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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re J.H., a Person Coming Under the
Juvenile Court Law.**

THE PEOPLE,

Plaintiff and Respondent,

v.

J.H.,

Defendant and Appellant.

A138847

**(Contra Costa County
Super. Ct. No. J1201565)**

J.H. (Minor) appeals from a dispositional order of the juvenile court, which found true an allegation that Minor had driven under the influence of alcohol and/or drugs, a violation of Vehicle Code section 23152, subdivision (a).¹ Minor contends on appeal that the true finding is unsupported by substantial evidence.

We conclude the record contains substantial evidence to sustain the juvenile court’s finding. Accordingly, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A juvenile wardship petition (Welf. & Inst. Code, § 602) filed on December 4, 2012, in Contra Costa County Superior Court alleged that Minor drove a vehicle while

¹ All undesignated statutory references are to the Vehicle Code.

under the influence of drugs and/or alcohol, a misdemeanor. (See § 23152, subd. (a).) After a contested jurisdictional hearing, the juvenile court sustained the petition.

On May 3, 2013, the court adjudged Minor a ward and placed him on probation subject to various terms and conditions. Minor then filed timely a notice of appeal.

Facts Surrounding the Offense

Around 1:15 a.m. on September 22, 2012, Walnut Creek Police Officer William Appel saw a Chevy Blazer that proceeded off the freeway and into the number three lane of North Main Street. Driving in the number two lane, Officer Appel observed that the Blazer appeared about to swerve into the number two lane, but when it hit the traffic control dots, returned to the number three lane. The officer kept watching the Blazer when it “seemed to swerve back and forth in its own lane. And then eventually, it started to completely swerve into [the officer’s] lane [W]hen the line splitting the number 2 and 3 lane[s] was directly underneath the center of the vehicle as it . . . started to shift into [the officer’s] lane, that’s when the vehicle turned its blinker on” Officer Appel had to slow down, because if he had not done so, he would “have made impact with [the] vehicle.”

Officer Appel intended to stop the vehicle for an unsafe lane change but decided to wait to make the stop in a safe location. The officer activated his emergency equipment, but the driver of the Blazer did not immediately comply with the show of authority. The officer sounded his air horn in an effort to stop the Blazer on the right side of the road, but the driver proceeded to the left turn lane and traveled 500 feet to the intersection after the officer turned on his emergency lights.

The Blazer stopped at the red light at the intersection, and Officer Appel positioned his car behind the Blazer. When the light turned green, the driver of the Blazer hesitated for few seconds and turned left. Officer Appel followed and activated his emergency lights again. The Blazer drove onto the curb, stopping on the sidewalk. As the officer approached the Blazer on foot, the driver drove 10 to 15 feet on the sidewalk, dropped to the street, proceeded another 30 feet, and finally returned to the sidewalk, where the car stopped. Officer Appel followed in his vehicle.

Officer Appel contacted Minor, who was driving the Blazer and accompanied by a female passenger. The officer explained the reason for the stop, but Minor did not respond. Officer Appel observed that Minor's eyes were glassy and bloodshot and were kept open with difficulty. Minor was slow to respond to commands, and his speech was "heavily slurred."

Minor got out of the Blazer upon request, but he "was . . . slow to respond, very cooperative, borderline basically polite, but just very difficult to get his attention, very difficult to keep him focused . . ." At that point, Officer Appel suspected Minor might be under the influence of "something," and so the officer asked "prefield sobriety questions." Minor said that he was taking his girlfriend home, and when asked the time, he said that it was 11:30 p.m. or midnight when it was actually 1:27 a.m. Minor denied consuming alcohol that evening, but admitted he had taken an unprescribed 0.5 milligram Xanax pill and marijuana. Minor said he could feel the drugs' effects.

Officer Appel conducted a series of field sobriety tests (FSTs). First, he conducted tests for horizontal gaze nystagmus (HGN) and vertical gaze nystagmus (VGN), both of which were present in appellant's reactions to the tests.² Minor's eyes could not cross. Minor was able to count from 85 to 105, but when asked to count backward from 105 to 85, he counted correctly from 105 to 96, then jumped to 94, counted up to 95 and 96, and returned to 94. He announced, "Oh, fuck . . . I spaced out," and started to laugh.

Officer Appel also conducted the Romberg test, which required Minor to stand with his heels and toes together, hands at his side, head leaned back, and eyes closed. After the officer said "start," Minor was required to estimate the passage of 30 seconds. His estimate was in fact 21 seconds. Minor swayed back and forth about one inch, clenched his teeth (bruxism) and fluttered his eyelids. These signs, especially bruxism, indicate drug use.

