IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 21, 2017 Session at Lincoln Memorial University[1]

STATE OF TENNESSEE v. JEFFREY DOUGLAS GWINN

Appeal from the Criminal Court for Knox County
No. 105996 G. Scott Green, Judge

No. E2016-01228-CCA-R3-CD

Defendant, Jeffrey Douglas Gwinn, was convicted of driving under the influence of an intoxicant ("DUI"). On appeal, he argues: (1) the evidence was insufficient to support his conviction; (2) the trial court erred by permitting the arresting officer to testify about Defendant's fitness to drive a motor vehicle and his performance on field sobriety tests; and (3) the State committed prosecutorial misconduct during its rebuttal closing argument. We conclude that the evidence was sufficient and that the lay opinion testimony was proper. We also conclude that remarks in the State's rebuttal were improper, but we find the error to be harmless. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J. ROSS DYER, JJ., joined.

Mark E. Stephens, District Public Defender; Jonathan Harwell (on appeal and at trial) and Denise M. Faili (at trial), Assistant Public Defenders, for the appellant, Jeffrey Douglas Gwinn.

Herbert H. Slatery III, Attorney General and Reporter; Katherine C. Redding, Assistant Attorney General; Charme P. Allen, District Attorney General; Joe Welker and Hayley Scheer, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

[1] Oral argument was heard in this case before law students at Lincoln Memorial University's Duncan School of Law.

I. Procedural History and Factual Summary

Defendant was indicted for DUI, a Class A misdemeanor. At trial, the evidence showed that, on the morning of July 6, 2014, around 4:30 a.m., Deputy Mitchell Crowe of the Knox County Sheriff's Office was on a routine patrol when he observed an orange pickup truck stopped near the entrance ramp to Interstate 40 at Exit 402 on Midway Road. According to Deputy Crowe, that particular exit did not receive much traffic, and it was unusual for a vehicle to be stopped there. There were no business establishments at the exit. The shoulder of the road was approximately four to six feet wide. Once the shoulder ended, the road "just drop[ped] off," and there was gravel. In some places, there were cracks in the asphalt of the shoulder. Because the exit did not receive much traffic and was located near the outskirts of Knox County, it was not well lit.

The truck was running, and its lights were on. Deputy Crowe pulled over behind the truck and turned on his spotlight and takedown lights. He approached the truck and observed vomit on the inside and outside of the truck's door. Defendant was in the driver's seat, and there was also vomit on Defendant. There was "a faint odor of alcoholic beverage" coming from the vehicle, but Deputy Crowe could not discern its origin. Deputy Crowe asked Defendant if he needed an ambulance. Defendant said that he did not. Defendant acted "cooperative but rather lethargic—slow." Defendant admitted drinking alcohol that night but could not recall how much. His speech was "slurred," and he appeared "confused."

Deputy Crowe then administered three field sobriety tests—the horizontal gaze nystagmus ("HGN") test, the walk-and-turn, and the one-legged-stand. The prosecutor did not ask Deputy Crowe to elaborate on the results of the HGN test. Deputy Crowe explained that the walk-and-turn requires the subject to "walk heel to toe for nine steps the[n] turn around and come back." The subject counts the steps out loud while walking. The test is preceded by an instructional phase in which the deputy explains the test and gives a demonstration. The one-legged-stand requires the subject to stand with his or her feet together with arms down at the side. Then, the subject lifts either leg off the ground approximately six inches and holds that position for about thirty seconds. Defendant denied having any medical conditions that would interfere with the tests.

Defendant did not have any difficulty exiting his truck, but Defendant did not perform the walk-and-turn satisfactorily. He completed the first nine steps successfully, but he "lost his balance and didn't make the turn correctly." Defendant also did not perform the one-legged-stand satisfactorily. "He raised his arms for balance and could not keep still. He was swaying from side to side." However, Defendant was able to hold his leg off the ground for the duration of the test. There was no recording of the field sobriety tests because Deputy Crowe did not have a dashboard camera in his vehicle.

After the field sobriety tests, Deputy Crowe arrested Defendant. Deputy Crowe explained the implied consent law to Defendant. Defendant refused to submit to a blood draw and signed his name on the implied consent form. Deputy Crowe decided to let Defendant leave without being charged, if he could arrange for someone to pick him up. Defendant called his wife, but she was unable to help.

