IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WAYNE GILPATRICK — APPELLANT

VS. — NO. 2007-KA-0614-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WAYNE GILPATRICK **APPELLANT**

VS. **NO. 2007-KA-0614-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

I. THE TRIAL COURT DID NOT ERR IN ACCEPTING EXPERT TESTIMONY FROM JOHN STEVENSON, THE STATE'S EXPERT FORENSIC TOXICOLOGIST.

II. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

III. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

On March 19, 2005 at approximately 1:00 a.m., Joey Thrash was driving home from a convenience store on Highway 18 in Brandon. T. 84. Thrash, who was southbound, saw from his rearview mirror that a white Chevrolet truck behind him was swerving and crossing into the northbound lane. T. 85. The white truck came back into its proper traffic lane, but continued to swerve. T. 85. When Thrash saw a northbound Ford Ranger approaching, he looked in his rearview mirror again to make sure that the white truck was in its proper lane, which it was. T. 86. However, when Thrash next glanced into the rearview mirror, he saw the Ranger's brake lights as the white truck darted out in front of the Ranger. T. 86. Thrash pulled over and ran to the crash site to check on the occupants of both vehicles. T. 90. The three young men in the Ford Ranger, John Callicott, Craig Beebe, and Vince Pontillo, were non-responsive. T. 90. Thrash could not see the two occupants of the white truck, but heard the female passenger, Candace Burr, moaning. T. 90. Thrash smelled alcohol emanating from the white truck. T. 91.

Brandon Police Officer Andrea Wade was the first officer to arrive at the scene. T. 48. She observed that the white truck occupied the majority of the northbound lane and that the Ranger had been pushed off of the shoulder of the northbound side of Highway 18. T. 50. When Wayne Gilpatrick, the driver of the white truck, and his passenger were extracted from their vehicle, Wade saw a partially consumed vodka bottle on the floorboard and a cooler full of cold beer. T. 53. Wade also smelled alcohol emanating from the vehicle. T. 53. After observing the scene and speaking with Thrash, Wade concluded that Gilpatrick may have been driving under the influence of alcohol at the time of the wreck. T. 55. After her supervisor assumed control of the scene, Wade went to the Brandon Police Department to obtain a blood kit. T. 56. Wade obtained the kit at 2:30 a.m. and

drove to Baptist Hospital where Gilpatrick and Callicott, the driver of the Ranger, had been transported. T. 56-58. Gilpatrick apparently refused the blood test, and Wade ultimately obtained a search warrant at 5:00 a.m. T. 60-61. A blood sample was obtained from Gilpatrick, and his blood alcohol content (BAC) nearly four hours after the wreck was determined to be .07%. T. 61, 108.

Gilpatrick was indicted and tried for three counts of DUI maiming. Gilpatrick took the stand in his own defense. He admitted that he had started drinking alcohol less than one hour before the wreck, and that he had consumed "probably about three beers." T. 156, 157. He also admitted that he was drinking and driving and had a beer in his hand when he crossed the center lane and collided with the Ford Ranger. T. 163, 171. Although Gilpatrick admitted that he was negligent in causing the accident, he claimed that did not feel "a buzz, fuzzy, disoriented, anything like that" or in any way impaired. T. 159, 161, 167.

A Rankin County Circuit Court jury found Gilpatrick guilty on all three counts. C.P. 37. He was sentenced to three concurrent twenty-five year sentences. C.P. 38.

SUMMARY OF ARGUMENT

The trial court did not err in accepting Stevenson's expert testimony. Additionally, the trial court did not err in overruling Gilpatrick's motions for directed verdict and new trial. The State presented legally sufficient evidence to support the verdicts which were not against the overwhelming weight of the evidence.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ACCEPTING EXPERT TESTIMONY FROM JOHN STEVENSON, THE STATE'S EXPERT FORENSIC TOXICOLOGIST.

The standard of review for the admission of expert testimony is abuse of discretion. *Taylor v. State*, 954 So.2d 944, 948-49 (¶15) (Miss. 2007). The State would generally begin a discussion of the issue of expert testimony with a *McLemore*/M.R.E. 702 analysis.[1] However, such an analysis can be pretermitted in the present case, as Gilpatrick's assignment of error is wholly based on an apparent misapprehension of Stevenson's testimony.

