IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1995 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9412-CR-00446
	)	
	)	Greene County
v.	)	
	)	Hon. James E. Beckner, Judge
	)	
MARCUS LYNN KESTERSON,	)	(Driving Under the Influence)
	)	
Appellant.	)	

For the Appellant:

LeRoy Tipton, Jr.
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For the Appellee:

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and
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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Marcus Lynn Kesterson, appeals from a jury conviction in the Greene County Criminal Court for driving under the influence, second offense, a Class A misdemeanor. The defendant received a sentence of eleven months and twenty-nine days to be served in the Greene County Jail with a thirty percent release eligibility date and a fine of five hundred and ten dollars. In this appeal as of right, the defendant contends the following:

> (1) that the trial judge committed plain error by making improper comments to prospective jurors during voir dire,
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> (2) that the state failed to meet its burden of proof regarding the qualifications and certification of the operator of the intoximeter machine and
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> (3) that he was denied the right to cross-examine the operator of the intoximeter machine regarding her knowledge and qualifications to operate the machine.

Deputy Mark McClain of the Greene County Sheriff's Department testified that at approximately 2:40 a.m. on February 6, 1994, he saw the defendant's truck run a stop sign. He followed the defendant and saw him stop at a railroad crossing and turn on his right turn signal, although there was no place to make a right turn. He followed the defendant further and observed the defendant weave across the center of the road at least four times. He testified that he followed the defendant to the Doehler-Jarvis parking lot where he stopped the defendant for driving under the influence. He stated that the defendant was unsteady on his feet, his speech was slurred and that he smelled strongly of alcohol. Deputy McClain testified that he also saw several unopened cans of beer in the car, as well as two opened cans, one of which had spilled on the back floorboard. Deputy McClain testified that he called Officer Beth Dyke of the Greeneville Police Department to the scene in order to administer field sobriety tests because he was not certified to administer them. He stated that she arrived as the defendant was getting out of his truck.

On cross-examination, Deputy McClain admitted that he did not stop the defendant for running the stop sign, because he wanted to follow him to determine whether the defendant was driving under the influence. He stated that there was also a car with a flat tire parked in the lot where he arrested the defendant and that the defendant told him that the disabled vehicle belonged to a friend of his, Kenneth Bitner.

Officer Beth Dyke testified that she is certified to administer field sobriety tests. She stated that she was called to the parking lot as backup assistance for Deputy McClain and arrived to find the defendant leaving his vehicle. She said that Deputy McClain asked her to administer the field sobriety tests because he was not certified. She stated that before giving the tests, she asked the defendant if he had any physical problems or was on any medication that would affect his ability to perform the tests. After the defendant told her no, she proceeded to administer the walk-and-turn test. She stated that the walk-and-turn test has eight clues that indicate a person is intoxicated and that the defendant exhibited all eight clues. She testified that she gave the defendant the one-leg stand test next and that the defendant told her that he could not complete the test. She said that there are four clues to this test and that the defendant exhibited all four of the clues by stopping the test. She testified that the final test she gave was the horizontal eye nystagmus test, which has six clues, and that the defendant exhibited all six clues.

Officer Dyke testified that she followed the defendant and Deputy McClain to the Greene County Detention Center where she administered a breathalyzer test to the defendant. She stated that the defendant signed the implied consent form and that she observed him for the twenty-minute waiting period before administering the test. She said that the results of the test showed a .14 percent blood alcohol level. A printout of the defendant's test results was admitted into evidence

without objection. On cross-examination, Officer Dyke testified that the Intoximeter 3000 breathalyzer machine used to test the defendant is tested every ninety days and was last tested on January 31, 1994, seven days before the defendant's arrest. The trial court sustained the state's objection to defense counsel's inquiry of what chemicals were involved in the operation of the breathalyzer machine.

The defendant testified that he went to a restaurant to hear a friend play in a band on February 5, 1994. He said that he sat with his friends a really long time and that he might have had "not even a full beer." He said that several of his friends were drinking. He stated that he agreed to drive a friend, James Teaster, to another bar and that, on the way, they saw Mr. Bitner pulled over in a ditch. He said that they helped Mr. Bitner get his truck out of the ditch and followed him to the Doehler-Jarvis parking lot to park the truck because it had a flat tire. The defendant testified that he spoke with the security guard who said that it would be okay to leave the disabled truck at the parking lot. The three men then went to a bar to drop off Mr. Teaster. When they arrived at the bar, someone was outside with a gun and Mr. Teaster decided not to wait for a ride there. The defendant stated that he then drove Mr. Bitner home.

The defendant testified that while taking Mr. Teaster home, he was stopped and arrested. He admitted that he did not completely stop at the stop sign where Deputy McClain initially noticed him. He stated that when he approached the railroad tracks, he noticed Deputy McClain behind him and considered telling him about the man with the gun at the bar. He explained that he turned on his turn signal to pull over but changed his mind and decided to stop at the parking lot instead. He said that Deputy McClain's blue lights came on as he entered the parking lot. He testified that both Mr. Bitner and Mr. Teaster had carried beer into his car. He denied that any of the beer was his. He stated that he did not think that the beer he consumed at the restaurant had impaired his ability to drive. He admitted that he was

convicted of passing a forged instrument in 1985. On cross-examination, the defendant admitted that he probably weaved a little when he drove but explained that the road was very narrow, with a lot of holes, and that his truck has large tires and is difficult to drive.