² "Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotatory." (*People v. Ojeda* (1990) 225 Cal.App.3d 404, 406.)

The officer administered the one-leg balance test, asking Minor to lift one foot six to 10 inches from the ground, look at his pointed toe, and “count out loud so I can hear 1, 1000, 2, 1000, et cetera until I tell him to stop.” Appellant did not follow the officer’s instructions and stopped counting at 28, 1000. The last test required Minor to walk heel-to-toe for nine steps, pivot, and walk another nine steps to return. Minor did not perform the pivot properly.

Officer Appel examined Minor’s pupils, which measured 7.5 millimeters in darkness and 7.0 millimeters in direct light. The eyes of a person not under the influence of a drug will exhibit a greater reaction to light, with the pupil constricting to a size less than 7.0 millimeters.

The police officer also took Minor’s pulse three times during the administration of the FSTs. At 1:44 a.m., Minor’s pulse was 128 beats per minute; a healthy heart at rest beats 60 to 70 times per minute. At 1:47 a.m., Minor’s pulse was 140 beats per minute, and at 3:15 a.m. it was 132 beats per minute. Both Minor’s pupil size and heart rate “indicated to [the officer] that there was some type of drug in his system.” Officer Appel concluded Minor had been driving under the influence of a drug or alcohol based upon the results of the FSTs, appellant’s statements, his driving pattern, his general demeanor, and his physical signs.

Officer Appel arrested Minor and took him to the police station, where Minor said spontaneously, “I guess this is a lesson that Xanax and alcohol don’t mix.” Blood drawn from Minor’s arm at the station contained a blood alcohol level of 0.014 and 0.339 micrograms per milliliter of the drug MDMA (Ecstasy), but no Xanax.

Expert Testimony at Trial

Danielle Roberts, a criminalist and forensic supervisor at the Contra Costa County Sheriff’s Department, testified that Ecstasy is a hallucinogen that can cause euphoria and “a detachment of time and space.” It can produce muscle rigidity, muscle tremors, and eyelid flutters. It can also cause an increase in blood pressure and pulse. Ecstasy will dilate the pupils, causing sensitivity to light and a reduction in visual acuity. “It diminishes the ability to perform multiple tasks such as driving.” The effects of Ecstasy

could be “multiplied if multiple drugs are present.” Based on the circumstances of Minor’s behavior on the night of his arrest—including ingestion of Ecstasy, his driving, his physical appearance, and his psychological symptoms—Roberts believed Minor was impaired.

DISCUSSION

Minor contends there was insufficient evidence to sustain the juvenile court’s finding of driving under the influence. In particular, he challenges the conclusion drawn by Officer Appel about whether he suffered from HGN and/or VGN. In addition, he argues that Roberts’s testimony lacked sufficient basis to constitute substantial evidence. Finally, he asserts the evidence of his behavior and demeanor was insufficient to meet the reasonable doubt standard. For the reasons that follow, we reject these arguments.

I. *Standard of Review*

“The law regarding appellate review of claims challenging the sufficiency of the evidence in the juvenile context is the same as that governing review of sufficiency claims generally. [Citation.] In determining the sufficiency of the evidence, ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] ‘[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*In re Z.A.* (2012) 207 Cal.App.4th 1401, 1424-1425.) Moreover, in considering appellant’s claim that the evidence was insufficient to sustain the juvenile court’s finding, we must consider all of the evidence presented at trial, including evidence that should not have been admitted. (*Id.* at p. 1425.)

II. *Elements of the Offense*

Section 23152, subdivision (a) provides: “It is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle.” “A person is under the influence within the meaning of the statutes when, as a result of using [a particular

intoxicant], his physical or mental abilities are impaired to such a degree that he no longer has the ability to drive his vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances.” (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1194 (*Bui*).)

Whether a defendant was under the influence for purposes of section 23152 is a question of fact to be determined “from all the proven circumstances of the case.” (*Bui, supra*, 86 Cal.App.4th at p. 1194.) The statute does not proscribe the operation of a vehicle with a specific amount of a drug in the blood (*ibid.*), and thus the People need not prove that a defendant had any particular level of alcohol or drug in his blood.³ (See *People v. McNeal* (2009) 46 Cal.4th 1183, 1203 [evidence sufficient to sustain conviction under § 21352, subd. (a) even without specific blood alcohol level].)

