

62164-5

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NO. 62164-5-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TODD A. OLSON,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Before defendant's trial for, inter alia, driving under the influence of intoxicants (DUI), defendant moved to exclude the expert opinions of the two officers of whether he was intoxicated. The court ruled that the officers could give their opinions, but the opinions had to be based on their observations only, not on their training and experience.

During the trial, defendant moved to suppress the second officer's opinion of the meaning of his observations of defendant during the horizontal gaze nystagmus (HGN) field sobriety test. The court ruled that the officer would be allowed to explain the test and give his observations of defendant's performance. The officer would not be allowed to offer an opinion of defendant's intoxication based on HGN. The officer would, however, be allowed to give his opinion of defendant's intoxication based on his other observations. The court suggested that to preclude raising an issue, the State could ask for the officer's opinion, specifically excluding the HGN observations as a basis for that opinion.

The State asked the officer for his opinion, based on his observations, of whether defendant was intoxicated. Defendant started to object, but withdrew the objection. The officer opined

that defendant was intoxicated. At the conclusion of the officer's testimony, defendant moved for a mistrial. In light of the other evidence of defendant's intoxication, the irregularity of not specifically excluding the HGN observations as part of the basis for the officer's opinion was not significant enough to warrant a new trial. The court did not abuse its discretion in denying the motion.

After conviction, based on defendant's offender score, the standard range of confinement was 60 months, the statutory maximum. The court imposed that sentence. The conviction also required imposition of 9-18 months of community custody. The court imposed the community but specifically noted that the combination of confinement and community custody could not exceed the statutory maximum. The court imposed the correct sentence.

II. ISSUES

1. An officer testified, without objection, that in his opinion defendant was intoxicated. The officer did not specifically exclude from his opinion his observations on a partial field sobriety test, as the court had suggested. Did the court abuse its discretion by denying defendant's motion for a mistrial where there was no

substantial likelihood that the failure to specifically exclude HGN from the officer's observations would influence the verdict?

2. Here, the mandatory sentence to confinement and the mandatory range of community custody potentially exceeded the statutory maximum sentence. The court imposed the mandated sentence but explicitly stated that the combination of confinement and community custody could not exceed the statutory maximum. Did the court impose an illegal sentence?

III. STATEMENT OF THE CASE

On May 24, 2008, at about 8:00 PM, defendant rear-ended another car that was stopped at a stop light. When the driver of the other car approached defendant, he backed up and fled. 9/30 RP 78, 80-81.

Two witnesses were talking in a parking lot in the vicinity. They heard and saw the accident. They immediately gave chase, with one of the witnesses calling 911. The witnesses followed defendant until he pulled into an apartment complex. 10/1 RP 28, 33, 37. Defendant got out of his car and walked to the front door of an apartment. When he found the door was locked, defendant ran around behind the apartment. One of the witnesses followed defendant on foot. He never lost sight of defendant. When he got

six to ten feet from defendant, the witness could smell the odor of intoxicants coming from defendant. He also noticed defendant's face was red. 10/1 RP 38-40, 44.

After defendant went around behind the apartment, Officer Shorthill, Lynnwood Police Department, arrived. The witness motioned for the officer to follow him, and the officer did. The officer saw defendant on the back porch of an apartment. The witness told the officer, "That's him." The officer arrested defendant. 1/10 RP 89-90.

The officer observed that defendant had glassy, water eyes, his speech was slurred, and he appeared to have urinated on himself. After walking defendant back to his patrol car, the officer turned him over to Officer Harvey for further investigation. 1/10 RP 92-93.

Officer Harvey observed that defendant was staggering when he walked. He also noticed defendant's eyes were watery, droopy, and bloodshot. Defendant's face was flushed. The officer also smelled the medium odor of alcohol "emanating from [defendant's] mouth." 10/1 RP 146-47, 151.

