IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0576-16

BURT LEE BURNETT, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS TAYLOR COUNTY

HERVEY, J., delivered the opinion of the Court in which KEASLER, ALCALA, RICHARDSON, NEWELL, and WALKER, JJ., joined. RICHARDSON, J., filed a concurring opinion. KELLER, P.J., filed a dissenting opinion in which YEARY and KEEL, JJ., joined. YEARY, J., filed a dissenting opinion in which KELLER, P.J., joined.

O P I N I O N

Burt Lee Burnett was charged with driving while intoxicated after he rear-ended another vehicle. The State alleged that Burnett was intoxicated "by not having the normal use of his mental and physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those

substances, and any other substance into his body . . . .” The jury charge included that language in the abstract and application portions of the charge. Burnett objected to including the entire “loss of faculties” statutory definition in either portion of the charge because the evidence showed that, if he was intoxicated, it was only due to alcohol, not anything else. His objection was overruled, and the jury convicted him.[1] He was fined $1,000 and sentenced to 120 days’ confinement in the county jail, which was probated for eighteen months.

On appeal, he made the same argument: the jury should have been instructed that “intoxication” only means “not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . .”[2] The court of appeals agreed, holding that it was error to submit the entire definition because no rational jury could conclude that Burnett consumed intoxicating drugs based on the evidence. In reaching its conclusion, the court of appeals distinguished our decision in *Ouellette v. State*, 353 S.W.3d 868 (Tex. Crim. App. 2011). We granted the State’s petition for discretionary review to decide whether the lower court erred when it distinguished *Ouellette* from the facts of this case. Because we agree with the analysis of the court of appeals, we will affirm its judgment.

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[1]Burnett was also arrested and convicted for unlawful carrying of a weapon. Like the DWI sentence, he was fined $1,000 and sentenced to 120 days’ confinement in the county jail, which was probated for eighteen months.

[2]Burnett says that “a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body . . . ,” should have been removed from the definition of “intoxication” in the jury charge. TEX. PENAL CODE § 49.01(2)(A).

BACKGROUND

Burnett rear-ended a vehicle occupied by Michael Bussey and Nathan Chappa. After the wreck, Bussey saw Burnett get out of his car and "kind of stagger" to his vehicle. When Burnett got there to ask if everyone was okay, Bussey rolled down his window, and he and Chappa caught a "whiff" of alcohol. Chappa said Burnett had glassy and bloodshot eyes, but Bussey only noticed that Burnett was slurring his words.[3] They both thought that Burnett was intoxicated.

Officer Clinton Coapland was the first to arrive on scene. When he made contact with Burnett, Burnett's speech was slurred. He also had to ask Burnett the same questions multiple times. When Coapland leaned towards Burnett to hear him better, Coapland smelled the faint odor of alcohol, but he did not see that Burnett's eyes were glassy or bloodshot. Coapland radioed for backup. Once Officer William Allred arrived, he began to secure the scene while Coapland began his DWI investigation. Coapland asked Burnett if he had been drinking and whether he would consent to taking standard field sobriety tests (SFSTs). Burnett said that he had not been drinking and consented to take the tests. He showed signs of intoxication during the horizontal-gaze nystagmus test (HGN test), the walk-and-turn test, and the one-leg-stand test.[4] Coapland concluded that Burnett was

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[3]Chappa did not hear much of what Burnett said because he was on the phone with the police.

[4]According to Coapland, Burnett exhibited all six clues of intoxication during the HGN test, four of eight clues during the walk-and-turn test, and two of four clues during the one-leg-stand test.

intoxicated and arrested him. Incident to the arrest, Coapland searched Burnett and found twenty white pills and one blue pill in his jacket. Meanwhile, Allred performed an inventory search of Burnett's car and found pills, a laptop, and a Ruger in a bag in the front-seat of the car. He also found a prescription pill bottle in the car. The bottle was not photographed or admitted into evidence. According to Coapland, Allred told him that the bottle was for the medication found in Burnett's coat pocket and that the pills may be hydrocodone. Allred, however, contradicted Coapland, testifying that he did not remember if the prescription pill bottle was for the pills they found.