III. *Substantial Evidence Supports Minor’s Conviction for Driving Under the Influence.*

Minor first contends the evidence was insufficient to demonstrate he exhibited HGN and VGN caused by intoxication. The focus of this argument is that Officer Appel had insufficient training in drug and alcohol effects recognition to enable him to identify these conditions, and thus the officer erroneously concluded that Minor exhibited them. We need not dwell on this argument, however, since Minor’s counsel did not object to Appel’s testimony on this point below, and any error is therefore forfeited. (See, e.g., *People v. Cua* (2011) 191 Cal.App.4th 582, 591 [failure to object at trial to scientific foundation of evidence is fatal to claim on appeal].) In any event, even if the claim of alleged error had been properly preserved, its significance is doubtful. As explained in

³ For this reason, Minor’s reliance on *People v. Beltran* (2007) 157 Cal.App.4th 235 is misplaced. That case involved an appeal from a conviction under subdivision (b) of section 23152 for driving with a blood-alcohol content (BAC) of 0.08 percent or more. (*Id.* at p. 238.) The court held that the prosecution had failed to prove beyond a reasonable doubt “the connection between the proved fact (test result demonstrating a BAC of 0.08 percent or greater within three hours of driving) and the inferred fact (BAC of 0.08 percent or greater at the time of driving), *which is an element of the charged crime[.]*” (*Id.* at p. 247, italics added.) As stated in the text, the People were not required to prove Minor was driving with any particular level of drugs or alcohol in his blood.

our statement of facts, Officer Appel's opinion that Minor was intoxicated was based on a great many factors, of which his observation of HGN and VGN was only one.

Minor next argues Roberts's opinion lacked an evidentiary basis sufficient to qualify it as substantial evidence. Contrary to Minor's claims, Roberts explained that her testimony regarding the effects of Ecstasy was based in part on having read peer-reviewed scholarly literature on the topic and on her personal observation of the behavior of two individuals stopped while operating motor vehicles whose blood later tested positive for Ecstasy. "[R]eviews of existing literature are common, valid, and accepted tools of scientific research," and while Minor complains that there was little research on this topic, this only meant the trial court was entitled to accord Roberts greater latitude in the sources of information on which she relied than might otherwise be the case.⁴ (See *Bui, supra*, 86 Cal.App.4th at pp. 1195, 1196-1197 [expert properly relied on review of scientific literature, and relative scarcity of evidence and studies regarding methamphetamine use and driving impairment did not preclude admission of expert's testimony].)

Minor argues Roberts did not explain how the Ecstasy and alcohol in his blood caused his admitted "weaving, lane change, and driving onto the sidewalk." The record demonstrates otherwise. Roberts testified that Ecstasy can cause a person to suffer from detachment of time and space, muscle rigidity and tremors, increased sensitivity to light, and a reduction in visual acuity. She explained Ecstasy "diminishes the ability to perform multiple tasks such as driving." She also testified that if Ecstasy were combined with alcohol, even at a low level, there might be greater impairment. Roberts therefore opined Minor was impaired. This testimony sufficiently explained how Ecstasy and alcohol impaired Minor's ability to drive.⁵ (See *People v. Benner* (2010) 185

⁴ Minor asserts that "Roberts claimed to have read unidentified articles about Ecstasy[.]" In fact, however, Roberts testified specifically that among other literature, she had consulted articles written by Dr. Barry Logan, the forensic toxicologist whose expert testimony was at issue in *Bui*. (See *Bui, supra*, 86 Cal.App.4th at pp. 1191-1193, 1197[.])

⁵ Relying on *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113 (*Zuckerman*), Minor appears to contend Roberts based her opinion on assumptions

Cal.App.4th 791, 795 [where expert testified as to effects of methamphetamine, and where after arrest appellant was anxious, agitated, paranoid, physically unbalanced, and had difficulty performing sobriety tests, jury could properly find her ability to drive was impaired].)

Finally, Minor contends the evidence of his behavior and demeanor did not meet the reasonable doubt standard. In this portion of his brief, he reargues various facts before the juvenile court, such why a 17-year-old might be nervous when pulled over by the police and how a teenager who had been drinking could be expected to drive poorly when the police were following him. As the People correctly point out, Minor is inviting this court to substitute its evaluation of the evidence for that of the trial court. As a court of appeal, we must decline this invitation, because we are not “a second trier of fact.” (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.)

unsupported by the record. *Zuckerman*, however, involved an expert’s valuation of real property, where the expert used a comparative property that “include[d] various fixtures, rights, improvements, and personal property which the property being [valued did] not include.” (*Id.* at p. 1130.) Therefore, the expert’s opinion in *Zuckerman* was based on facts wholly unsupported by the record. (*Id.* at pp. 1135-1136.) Here, in contrast, Roberts based her opinion on “the entire investigation. . . . [t]he driving pattern, the clues that . . . were seen physically, the dilated eyes, the increased pulse rate as well as the . . . [¶] [¶] chemical test.” These facts find ample support in the record.

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Needham, J.