the record shows Morgan did not object to this testimony at trial. Accordingly, this complaint was not preserved. *See* TEX. R. APP. P. 33.1(a)(1).

like at this point," Morgan objected that the answer called for "items under Rule 38.22 that [were] supposed to be electronically recorded." The trial court overruled the objection, and Sutton testified that Morgan was upset and "refused to do anything [they] said."

By its plain terms, "Article 38.22, § 3(a), applies only to oral statements made during custodial interrogation." *Garcia v. State*, 239 S.W.3d 862, 868 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (quoting *Holberg v. State*, 38 S.W.3d 137, 141 (Tex. Crim. App. 2000), *abrogated on other grounds by Meadoux v. State*, 325 S.W.3d 189 (Tex. Crim. App. 2010); *Hernandez v. State*, 114 S.W.3d 58, 65 (Tex. App.—Fort Worth 2003, pet. ref'd)). Because the State's questioning called for testimony about Morgan's demeanor and attitude as observed by Sutton, not a recitation of oral statements made by Morgan, the trial court was within its discretion to conclude that Article 38.22, Section 3, did not apply.[3] *See id.* As a result, we overrule Morgan's second complaint.

C. The Trial Court Did Not Abuse Its Discretion in Excluding Morgan's Wife's Testimony

"At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." TEX. R. EVID. 614. Before hearing any evidence, Rule 614 was invoked, and the trial court excluded potential witnesses. Even though Morgan's wife, LaKeitha Harris, was a potential witness, Morgan specifically asked that she be allowed to remain in the

[3]We note that Sutton's testimony included a nonresponsive answer that Morgan said he did not cause the crash. Morgan does not complain of this statement on appeal, likely because he did not object to the nonresponsive answer at trial and was required to do so to preserve any complaint about it. *See In re K.L.M.*, No. 06-17-00110-CV, 2018 WL 988394, at *9 (Tex. App.—Texarkana Feb. 21, 2018, no pet.) (mem. op.); *Jackson v. State*, 889 S.W.2d 615, 617 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (citing *Smith v. State*, 763 S.W.2d 836, 841 (Tex. App.—Dallas 1988, pet. ref'd)).

courtroom because she was "not going to testify anyway." As a result, the trial court allowed Harris to remain in the courtroom.

After Sutton testified that he questioned Morgan's sobriety when Morgan wanted to drive his non-drivable vehicle home, Morgan asked that he be allowed to call Harris as a rebuttal witness to testify that she retrieved the vehicle from impound and drove it home. After stating that Harris was only allowed to remain in the courtroom because Morgan promised not to call her as a witness, the trial court sustained the State's Rule 614 objection.

"Disqualification of a defense witness for such witness' violation of the Rule must be viewed in light of the defendant's constitutional right to call witnesses on his or her behalf." *Taylor v. State*, 173 S.W.3d 851, 853 (Tex. App.—Texarkana 2005, no pet.) (citing *Davis v. State*, 872 S.W.2d 743, 745 (Tex. Crim. App. 1994)). "Generally, a defense witness should not be excluded solely for violation of the Rule." *Id.* (citing *Lopez v. State*, 960 S.W.2d 948, 953 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd)). As we have previously stated,

> The test for determining if a court properly exercised its discretion in excluding testimony in this context is: 1) whether the "particular and extraordinary circumstances" show the defendant or his or her counsel consented, procured, connived, or had knowledge of a witness or potential witness who is in violation of the sequestration rule, and 2) if no particular circumstances exist to justify disqualification, was the testimony of the witness crucial to the defense.

Id. (citing *Lopez*, 960 S.W.2d at 953 (citing *Webb v. State*, 766 S.W.2d 236, 245 (Tex. Crim. App. 1989))). "The appellant has the burden of establishing both prongs" of the *Webb* test. *Id.*

When a defendant has "knowledge of [a witness's] presence in the courtroom and the context of h[er] potential testimony," he "fails to meet the first prong of the *Webb* test." *Id.* The record shows that Morgan expressly asked that Harris be excluded from Rule 614 and knew that

she remained in the courtroom. Evidence at trial established that Harris had arrived on the scene of the accident and Morgan had asked that the car be driven home but that the car was towed instead of released. During an offer of proof, Harris said that she was with Morgan when she retrieved the car from impound. As a result, the record shows that Morgan was aware of the substance of Harris's testimony. Because we conclude that Morgan failed to meet the first prong of the *Webb* test, we overrule his last point of error. *See id.*; *Longoria v. State*, 148 S.W.3d 657, 660–61 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

IV. Conclusion

We affirm the trial court's judgment.

Scott E. Stevens
Justice

Date Submitted: July 1, 2020
Date Decided: July 2, 2020

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