The State charged Burnett with Class B misdemeanor DWI and alleged that he was intoxicated "by not having the normal use of his mental and physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of the substances, and any other substance into his body . . . ."

Motion to Suppress

Burnett filed a motion to suppress, arguing that the officers should not be permitted to testify as to what type of pills they found because they were not drug recognition experts (DREs). The trial court agreed and ruled that the officers were not allowed to testify that they thought the pills were hydrocodone. The next day, however, the issue of the pills came up again. During this discussion, the State told Burnett and the court that there was video footage from the scene during which Coapland, Allred, and

Burnett spoke about the pills. The video showed that, after Coapland found the pills in Burnett's jacket, he gave them to Allred, who said that the pills looked like hydrocodone. Allred asked Burnett whether he had a prescription for the medication, and Burnett responded that he did. The State argued that the evidence of Burnett's pill possession should be admitted into evidence as same-transaction contextual evidence.[5] Burnett again objected that the officers were not DREs and so were not qualified to testify about what kind of pills they found or any potential intoxicating effects. He also made other objections that are not relevant here. The trial court ruled that the pill evidence was admissible as same-transaction contextual evidence.[6]

COURT OF APPEALS

Burnett raised two issues in the court of appeals. In his first point of error, he argued that the trial court erroneously admitted evidence that Burnett was in possession of

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[5]The State argued that,

> I believe the Court of Criminal Appeals has held that contextual evidence is admissible. It's the same transaction. Same transaction contextual evidence is admissible. What the Court has held verbatim is, you know, evidence did not occur in a vacuum and the jury has a right to hear what happens prior to the event and subsequently after the event.
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> And I believe this is all within the same transaction and is admissible. It goes to the credibility of [Burnett], his denial of knowing what's in the bag, to then admitting to having a prescription. Then to the -- the issues I believe we have to address are whether they're admissible. As I said, it's the same transaction contextual evidence . . . .

[6]The court of appeals held that the trial judge abused his discretion when he admitted the pills and related pill evidence as same-transaction contextual evidence. *Burnett v. State*, 488 S.W.3d 913, 920 (Tex. App.—Eastland 2016).

hydrocodone. *Burnett v. State*, 488 S.W.3d 913, 916 (Tex. App.—Eastland 2016). In his second point of error, he asserted that the trial court erroneously instructed the jury that it could convict him if it found that he was intoxicated by reason of the introduction of anything other than alcohol into his system. *Id.* In addressing his second issue, the court of appeals explained that it is insufficient for a charge to incorporate only the allegations in the charging instrument; "it must also apply the law to the facts adduced at trial." *Id.* at 923 (citing TEX. CODE CRIM. PROC. art. 36.14) (quoting *Gray v. State*, 152 S.W.3d 125, 127 (Tex. Crim. App. 2004)). It next turned to our decision in *Ouellette*, in which we suggested that it could be error to submit the full "loss of faculties" definition of intoxication if the evidence shows only alcohol intoxication. *Id.* at 923. According to the court, *Ouellette* is distinguishable from the facts of this case because, in this case a rational juror could not have reasonably inferred that Burnett ingested drugs, unlike in *Ouellette* where the evidence permitted such an inference. *Id.*

OUELLETTE

Similar to the facts of this case, Ouellette rear-ended another car and was charged with DWI "by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, or a combination of two or more of those substances[.]"[7] *Ouellette*, 353 S.W.3d at 868–69. The responding officer testified that Ouellette "was acting unusual and that he smelled alcohol on her breath." *Id.* at 869. He thought that Ouellette could be

[7]The only portion of the "loss of faculties" definition omitted from the charging instrument in *Ouellette* was "or any other substance." TEX. PENAL CODE § 49.01(2)(A).

intoxicated and asked for a member of the Austin Police Department's DWI task force to start an investigation. *Id.* Officer Mabe responded. Ouellette told Mabe that she drank one glass of wine earlier that evening, and she agreed to perform some SFSTs. Mabe administered two tests, and Oullette showed signs of intoxication, so Mabe arrested her for DWI "[b]ased on the results of the[] tests, physical symptoms of intoxication, and the odor of alcohol on her breath[.]" *Id.* After the arrest, police found three different types of pills in Ouellette's car.