The officer asked defendant to perform some field sobriety tests. Defendant agreed. He started with the HGN test. The

officer had to tell defendant four times to keep his head straight and only follow the stimulus with his eyes. The officer noticed “distinct nystagmus in both eyes.” At that point, defendant told the officer he did not want to perform any more field sobriety tests. The officer arrested defendant for “DUI and hit and run.” 10/1 RP 152, 153-55.

At the Lynnwood Police Department, defendant refused to perform a breath test. 10/1 RP 157.

The State charged defendant with felony driving under the influence of intoxicants and the gross misdemeanors of hit and run, attended vehicle, and first degree driving while license revoked. 1 CP 81-82.

Before trial, defendant moved to exclude the officers opinions of whether he was intoxicated when he was arrested. The basis of the motion was that the officers had not been endorsed as experts, and the opinions would go to the “ultimate issue of fact.” 1 CP 86-87, 9/30 RP 34-38.

The State argued that the officer’s opinion was admissible as either lay or expert opinion. 2 CP _____,¹ 9/30 RP 39.

¹ The State has designated the State’s Trial Brief, Sub. 27, filed September 30, 2008, as part of the Clerk’s Papers. The Trial Brief has not yet been paginated.

The court ruled that since the State did not endorse the officers as experts, they would not be allowed to give an opinion based on their "training and experience." The officers could give an opinion based on their observations. 9/30 RP 45-47.

Officer Shorthill and the lay witnesses testified as set out above. Before Officer Harvey testified, defendant moved to suppress his testimony concerning the HGN test "as it relates to whether that would be involving him as an undeclared expert." 10/1 RP 5. The court gave the parties a preliminary ruling:

I will permit him to testify to his facts and what he observed in relation to the nystagmus gaze, but I will not permit him to offer an opinion in relation to it. . . . if the question is going to be asked similar to what I referenced earlier based upon your observations, there's going to have to be a qualifier in the question, "Based upon your observations, excluding the nystagmus gaze test."

10/1 RP 107-08.

After a recess, the court heard arguments on Officer Harvey's testimony. The State commented:

And your preliminary decision allowed the officer to talk about the gaze nystagmus test, allows the officer to tell the jury that that's a standard field sobriety test, nationally and state recognized, that he will be able to explain what clues he looks for on that and then describe his observations. That's where I'm going to go.

10/1 RP 109-10.

Defendant responded:

My concern is that simply going into what would essentially amount to scientific explanation for the basis of the nystagmus or the basis for the field sobriety test or what they indicate or those sorts of things would all be inappropriate expert testimony.

10/1 RP 110.

The court ruled:

I'm going to permit the questioning in relation to what [the State] indicated. The difference to me, between expert testimony and lay testimony is in relation to the ability to state the opinion of the expert.

If the officer is explaining based on his training and experience the field sobriety test that he's familiar with, that's not the type of expert testimony that I would conclude in this case would be excluded. It's not opinion based testimony. It's based on his training as a police officer.

10/1 RP 111.

After further argument, the court ruled, "I'm going to permit the testimony consistent with what I ruled. . . . So you can question the officer in relation to what you originally indicated[.]" 10/1 RP 117.

After Officer testified to the facts set out above, he described defendant's performance on the HGN test. After further testimony, the State asked, "Officer, based on your observations of [defendant] on that day, do you have an opinion about whether he

was under the influence or affected by alcohol?" The officer responded, "My opinion is that he was intoxicated." Defendant started to object, but then withdrew the objection. 10/1 RP 159.

During re-direct, the State asked, "Based upon your observations of [defendant], do you have an opinion about whether his driving would be affected by alcohol?" The court sustained defendant's objection. 10/1 RP 179.

Outside the presence of the jury, defendant moved for a mistrial. Defendant argued:

And I think the court's ruling was very clear, that in allowing the testimony about the horizontal gaze nystagmus, that the state was allowed to ask the ultimate opinion question about intoxication so long as it was excluding the horizontal gaze nystagmus.

The state asked the ultimate opinion questions about intoxication and never excluded that from its questions.

10/1 RP 181.