Gilpatrick claims that John Stevenson, the State's expert forensic toxicologist, was not qualified to testify regarding the process of retrograde extrapolation. He further claims that Stevenson's opinions were based on assumptions and probabilities, and that his testimony "effectively deprived [Gilpatrick] of his constitutional guarantee that the State prove each element of the offense beyond a reasonable doubt." Appellant's brief at 18.

Stevenson was tendered and accepted as an expert toxicologist specializing in blood alcohol content analysis. T. 104, 106. He testified that Gilpatrick's BAC four hours after the accident was .07%. T. 107. Stevenson explained that ethyl alcohol begins affecting a person's motor skills, judgment, and perception at a BAC of .03%, and that a person with a BAC of .07% has lost multitasking abilities, mental judgment, and perception. T. 109. Stevenson was then asked if he was familiar with elimination rates of alcohol from the body and the process known as retrograde

---

[1] *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31(Miss. 2003).

extrapolation, to which Stevenson answered in the affirmative. T. 110-11, 113.[2] Stevenson then gave a general explanation regarding how the human body absorbs and eliminates alcohol. T. 111-12. Stevenson then opined that if a person stopped drinking alcohol at 1:04 a.m., the absorption phase would end no later than 2:34 a.m., at which time the body would only be eliminating alcohol. T. 112. Stevenson was then asked about the process of retrograde extrapolation and whether he had enough information apply retrograde extrapolation in the present case. T. 113. Stevenson stated that some of the required factors were present to perform a retrograde extrapolation but that others would have to be assumed. T. 114. For this reason, when asked if he had an opinion as to what Gilpatrick's BAC would have been at 1:04 a.m., Stevenson responded that it could have been higher, lower, or the same as his tested level of .07%. T. 115.

Gilpatrick claims that "the speculative testimony about retrograde extrapolation was introduced to meet the burden of proof that Gilpatrick was in fact intoxicated at the time of the accident, a necessary element for a violation of Section 63-11-30(5) of the Mississippi Code." Appellant's brief at 18. To the contrary, Stevenson was unwilling to apply retrograde extrapolation to determine what Gilpatrick's BAC may have been at the time of the accident because some relevant factors were unknown to him. He did, however, opine that Gilpatrick was under the influence of alcohol at 1:04 a.m., but that opinion was based on the fact that "an individual is under the influence of alcohol the minute they start to drink." T. 115.

Gilpatrick's claim that Stevenson's testimony regarding retrograde extrapolation was erroneously admitted is disingenuous at best. He has wholly failed to show that the trial court erred

---

[2]Retrograde extrapolation is mathematical process based on scientific principles by which one can take a know BAC calculated at a certain time and extrapolate what that person's BAC would have been in past hours. T. 113.

in admitting Stevenson's expert testimony, and his first assignment of error necessarily fails.

II. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

In determining whether the State presented legally sufficient evidence to support the jury's verdict, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005). On the issue of legal sufficiency, Gilpatrick claims that the State did not prove that he was intoxicated at the time of the accident. Gilpatrick again focuses on Stevenson's testimony and claims that Gilpatrick's .07% BAC four hours after the accident was insufficient to prove that he was intoxicated at the time of the accident. Gilpatrick does not alleged that the State failed to prove any other elements of DUI maiming.[3]

Gilpatrick was convicted of violating Mississippi Code Annotated § 63-11-30(5), which provides, "Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another" is guilty of DUI maiming. Among the numerous methods of committing the crime of driving under the influence, one violates subsection (1)(a) of the statute are by operating a motor vehicle under the influence of intoxicating liquor, and one violates subsection (1)(c) by having a BAC of .08% while operating a motor vehicle. Miss. Code Ann. §§ 63-11-30(1)(a), 63-11-30(1)(c). Section 63-11-30(1)(a) is commonly referred to as "common law DUI," while § 63-11-30(1)(c) is