Defendant did not testify. The jury convicted him as charged, and Defendant received a sentence of eleven months and twenty-nine days, suspended to unsupervised probation after forty-eight hours in the county jail. After being sentenced, he filed a timely notice of appeal.

II. Analysis

Defendant raises three issues on appeal: (1) whether the evidence was sufficient to support his conviction; (2) whether the trial court improperly allowed the deputy to offer opinion testimony as to Defendant's ability to operate his vehicle; and (3) whether the State committed prosecutorial misconduct during closing argument.

A. Sufficiency of the Evidence

Defendant maintains that the State failed to prove beyond a reasonable doubt that he was operating his vehicle while under the influence of an intoxicant. The State argues that the testimony of Deputy Crowe satisfied its burden of proof.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). The burden is then shifted to the defendant on appeal to demonstrate why the evidence is insufficient to support the conviction. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On appeal, "the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *State v. Elkins*, 102 S.W.3d 578, 581 (Tenn. 2003). As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of

fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

A person commits DUI by operating a motor vehicle on a public road while an intoxicant "impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of oneself that the driver would otherwise possess." T.C.A. § 55-10-401(1). Whether the driver was physically in control of the vehicle is a question for the trier of fact to determine after consideration of the totality of the circumstances. *State v. Lawrence*, 849 S.W.2d 761, 765 (Tenn. 1993). One may still be found guilty of DUI, even if the vehicle is not running, as long as the driver is still in possession of the keys. *See id.*; *see also State v. Butler*, 108 S.W.3d 845, 850-52 (Tenn. 2003).

Here, Deputy Crowe testified that he observed Defendant's truck parked on the shoulder of a road near the entrance ramp to the interstate. The truck was running, and its lights were on. Defendant appeared to be asleep in the driver's seat. There was vomit on the outside and inside of the truck and also on Defendant's person. Deputy Crowe smelled a "faint odor" of alcohol. When questioned by Deputy Crowe, Defendant admitted to drinking alcohol before driving. Defendant appeared lethargic and confused, but he was cooperative with Deputy Crowe and seemed to understand the conversation. Defendant's speech was slurred, and his eyes were bloodshot and watery. Defendant did not perform satisfactorily on the field sobriety tests. He partly completed the walk and turn, but he lost his balance before he could complete the task as instructed. He completed the one legged stand, but he was unable to do so without swaying and raising his arms to improve his balance. When asked to submit to a blood draw, Defendant refused. This evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that Defendant was unsafely operating a motor vehicle while under the influence of an intoxicant. Defendant is not entitled to relief on this issue.

B. Opinion Testimony

Defendant argues that the trial court erred by allowing Deputy Crowe to offer lay opinion testimony that Defendant was "unfit" to drive a motor vehicle. Defendant further argues that the trial court erred by allowing Deputy Crowe to base his opinion on his personal belief that Defendant "failed" the field sobriety tests. The State asserts that the deputy's testimony was properly admitted and that the latter argument is waived because it was not raised at trial.

At trial, Deputy Crowe testified that he had been with the sheriff's office for nearly fifteen years. During his training at the police academy, he received DUI training,

which included practicing field sobriety tests on intoxicated volunteers. After completing the police academy, Deputy Crowe received additional periodic training on DUI investigations when protocol or the law changed. Deputy Crowe had been involved in around thirty DUI investigations prior to the investigation of Defendant but had testified in court only once for a DUI case. Deputy Crowe was not on the DUI Task Force and admitted that he did not consider himself an expert in DUI investigation.

When Deputy Crowe testified that he performed field sobriety tests in this case, the prosecutor asked, "What is the point of field sobriety tests?" Deputy Crowe responded, "Well, you determine the level of intoxication on someone." Defendant objected on the basis that Deputy Crowe was not qualified as an expert. The trial court overruled the objection, explaining that Deputy Crowe could "say based on his training and experience." Defendant renewed his objection shortly thereafter, but the trial court again overruled it.

Later during direct examination, the following exchange occurred:

Prosecutor: So, officer, [considering] everything we've talked about, what was your interpretation of [Defendant's] ability to drive that morning?"