When Mabe confronted Ouellette about the pills, Ouellette said that she recognized two of them as Soma and Darvocet, but that she did not know what the third one was. *Id.* at 869. According to her, she had a prescription for all of the medications and had not taken any of them in over a month. *Id.* To backup her story, she offered to provide a blood sample, but she later withdrew that offer after Mabe told her that the sample would also be checked for its alcohol concentration. *Id.* Mabe testified that both alcohol and Soma are central nervous-system depressants (CNS depressants) that can cause the horizontal-gaze nystagmus like the one he observed while administering the HGN field-sobriety test. *Id.* During closing arguments, the State told the jury that it could find that Ouellette was intoxicated from drinking alcohol, from the Soma found in her car, or from a combination of both alcohol and the prescription medication. *Id.* The jury convicted Ouellette.

Ouellette appealed her case to the Austin Court of Appeals, arguing that the

evidence showed that, if she was intoxicated, it was due to only alcohol. *Id.* The court of appeals rejected her claim, however, concluding that a jury could have found that her intoxication was caused by the Soma found in her car. *Id.*

After losing in the court of appeals, Ouellette filed a petition for discretionary review in this Court. We granted it to decide whether it was proper for the charge to authorize Ouellette's conviction under the theory that she was intoxicated by a drug or a combination of alcohol and a drug, although the only evidence of drug intoxication was the prescription medications found in her car. *Id.* In our analysis, we first noted that the DWI statute focuses on whether a person is intoxicated while operating a motor vehicle in a public place, not the specific substance that caused a person to become intoxicated. *Id.* at 869. We further explained that trial courts are required to instruct juries regarding "law applicable to the case," which includes the elements of the offense and any statutory definitions that affect the meaning of those elements.[8] *Id.* at 870. We have previously suggested that giving an entire statutory definition may be error when only a portion of a statutory definition is relevant to the elements of the offense; however, we did not have to

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[8]In *Ouellette* we cited *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985) (op. on reh'g), to support the proposition that submitting to the jury an entire statutory definition when only a portion of it is relevant could be error. In *Alvarado*, the appellant was convicted of injury to a child. *Alvarado*, 704 S.W.2d at 37. On appeal, she argued in part that, because the injury-to-a-child statute is a result-oriented offense, the definition of culpable mental states in the charge should have been limited to only those that relate to the result of the offense. *Id.* We agreed, holding that it was error not to tailor the culpable mental-states definitions to the result of a defendant's conduct when the offense with which he is charged is a result-oriented crime. *Id.* Later, we applied this same reasoning to nature-of-conduct offenses. *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015).

reach that issue in that case because, even though the drug-intoxication evidence was circumstantial "and not obviously overwhelming," it was nonetheless sufficient to support the jury instruction. *Id.*

The circumstantial evidence indicated that Ouellette showed signs of having ingested a CNS depressant and that alcohol and Soma are both CNS depressants. We affirmed the judgment of the court of appeals, summarizing that,

> In short, [Ouellette] appeared intoxicated, police found in her vehicle a drug that could have produced the observed symptoms of intoxication, and she refused a blood test. Although there was no direct evidence that [Ouellette] consumed the drug, there was evidence from which a rational juror could have found that the defendant did so.
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> The jury charge in this case reflected the law as it applied to the evidence produced at trial.

Id.