---

[3]Gilpatrick admitted negligence, and the mutilation and disfigurement of the victims was firmly established by their testimony. T. 167, 128-30, 134-35, 139-48.

commonly referred to as "DUI *per se*." *Deloach v. City of Starkville*, 911 So.2d 1014, 1017 (¶14) (Miss. Ct. App. 2005). This honorable Court has noted the distinction between these two forms of DUI and stated that DUI *per se* is proven when the defendant's BAC tests above the legal limit, while a charge of common law DUI is pursued when no BAC results are available or the defendant's BAC tests under the legal limit and proof exists to establish that "the person is driving or operating a vehicle under circumstances indicating that his ability to so drive or operate the vehicle has been impaired by the ingestion of intoxicating liquor." *Leuer v. City of Flowood*, 744 So.2d 266, 268 (¶7) (Miss. 1999). In the present case, the State clearly prosecuted the DUI maiming charges under subsection (1)(a), or common law DUI, as evidenced by the plain language of the indictment, the evidence presented by the State, and jury instructions S-1, S-2, and S-3.

The State presented the following evidence which proved beyond a reasonable doubt that Gilpatrick was under the influence of intoxicating liquor at the time of the accident:

- Thrash's testimony that Gilpatrick was swerving and crossing the line immediately prior to the wreck. T. 85.
- Thrash's testimony that Gilpatrick crossed the center lane and darted out in front of Callicott's truck. T. 86.
- Thrash's testimony regarding the distinct smell of alcohol emanating from Gilpatrick's truck. T. 91, 94.
- Wade's testimony that a partially consumed vodka bottle and cooler full of beer were in Gilpatrick's truck. T. 53.
- Wade's testimony regarding the smell of alcohol emanating from Gilpatrick's truck. T. 53.
- Ruth's testimony regarding the vodka and beer found in Gilpatrick's truck. T. 79-80.
- Ruth's testimony that the truck smelled of alcohol. T. 81.
- Gilpatrick's BAC four hours after the wreck tested at .07%, combined with the fact that

Gilpatrick testified that he consumed no alcohol at any time after the wreck. T. 108, 167.

- Gilpatrick's admission that he had consumed "probably about three beers" in the forty-five minutes preceding the wreck and that he was drinking while driving. T. 156-57, 163.

- Gilpatrick's admission that he had a beer in his hand when he swerved in front of Callicott. T. 171.

In viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved the element of intoxication beyond a reasonable doubt. Accordingly, Gilpatrick's second assignment of error necessarily fails.

III. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Reviewing courts will not disturb the jury's verdict based on a claim that it was against the overwhelming weight of the evidence unless allowing the verdict to stand would sanction an unconscionable injustice. *Bush*, 895 So.2d at 844 (¶18). "Matters regarding the weight and credibility of the evidence are to be resolved by the jury." *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993). The duty to resolve conflicts in witness testimony lies within the sole province of the jury. *Stephens v. State*, 911 So.2d 424, 436(¶38) (Miss. 2005).

The jury heard testimony from Thrash, Wade, Ruth, and Stevenson which indicated that Gilpatrick was intoxicated at the time he drove his truck in the wrong lane, thereby negligently disabling three victims. The jury also heard Gilpatrick's testimony that although he admitted that he had been drinking and driving, he did not believe that he was intoxicated. In accordance with their duty, the jury resolved the conflict against Gilpatrick. The verdict represents no unconscionable injustice and must not be disturbed.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Gilpatrick's convictions and sentences.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: La Donna C. Holland

LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

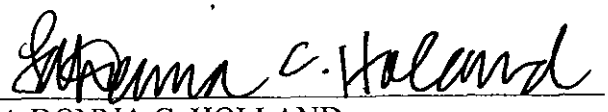
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable William E. Chapman, II
Circuit Court Judge
Post Office Box 1885
Brandon, MS 39043

Honorable Michael Guest
District Attorney
Post Office Box 68
Brandon, MS 39043

Lance O. Mixon, Esquire
Attorney At Law
499 South President Street
Jackson, MS 39201

This the 18th day of January, 2007.



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680