Defense: Objection, your Honor.

Trial court: Overruled.

Prosecutor: Based on your training and experience, what you observed that early morning, what was your opinion of [Defendant's] ability to drive?

Deputy: He was unfit to drive a motor vehicle.

Prosecutor: Why do you say that?

Deputy: Because of his level of intoxication.

Prosecutor: And do you remember any articulable facts about that, anything specific?

Deputy: Well, he failed the test. He was very lethargic. When I walked up to the vehicle, he was actually passed out or asleep. So, that was most of it.

Prosecutor: What about his speech?

Deputy: Slurred speech. Bloodshot, watery eyes.

Prosecutor: And then what about his admission of drinking, was that also a factor?

Deputy: Yes.

"When the admission or exclusion of opinion evidence is challenged on appeal, it is reviewable only for abuse of discretion." *State v. McCloud*, 310 S.W.3d 851, 865 (Tenn. Crim. App. 2009). Under Tennessee Rule of Evidence 701, a lay witness may testify to opinions or inferences that are "rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Opinion testimony which embraces an ultimate issue to be decided by the trier of fact, if otherwise properly admitted, is not objectionable. *See* Tenn. R. Evid. 704. A witness not testifying as a layman must testify as an expert, which requires qualification by the trial court. *See* Tenn. R. Evid. 701-03; *see also McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997) (setting forth the gatekeeping analysis to be used by trial courts regarding the reliability of expert testimony).

The parties agree that Deputy Crowe was not qualified as an expert witness. The parties disagree as to whether lay testimony from a law enforcement officer may encompass (1) a driver's fitness to operate a motor vehicle or (2) whether a driver has succeeded or failed a field sobriety test. The State asserts that Defendant has waived his challenge to the latter by failing to make a contemporaneous objection at trial. We decline to find waiver under the circumstances of this case. Although Defendant did not object to Deputy's Crowe's testimony as to the basis of his opinion that Defendant was unfit to operate a vehicle, the trial court had on two occasions previously overruled objections to Deputy Crowe's competence to offer testimony regarding the purpose of the field sobriety tests. From the record, it appears that the trial court made it clear that it was going to permit Deputy Crowe to testify about the nature of the field sobriety tests and Defendant's performance of them. We conclude that the issue was adequately preserved. *See State v. McGhee*, 746 S.W.2d 460, 464 (Tenn. 1988) (stating generally that "this Court is not inclined to require counsel to make technical, argumentative or repetitious objections to issues which have already been ruled upon").

Turning to the applicable law, "a lay witness may testify to his own physical condition or that of another person provided that the witness first states the detailed facts and then gives his opinion or conclusion." *Simpson v. Satterfield*, 564 S.W.2d 953, 955-56 (Tenn. 1978). On numerous occasions, this Court has held to be admissible the lay opinion testimony of law enforcement officers as to a suspect's intoxication and the

ability to safely operate a vehicle. *See State v. Thomas Santelli*, No. E2015-01004-CCA-R3-CD, 2016 WL 3563423, at *6 (Tenn. Crim. App. June 22, 2016) (citing cases), *perm. app. denied* (Tenn. Oct. 20, 2016). This Court has previously explained:

> Evidence of intoxication includes the observations of a police officer during a defendant's performance of field sobriety tests. With the exception of the HGN test, field sobriety tests are not scientific tests requiring testimony of a qualified expert pursuant to Tennessee Rule of Evidence 702. *See State v. Murphy*, 953 S.W.2d 200, 202-03 (Tenn. 1997); *State v. Gilbert*, 751 S.W.2d 454, 459 (Tenn. Crim. App. 1988). Thus, police officers generally do not need to be qualified as expert witnesses in order to testify about their administration and interpretation of field sobriety tests. [*State v. Everett D. Robinson*, No. W1999-01348-CCA-R3-CD, 2000 WL 364844, at *3 (Tenn. Crim. App. Apr. 7, 2000) (citing *State v. Christopher R. Hicks*, No. 03C01-9602-CC-00064, 1997 WL 260069, at *1 n.1 (Tenn. Crim. App. May 13, 1997), *no perm. app. filed*), *no perm. app. filed*].