Defendant also argued that the State asked the question twice, "[a]nd defense was, I felt, in a position that to have even objected at that point would have simply underscored the problem in front of the jury." 10/1 RP 182.

In denying the motion, the court commented:

In relation to the question here that is being addressed related to the officer's opinion and the

nonexclusion of the nystagmus gaze test, first of all, as opposed to an actual ruling, it was more from the standpoint of instructions for how to avoid the issue.

From the standpoint of the timing, there was sufficient time in between the time the question was asked and the response was made in which an objection could have been made.

* * *

In relation to the second time, I'm not sure what [defendant] is addressing, but if he's addressing the last question, I sustained the objection. There was no response to that.

10/1 RP 183-84.

Defendant did not request a curative instruction. The State rested, and defendant then rested. 10/2 RP 25.

The jury convicted defendant as charged. 1 CP 52, 53, 54. Defendant had an offender score of 11. The court sentenced defendant to a standard range sentence of 60 months confinement followed by community custody for 9-18 months, or the period of earned release, whichever was longer. The court specified "The combined term of community placement or community custody and confinement shall not exceed the statutory maximum." 1 CP 38-39, 10/29 RP 16. (emphasis in the original).

IV. ARGUMENT

A. STANDARD OF REVIEW.

“Such denials [of a motion for a mistrial] will be overturned only when there is a ‘substantial likelihood’ the prejudice affected the jury’s verdict.” State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995), quoting State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991).

B. THE COURT PROPERLY DENIED DEFENDANT’S MOTION FOR A MISTRIAL.

After the testimony of Officer Harvey, defendant moved for a mistrial because the State asked the officer’s opinion of defendant’s intoxication without specifically excluding the officer’s HGN observations. 10/1 RP 180-81. The court denied the motion. 10/1 RP 181-82. Defendant asserts that this ruling denied him a fair trial. Brief of Appellant 9. Defendant did not demonstrate that “only a new trial [could have] insure[d] that the defendant [was] tried fairly.” State v. Koch, 126 Wn. App. 589, 598, 103 P.3d 1280, review denied, 154 Wn.2d 1028 (2005).

This Court’s decision should be guided by the legal reasoning in Koch. There, a defendant was tried for DUI. Despite an earlier ruling, a toxicologist testified, without objection, that HGN

was 91 or 92 percent reliable to show a certain alcohol concentration. The court of limited jurisdiction denied defendant's mistrial motion. Koch, 126 Wn. App. at 593. On appeal, the superior court reversed the trial court. Koch, 126 Wn. App. at 592.

In reversing the superior court, the Court of Appeals held that in light of the other evidence, including his breath test results of .147 and .141, the defendant had not shown that the testimony about the HGN "sufficiently prejudiced him such that a new trial is necessary." Koch, 126 Wn. App. at 598.

Here, the lay witness testified he smelled alcohol on defendant, and defendant's face was red. 10/1 RP 44. Two officers testified that they observed defendant had the physical appearance of someone who was intoxicated, staggered when he walked, and had slurred speech. 10/1 RP 92-93, 146-47. The second officer also smelled "a medium odor of an alcohol beverage emanating from his mouth as he spoke." 10/1 RP 151. The second officer testified he observed nystagmus in the form of a lack of smooth pursuit in both of defendant's eyes, and that defendant could not follow instructions on the HGN test. 10/1 RP 153-54. The second officer opined that based on his observations, defendant was intoxicated. 10/1 RP 159. It is clear that the officer

would have given the same opinion if he had been asked to exclude the HGN observations.

In light of all the evidence, defendant has not shown a substantial likelihood that having Officer Harvey testify that his opinion of defendant's intoxication did not include his HGN observations would have changed the outcome of the trial. Accordingly, the court did not abuse its discretion in denying defendant's mistrial motion. See State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983) ("The decision to declare a mistrial is within the discretion of the trial court and should not be disturbed on appeal absent an abuse").

Defendant relies on State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), to argue that the failure to specifically exclude the HGN observations from Officer Harvey's opinion that defendant was intoxicated denied him a fair trial. Brief of Appellant 1. That reliance is misplaced.