ARGUMENTS

The State argues that a jury charge should include the entire "loss of faculties" definition, irrespective of the trial evidence. According to it, the substance that caused a person to become intoxicated is purely an evidentiary issue because the focus is on only whether the defendant was intoxicated, not the intoxicant. For support, the State relies on Judge Cochran's dissenting opinion in *Gray v. State*, 152 S.W.3d 125, 136 (Tex. Crim. App. 2004) (Cochran, J., dissenting).[9] It also contends that, by not instructing the juries on

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[9]The State provided the following excerpt from Judge Cochran's opinion,

> I think that appellant is technically correct. However, I would take this opportunity

the entire "loss of faculties" definition, courts are contravening the purpose of the expansive definition adopted by the legislature. By way of hypothetical, it warns that,

> If a criminal defendant were to demonstrate clear evidence of extreme intoxication yet provides a breath sample showing a blood alcohol level considerably below .08, the defendant's own behavior is indicative that some other substance contributed to his intoxication even if the exact nature of the intoxicant is not known or cannot be determined. Under the Eastland Court's rationale, the jury charge in this defendant's case would only be

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> to overrule *Garcia* which held that, in a DWI prosecution, "the type of intoxicant used, i.e., alcohol, a controlled substance, a drug, or a combination of two or more of these substances, becomes an element of the offense and critically necessary to the State's proof." *Garcia* is no longer good law because the DWI statute has been amended so that the type of intoxicant that a person consumed to become physically or mentally impaired is of no legal significance.
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> When *Garcia* was decided in 1988, there were only three possible "intoxicants" that were subject to prosecution under the DWI statute: alcohol, a controlled substance, or a drug. A driver who was impaired because of the ingestion of any one of these three substances, either alone or in combination, could be convicted of DWI. In 1993, the Legislature amended the definition of "intoxicated" to include "alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance." Any other substance at all. Under current law, if a person eats too many M & Ms either alone or in combination with alcohol, drugs, water, or whatever such that his mental and physical faculties are impaired, he may be prosecuted for DWI. However, "eating M & Ms" is clearly not an element of the offense of DWI. "Intoxicated" is an element of DWI, and it is a physical state of being, regardless of the specific substance which caused the impairment.
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> The purpose of DWI laws, both here in Texas and across the nation, is to prevent and punish the "carnage caused by drunk drivers." These laws are not focused upon the type of substance that caused the driver to become "drunk" and then get behind the wheel of a car. The law does not differentiate between the drunk driver who was intoxicated because he consumed alcohol, or injected heroin, or sniffed glue, or took prescription medicine. It is the act of driving while one's mental or physical faculties are impaired that is inherently dangerous and the target of our DWI law.

Gray v. State, 152 S.W.3d 125, 136 (Tex. Crim. App. 2004) (Cochran, J., dissenting) (emphasis removed) (footnotes omitted).

> allowed to give an instruction on alcohol; the possibility that the defendant may be intoxicated on "any other substance" may not even be considered.

State's Brief on the Merits at 21.

Burnett responds that, while the State in its charging instrument need only allege that the defendant was "intoxicated" and is permitted to track the language of the entire statutory definition, it is error to give to the jury portions of a statutory definition that are not supported by the evidence. He argues that the rule urged by the State would invite the exact type of speculation that we condemned in *Hooper v. State*, 214 S.W.3d 9, 15–16 (Tex. Crim. App. 2007), and that such guessing could ensnare thousands of innocent Texans, such as fatigued drivers and those with naturally bad balance, even though they never ingested any substance as required to prove intoxication. He also contends that the State misreads Judge Cochran's dissent in *Gray*, and that she was "lament[ing] the Court's holding in *Garcia* which required the State to plead the specific intoxicant, and then allowed a defendant to claim the State proved the incorrect intoxicant . . . ." Appellant's Amended Brief on the Merits at 23 (citing *Gray*, 152 S.W.3d at 136). He also points out that, in *Gray*, the majority concluded that, although the State specifically pled alcohol intoxication and presented proof that Gray was intoxicated by alcohol, the synergistic-effect instruction given in that case was not erroneous because there was also evidence that Gray took anti-depressants and that those anti-depressants made him more

susceptible to becoming intoxicated by alcohol.[10] Here, however, Burnett contends that there is no evidence that he was intoxicated by prescription medication.