State v. Ronnie Wayne Blair, No. M2009-01987-CCA-R3-CD, 2011 WL 743396, at *8 (Tenn. Crim. App. Mar. 3, 2011), *perm. app. denied* (Tenn. July 20, 2011).

Defendant concedes much on this point, and it appears that his argument is quite narrow. He states that he is "not arguing that a lay witness cannot testify, based on accumulation of lay observations, that someone appears intoxicated or looks drunk." He further acknowledges that "there is no problem with having a police officer, not qualified as an expert, describe the instructions he gave to the defendant and describe the defendant's physical and mental performance in response . . . ." However, he insists that an officer's testimony that a driver appeared "unfit to drive" because the driver "failed" a field sobriety test constitutes "the drawing of a conclusion based on the accumulation of disparate facts—which is precisely what is prohibited by the rules." Defendant maintains that Deputy Crowe's testimony in this case became the "hybrid" testimony of "a pseudo-expert" because he offered his opinion "based on [his] training and experience."

We think Defendant makes too much of this testimony. In the context of Deputy Crowe's testimony as a whole, his testimony that Defendant "failed" the field sobriety tests was merely a succinct summary of his personal observations of Defendant's physical conduct during those exercises. In other parts of his testimony, Deputy Crowe described which of Defendant's behaviors suggested intoxication, and on cross-examination, Deputy Crowe acknowledged other behavior that did not suggest intoxication. Indeed, Deputy Crowe testified that the field sobriety tests are simply a means of providing "clues" to the investigating officer about the physical condition of a driver, and he agreed that whether one passed or failed the field sobriety tests was "an opinion too." We think the jury would have understood Deputy Crowe's testimony to

mean that Defendant's physical behavior gave him the impression that Defendant was not sober. Similarly, we think the jury naturally would have understood that Deputy Crowe's opinion that Defendant was unfit to operate a motor vehicle was based partly on his observations of Defendant's lack of coordination during the field sobriety tests.

Contrary to Defendant's assertions, Deputy Crowe was not attempting to offer an opinion on "scientific, technical, or other specialized knowledge." Tenn. R. Evid. 702. He was permitted to give his lay opinion as to Defendant's condition of intoxication and his perceived ability to operate a vehicle. He was also permitted to provide the factual basis for his opinions. We see no problem with the State laying a foundation for this lay opinion by establishing the officer's previous experiences observing intoxicated behavior. Thus, Deputy Crowe testifying based on his training and experience does not move his testimony from that of a layman to that of an expert. This firsthand account regarding the nature and extent of Defendant's intoxication was the sort of lay opinion testimony that would have been helpful to the determination of a fact at issue in this case. The jury heard the factual basis for Deputy Crowe's opinion, and they were free to reject his assessment of the situation.

Defendant cites extra-jurisdictional authority to support his argument. However, such authority is non-binding on this Court. Defendant claims that the cases we have cited above are not controlling on this issue, but we disagree. We are persuaded by those cases stating that an officer may offer lay opinion testimony as to a driver's performance on field sobriety tests, fitness to operate a motor vehicle, and degree of intoxication. *See, e.g.*, *Thomas Santelli*, 2016 WL 3563423, at *6; *Ronnie Wayne Blair*, 2011 WL 743396, at *8; *Everett D. Robinson*, 2000 WL 364844, at *3. Moreover, any error by the trial court in allowing this testimony was harmless in light of the strong evidence of guilt. *See State v. Rodriguez*, 254 S.W.3d 361, 372 (Tenn. 2008) ("The greater the amount of evidence of guilt, the heavier the burden on the defendant to demonstrate that a non-constitutional error involving a substantial right more probably than not affected the outcome of the trial."). Defendant is not entitled to relief on this issue.

C. Prosecutorial Misconduct

Defendant argues that the State committed prosecutorial misconduct during closing argument by asking the jury to put themselves in the place of a hypothetical victim confronted with a drunk driver approaching in another vehicle. The State argues that the prosecutor's statements did not amount to misconduct and, alternatively, that any error was harmless.