In Escalona, the trial court ruled in limine that evidence Mr. Escalona had previously been convicted of second degree assault with a knife – the precise crime he was on trial for – would be excluded. Escalona, 49 Wn. App. at 252. Despite this ruling, the victim testified Mr. Escalona "already has a record and had stabbed

someone.” Escalona, 49 Wn. App. at 253. In reversing the trial court’s denial of a mistrial, this Court considered:

(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark[.]

Escalona, 49 Wn. App. at 254.

This Court characterized the remark as “particularly serious considering the paucity of credible evidence against Escalona.” Further, since the prior crime was the same as the crime Mr. Escalona was on trial for, the jury was likely to conclude he had a propensity to commit that type of crime. Escalona, 49 Wn. App. at 256. It found the remark was not cumulative, and that the instruction to disregard was ineffective because the evidence was so inherently prejudicial. Escalona, 49 Wn. App. at 255.

Here, officer’s opinion that included the HGN observations was not a serious irregularity. The testimony did not refer to defendant having been convicted of prior DUI offenses. Rather, the HGN observations were only part of the total observations the officer made of defendant that led him to conclude defendant was intoxicated. Defendant’s failure to timely object is an indication that the testimony did not appear critically prejudicial to him. State v.

Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). The failure to specifically exclude the officer's HGN observations from his other observations in forming his opinion that defendant was intoxicated pales in comparison to the comments in Escalona that he had previously been convicted of the same crime he was then being tried for. See State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993), review denied, 123 Wn.2d 1031 (1994) (irregularity in Escalona was extremely serious because the jury likely concluded he had a propensity to commit that type of crime, however the irregularity of mentioning the defendant had been in jail was not so serious); State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992) (improper comment that an unidentified caller identified the defendant not so serious as to warrant a new trial).

In looking at the second prong of Escalona, the HGN observations were cumulative to the other observations showing that defendant was intoxicated. Defendant argues that this was the only HGN evidence, thus not cumulative. Brief of Appellant 12. This is the wrong comparison.

The court excluded the officer's opinion of intoxication based on the HGN observations. It did not exclude HGN observations or

the officer's opinion that defendant was intoxicated. Accordingly, it is the cumulative nature of the HGN observations with the other observations indicative of intoxication that this Court should consider. The evidence was cumulative with other properly admitted evidence. See State v. Essex, 57 Wn. App. 411, 416, 788 P.2d 589 (1990) (only reference in a joint trial to defendant's participation in the illegal sale of bear gall bladders was cumulative with other evidence of a co-accused's guilt of that crime).

As to the third Escalona prong, no curative instruction was proposed. The jury was instructed to disregard testimony about seven times. It was instructed twice that testimony of Officer Harvey was admitted for a limited purpose. There is no indication the jury did not follow those instructions. There is no reason to believe that it would not have followed any curative or limiting instruction concerning the HGN observations. See Condon, 72 Wn. App. at 649 (Jury presumed to follow instructions to disregard evidence defendant had been in jail), Post, 118 Wn.2d at 520 (jury presumed to follow instruction to disregard evidence of how defendant came to the attention of the police), Essex, 57 Wn. App. at 416 (jury presumed to follow instructions to disregard evidence of uncharged crime).

Using the three prongs of Escalona, it is clear the court properly denied defendant's motion for a mistrial. Defendant has not shown that there was such a serious irregularity in his trial that he is entitled to a new trial.

C. THE COURT IMPOSED A LEGAL SENTENCE.

Defendant argues that the sentence the court imposed was illegal in that it exceeded the statutory maximum, was indeterminate, and violated the separation of powers doctrine. Brief of Appellant 13-22. There was no error.

The Supreme Court definitively resolved this issue adversely to defendant. Where the term of confinement and community custody potentially exceed the statutory maximum, the sentencing court must "explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." In re Personal Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). That is exactly what the court did here. CP 39, 10/29 RP 16. This claim of error must be rejected.

V. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on January 20, 2010.

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