ANALYSIS

We agree with Burnett that the State's reliance on Judge Cochran's dissent is misplaced. Our reading of Judge Cochran's opinion shows that she was in fact discussing the State's pleading burden, not instructions in a jury charge. This is evident from the passage directly following the excerpt provided by the State,

> This case is a prime example of the Dickensian hair-splitting that we have allowed ourselves to fall into. Appellant makes no claim that he was not intoxicated at the time he rear-ended a fellow driver. He admits that he was a physically and mentally impaired driver. His contention is simply that he was not intoxicated because of the alcohol he drank; instead, he was intoxicated because of the anti-depressants he was taking. This is a "defense" that is condoned, if not encouraged, by our decision in *Garcia* which requires the State to allege the precise substance that it thinks caused an impaired driver's intoxication, and then permits that driver to defend against the charge by claiming that he was intoxicated on some other substance.

Gray, 152 S.W.3d at 136 (Cochran, J., dissenting).

We also decline the State's invitation to hold that the entire statutory definition of "intoxicated" should be included in every DWI jury charge regardless of the evidence

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[10]In this way *Gray* is like *Ouellette*—in both cases there was expert testimony that the signs of intoxication observed by the police could have resulted from ingesting drugs and/or alcohol. In *Ouellette*, that evidence was that Soma and alcohol are both CNS depressants that cause similar symptoms of intoxication. *Oullette*, 353 S.W.3d at 870. In *Gray*, the charge was that his intoxication could have been caused by alcohol alone or "by reason of the introduction of alcohol into his body, either alone or in combination with Respiratol, Zoloft, Klonopin and/or Depical[,]" all of which are also CNS depressants. *Gray*, 152 S.W.3d at 126–27.

adduced at trial. The State is correct that the legislature has adopted a broad definition of "intoxicated" that focuses on whether a person is intoxicated and not the agent that caused it. *Ouellette*, 353 S.W.3d at 869–70. We have explained that the State can use this to its advantage by alleging in its charging instrument that the defendant was simply "intoxicated" or by including the entire statutory definition, instead of pleading the specific intoxicant as was previously required. However, it is the responsibility of the trial court to deliver to the jury a written charge setting forth the "law applicable to the case." TEX. CODE CRIM. PROC. art. 36.14. Part of that duty includes applying the law to the facts of the case. *Gray*, 152 S.W.3d at 127–28. And, although the trial court is obliged to include in the jury charge statutory definitions that affect the meaning of elements of the crime, *Villarreal v. State*, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009), the charge must also be tailored to the facts presented at trial.[11] That is, the trial court must submit to the jury only the portions of the statutory definition of "intoxicated" that are supported by the evidence. To do otherwise is error.

The State argues that, under this rationale, the jury was not permitted to consider the possibility that the defendant was intoxicated from "any other substance." We disagree. The jury is permitted to consider whether a defendant was intoxicated from "any

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[11] *Kirsch*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010); *see Ouellette*, 353 S.W.3d at 870 ("The jury charge in this case reflected the law as it applied to the evidence produced at trial."). In *Kirsch*, we explained that the State can prove intoxication under an "impairment" theory or *per se* theory of intoxication. *Kirsch*, 306 S.W.3d at 743. We also noted that the two theories are not mutually exclusive and that, "as long as there is evidence that would support both definitions, both theories are submitted in the jury charge." *Id.*

other substance" when there is evidence that the defendant ingested a substance that caused him to become intoxicated or there is sufficient evidence for a rational juror to infer such. But, as we will explain, the record here does not support that Burnett ingested a substance other than alcohol.

The evidence here shows that Burnett was intoxicated because he had been drinking alcohol. The witnesses and police could smell it, and Burnett showed signs of intoxication during three SFSTs, which as Coapland testified, is consistent with a person that has lost his mental or physical faculties due to the imbibement of alcohol. Burnett was also observed to have slurred speech and glassy and bloodshot eyes. Police later found hydrocodone pills in Burnett's vehicle, but there is no evidence in this record as to what kind of drug hydrocodone is, whether it can cause intoxicating effects, or whether the symptoms of intoxication Burnett was experiencing were also indicative of intoxication by hydrocodone. These are critical elements that were present in *Ouellette* but not in this case.