At the end of the State's rebuttal argument, the prosecutor made the following remarks:

> I'm going to end with this. You might -- sometimes at night, you're driving home from dinner, picking up your kids in the winter when it gets dark early, and you're driving down the street, maybe a two lane road, one lane this way and one way this way, and you see some headlights in the distance. Normally, on a double yellow line road, you don't think that's very different, you don't think anything of that. Maybe if you're with one hand checking out the radio once you see the headlights you might perk up a little bit, just to make sure. Maybe turn down the radio, maybe go two hands, and you know nothing about that driver. But what I want you to imagine, is you do know that driver now. That car that's coming to you --

Defense counsel objected that the argument was "putting the jury in a position of a potential victim." Before the trial court could rule on the objection, the prosecutor agreed to "move on." The prosecutor then continued his rebuttal by saying, "I think we all know where I'm going, but here's what we know about this defendant that early morning at 4:30 in the morning." The prosecutor then proceeded to summarize some of Deputy Crowe's testimony and concluded the rebuttal.

Closing argument is "a valuable privilege that should not be unduly restricted." *Terry v. State*, 46 S.W.3d 147, 156 (Tenn. 2001); *see State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001); *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998). Closing arguments "have special importance in the adversarial process," allowing the parties "to present their theory of the case and to point out the strengths and weaknesses in the evidence to the jury." *State v. Banks*, 271 S.W.3d 90, 130 (Tenn. 2008). Attorneys "should be given great latitude in both the style and the substance of their arguments." *Id.* at 131. However, "a prosecutor's closing argument must be temperate, must be based on the evidence introduced at trial, and must be pertinent to the issues in the case." *Id*. Although not exhaustive, this Court has recognized five general areas of potential prosecutorial misconduct during closing arguments: (1) intentionally misstating the evidence or misleading the jury as to the inferences it may draw; (2) expressing personal beliefs or opinions as to the truth or falsity of any testimony or the guilt of the defendant; (3) inflaming or attempting to inflame the passions or prejudices of the jury; (4) injecting issues broader than the guilt or innocence of the accused; (5) arguing or referring to facts outside the record unless the facts are matters of common knowledge. *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). This Court has previously stated that "suggesting that the jurors put themselves in the shoes of the victim [i]s improper" as an attempt to inflame their emotions. *State v. Ashburn*, 914 S.W.2d 108, 115 (Tenn. Crim. App. 1995) (citing *Lycans v. Commonwealth*, 562 S.W.2d 303, 305-06 (Ky. 1978)).

Obviously there was not a personal victim involved in this case. However, it does appear from the record that the prosecutor was setting up a hypothetical wherein the jury would be asked to imagine how they would feel when placed in a scenario involving the

driver of another vehicle exhibiting behavior consistent with intoxicated driving. Such a hypothetical would have a substantially similar effect to an argument regarding an actual victim. Accordingly, such an argument is improper because of its potential to inflame the jury.

However, "[a] criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." *Banks*, 271 S.W.3d at 131. Instead, "an improper closing argument will not constitute reversible error unless it is so inflammatory or improper that it affected the outcome of the trial to the defendant's prejudice." *Id.* In other words, it will be reversible error if the improper comments of the prosecutor were so improper or the argument so inflammatory that it affected the verdict. *See State v. Reid*, 164 S.W.3d 286, 344 (Tenn. 2005). We use the following factors when making this determination:

> (1) the conduct complained of viewed in context and in light of the facts and circumstances of the case; (2) the curative measures undertaken by the [c]ourt and the prosecution; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case.

State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984) (quoting *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)); *see also Goltz*, 111 S.W.3d at 5-6.

In this case, the prosecutor did not complete his hypothetical due to the vigilance of defense counsel. Without more specifics, the prosecutor's setting of the stage, so to speak, was relatively benign. It's possible that the jury anticipated where the hypothetical was leading them, but without an actual emotional appeal, the risk that the jury was so inflamed as to render a tainted verdict seems relatively minimal. Similarly, the prosecutor's comment that everyone knew where he was going was ambiguous. It may have been a reference to the hypothetical, or it may simply have been a reference to the following argument that the facts presented pointed to Defendant's guilt. Additionally, as recounted above, we note that the evidence of guilt presented in this case was very strong. Considering all of the *Judge* factors, we find any error in the prosecutor's closing argument to be harmless.

III. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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TIMOTHY L. EASTER, JUDGE