Michael King testified that he was a security guard assigned to the Doehler-Jarvis parking lot in February 1994. He testified that the defendant came to his office and asked if he could leave a disabled truck in the lot and that he told him it was okay. He stated that he had never met the defendant before that night and that the defendant was polite. He said that the defendant did not smell like alcohol. On cross-examination, he admitted that he has no law enforcement training in determining whether someone is intoxicated but added that he spoke to the defendant for about three or four minutes and paid very close attention to him because it was so late at night.

Kenneth Bitner testified as a rebuttal witness for the state. He said that he is an auxiliary police officer with the Tusculum Police Department and that he has known the defendant for about three years. He said that he and the defendant were with several other friends on the night of February 5th into the early morning hours of February 6th. He said that the defendant arrived at the restaurant at about 10:00 p.m. and that everyone left around 1:30 a.m. He testified that the defendant drank three or four beers and one or two shots of tequilla that night. On cross-examination, he admitted that he had drunk about six beers. Mr. Bitner denied that he was drunk but did admit that he had driven his truck into the ditch that night.

I

The defendant contends that the trial court committed reversible error when it discussed the passage of the open container law during voir dire. The

defendant admits that there was no contemporaneous objection to the trial court's statement but asks that we find plain error because the trial court's remarks were "overwhelmingly prejudicial" because the remarks coupled with the subsequent testimony of Deputy McClain indicate that the defendant committed a "prior bad act and a violation of the law." See Tenn. R. Crim. P. 52(b). The statement at issue occurred during questioning of a prospective juror by the trial court as follows:

> MRS. BUCKNER: I do believe that one drink impairs judgment.
>
> DEFENSE COUNSEL: All right, Ms. Buckner, so that would certainly affect your judgment in this case, would it not if the proof was. . .
>
> THE COURT : Mrs. Buckner, you're saying that if the [state] proved the defendant had one drink you would automatically find him guilty?
>
> MRS. BUCKNER: I believe he would be impaired by it.
>
> THE COURT: Well, of course . . . that's semantics I guess, but if a person is impaired by the use of alcohol they are, in fact, guilty of driving under the influence.
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> So am I correct in that? And from that since the law says the state has to prove beyond a reasonable doubt that a person is impaired.
>
> And I guess maybe there's no law in Tennessee . . . at least there is now a new law that says you can't drink and drive with an open container no matter how much it is.
>
> But in Tennessee, whether you like it or you don't like it, the law is that a person can drink and drive as long as it doesn't affect their ability to drive. And if you're solid in that belief then I guess I'd better excuse you.

"The ultimate goal of voir dire is to insure that jurors are competent, unbiased and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the discretion of the trial court." State v. Stephenson, 878 S.W.2d 530, 540 (Tenn. 1994). The trial court is permitted to question prospective jurors "regarding their qualifications to serve as jurors." Tenn. R. Crim. P. 24(a). The trial court's comment was an isolated remark made while determining a prospective juror's ability to consider the issue of guilt fairly. Given this context, we do not believe it to be

clear error that adversely affected a substantial right of the defendant as is required for a determination of plain error. See State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994).

II

The defendant contends that the state failed to meet its burden of proof regarding the certification of Officer Dyke to operate the breath testing device. See State v. Sensing, 843 S.W.2d 412, 416 (Tenn. 1992). Essentially, this is an attack on the admissibility of the test results. However, the test results were admitted without objection during the direct examination of Officer Dyke. Furthermore, the defendant failed to raise the admissibility of the test results as an issue in his motion for a new trial. Therefore, any issue regarding the admissibility of the results is waived. See T.R.A.P. 36(a).

III

The defendant contends that the trial court improperly restricted the cross-examination of Officer Dyke regarding her knowledge and qualifications to operate the breath testing device. Defense counsel asked Officer Dyke if she knew what chemical was involved in measuring a defendant's blood alcohol content with a breathalyzer machine. The state objected, stating that the operating officer is not required to know the mechanics of a breathalyzer and the trial court sustained the objection. We note that in Sensing, 843 S.W.2d at 416, the Tennessee Supreme Court held that it is not necessary for the operator of the same type of device used in this case to know the scientific technology involved in the functioning of the machine in order for the test results to be admissible. However, the fact that a question is not relevant to the threshold admissibility of the results does not necessarily bar the inquiry for other purposes.

The defendant argues that the purpose of the question in issue was to determine what chemical test was performed because the defendant consented to a chemical test by signing the implied consent form. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Tenn. R. Evid. 611(b). Substantial latitude should be allowed in cross-examination. See State v. Tizard, 897 S.W.2d 732, 745 (Tenn. Crim. App. 1994). The record reflects that, essentially, the defendant attempted to question Officer Dyke regarding her knowledge of the operation of the device in order to test her credibility and expertise with the testing procedures. In this respect, seeking to determine if she knew what "chemical" was involved in the test might be arguably relevant to her credibility, in terms of her training and experience with testing. However, even if we were to conclude that the defendant should have been allowed to question Officer Dyke about such knowledge, we do not believe reversible error occurred. The defendant was allowed to cross-examine Officer Dyke extensively about her knowledge of the operation of the breath testing device. In light of this extensive questioning and Officer Dyke's resulting testimony, we conclude that the trial court's restriction about which the defendant complains was quite harmless.

In consideration of the foregoing and the record as a whole, the judgment of conviction is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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John H. Peay, Judge

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David G. Hayes, Judge