In *Ouellette*, the arresting officer asked Ouellette about the pills that were found in her vehicle, and she expressly identified two of them. Here, Burnett did not tell the officers that the pills were hydrocodone, although Allred told Coapland that he thought they were hydrocodone. Allred asked Burnett whether he had a prescription for the medication he found,[12] and Burnett responded that he did. Allred did not ask Burnett,

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[12]Although the police did not specify whether the white pills or blue pill might be hydrocodone, they repeatedly refer to "the pills" as possibly being hydrocodone. Based on the

however, whether the pills were hydrocodone or whether he had a prescription for hydrocodone; he simply asked Burnett if he had a prescription for "those." And, Burnett never told the police that the pills were hydrocodone or that he had a prescription for hydrocodone. We agree with the court of appeals that this interaction was insufficient for a jury to rationally infer that the white pills were hydrocodone and that Burnett was claiming to have a prescription specifically for hydrocodone. In *Ouellette*, the officer testified that Ouellette appeared intoxicated after ingesting a CNS depressant and that alcohol and Soma (one of the medications Ouellette identified), are both CNS depressants. This pivotal testimony provided the link that allowed the jury to infer that Ouellette was intoxicated due either to ingesting alcohol or the Soma found in her car.[13]

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fact that there was only one blue pill but multiple white pills, we understand the officers to be referring to the white pills as hydrocodone.

[13]We stated in *Ouellette* that,

> In short, the appellant appeared intoxicated, *police found in her vehicle a drug that could have produced the observed symptoms of intoxication*, and she refused a blood test. Although there was no direct evidence that the defendant consumed the drug, there was evidence from which a rational juror could have found that the defendant did so.
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> The jury charge in this case reflected the law as it applied to the evidence produced at trial. We affirm the judgments of the courts below.

Ouellette, 353 S.W.3d at 870 (emphasis added); *see Smithhart v. State*, 503 S.W.2d 283, 286 (Tex. Crim. App. 1973). In *Smithhart*, we stated that,

> The missing essential element is a showing which would connect the symptoms observed by [the arresting officer] to a conclusion that appellant was under the influence of a drug to a degree rendering him incapable of safely operating a vehicle. Just as there was an absence of evidence to qualify [the arresting officer]

Ouellette, 353 S.W.3d at 870. That explains why we said in *Ouellette*, that the jury charge "reflected the law as it applied to the evidence produced at trial." *Id.*

We agree with the court of appeals that *Ouellette* is distinguishable from the facts of this case and that, here, the jury charge was erroneous because it did not apply the law to the facts produced at trial.

HARM

The court of appeals held that Burnett was caused some harm by the erroneous jury charge in this case. *Burnett*, 488 S.W.3d at 925. According to it, Burnett was harmed because the pill-related evidence became an integral part of the trial even though there was insufficient evidence to submit that theory of intoxication to the jury. *Id.* We do not review its harm analysis, however, because we did not grant review on that issue. *Juarez v. State*, 308 S.W.3d 398, 406 (Tex. Crim. App. 2010) (judgment of the court of appeals finding harmful error should be affirmed when this Court agrees that the jury charge was erroneous but did not grant review of the lower court's harm analysis).

> to give his opinion on this point, so was there an absence of any other evidence from which the jury could draw such a conclusion. Unlike alcoholic intoxication, which is 'of such common occurrence' that its recognition requires no expertise as in *Inness v. State*, this court is unable to say that such is the case with being under the influence of drugs.

Smithhart, 503 S.W.2d at 286 (citation omitted); *see Paschall v. State*, 285 S.W.3d 166, 181 (Tex. App.—Fort Worth 2009, pet. ref'd) (Dauphinot, J., dissenting) ("Slurred speech, constricted pupils, and swaying may indicate intoxication, but such evidence only goes to the element of lack of normal use. It is not, in and of itself, proof of introduction into the body of a drug or controlled substance or alcohol, a necessary element of intoxication that the State must prove.").

CONCLUSION

We affirm the judgment of the court of appeals.

Delivered: September 20, 2017

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