Affirmed and Memorandum Opinion filed April 20, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00931-CR

JESSE MARRON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1140332

M E M O R A N D U M   O P I N I O N

Appellant, Jesse Marron, was found guilty by a jury of felony third-offender driving while intoxicated ("DWI"). After finding two punishment enhancement paragraphs true, the trial court sentenced appellant to life in prison. In four issues, appellant challenges the sufficiency of the evidence (1) to prove that he had been convicted of two prior DWI offenses used to enhance the charge to felony DWI and (2) to support his felony DWI conviction on the element of intoxication. We affirm.

I. BACKGROUND

On November 5, 2007, Deputies Alan Whitlock and Leonard Gonzalez of the Harris County Sheriff's Department were driving eastbound on Spindle Street, when Deputy Whitlock observed appellant—traveling westbound in an opposite lane of traffic—swerve into the deputies' lane of traffic. The deputies' vehicle was nearly forced completely off the street. Deputy Arthur Ramirez, who was following Deputies Whitlock and Gonzalez in a separate unit, also observed appellant cross over into the opposite lane of traffic into the deputies' lane. Deputy Ramirez activated his emergency equipment and proceeded to initiate a traffic stop. Deputies Whitlock and Gonzalez followed Deputy Ramirez.

Deputy Ramirez stopped appellant in a nearby neighborhood. Appellant almost immediately exited the vehicle, and Deputy Ramirez observed appellant having difficulty standing: appellant was swaying and had to use the side of his vehicle to maintain his balance. Deputies Whitlock and Gonzalez also observed appellant's "very" unsteady balance. Deputy Ramirez approached appellant, who became belligerent with the deputies. Appellant waved his arms in "an aggressive manner" and yelled at the deputies. Deputy Whitlock smelled a strong odor of alcohol emitting from appellant's breath and person. Appellant's eyes were red, watery, and bloodshot. His speech was also slurred.

Based on their observations, the three deputies believed that appellant was intoxicated and arrested him for DWI. The deputies then inventoried appellant's vehicle and discovered two beer cans: one opened, one closed, and both cold to the touch. The opened beer can was on the driver's side of the vehicle; the closed can of beer was on the front passenger's side. Appellant was transferred to the police station where he was asked to perform a number of field sobriety tests; he agreed to perform only the Horizontal Gaze Nystagmus ("HGN") test. Deputy Raymond Parker conducted the HGN test and observed five of the six clues, indicating that appellant was legally intoxicated.

Appellant was indicted for DWI, which was enhanced for purposes of jurisdiction to a felony by allegations of two prior DWI convictions: the first in 1993 and the second in 1994. In addition, for purposes of punishment enhancement, the indictment alleged habitual offender status based on two prior felony convictions for rape and aggravated assault. Appellant pleaded not guilty to the felony DWI charge and pleaded not true to the enhancement paragraphs. A jury ultimately found appellant guilty of felony third-offender DWI. Upon finding the habitual offender punishment enhancements true, the trial court assessed punishment at life in prison.

On appeal, appellant raises four sufficiency issues: (1) the evidence is insufficient to prove that appellant was the individual convicted of the 1993 DWI alleged in the indictment; (2) the evidence is insufficient to prove that appellant was the individual convicted of the 1994 DWI alleged in the indictment; (3) the evidence is legally insufficient to support appellant's felony DWI conviction on the element of intoxication; and (4) the evidence is factually insufficient to support appellant's felony DWI conviction on the element of intoxication.

II. STANDARD OF REVIEW

In a legal sufficiency review, we view all the evidence in the light most favorable to the verdict and determine whether a rational jury could have found the defendant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Williams v. State*, 270 S.W.3d 140, 142 (Tex. Crim. App. 2008). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given to their testimony. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). Reconciliation of conflicts in the evidence is within the exclusive province of the jury. *Cleburn v. State*, 138 S.W.3d 542, 544 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). We must resolve any inconsistencies in the testimony in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

In a factual sufficiency review, we review all the evidence in a neutral light, favoring neither party. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We then ask (1) whether the evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the jury's verdict seems clearly wrong and manifestly unjust, or (2) whether, considering the conflicting evidence, the jury's verdict is against the great weight and preponderance of the evidence. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006); *Watson*, 204 S.W.3d at 414–17. We cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Watson*, 204 S.W.3d at 417. If an appellate court determines that the evidence is factually insufficient, it must explain in exactly what way it perceives the conflicting evidence greatly to preponderate against conviction. *Id.* at 414–17; *Rivera-Reyes v. State*, 252 S.W.3d 781, 784 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The reviewing court's evaluation should not intrude upon the fact-finder's role as the sole judge of the weight and credibility given to any witness's testimony. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000).

III. JURISDICTIONAL ENHANCEMENTS

In appellant's first and second issues, he contends that the State did not prove him to be the person convicted of the two prior DWIs alleged in the indictment. A person commits the crime of DWI if he "is intoxicated while operating a motor vehicle." Tex. Penal Code § 49.04(a). Driving while intoxicated is ordinarily a Class B misdemeanor. *Id.* § 49.04(b). Misdemeanor DWI may be enhanced to a third-degree felony if the state shows that the person has previously been convicted two times of an offense relating to operating a motor vehicle while intoxicated. *Id.* § 49.09(b). The prior intoxication convictions are elements of the felony DWI offense. *Gibson v. State*, 995 S.W.2d 693, 696 (Tex. Crim. App. 1999). To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists;

and (2) the defendant is linked to that conviction. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007).

To prove appellant was the same person convicted of the 1993 and 1994 DWI offenses alleged in the indictment, the State offered five documentary exhibits—a jail card, two fingerprint cards, and two judgments—and the testimony of Juan Melo and Dimitry Payavla from the Harris County Sheriff's Department. The jail card, State's exhibit 1, contained identifying characteristics, including fingerprints, for a "Jesse Marrone" a/k/a "Joe Marrone." The jail card reflected that the individual was convicted of two DWIs in cause numbers 9404881 and 9321643. Appellant argues that the State failed to prove him to be the same individual as "Jesse Marrone" a/k/a "Joe Marrone" identified on the jail card because appellant's name is spelled "Jesse Marron." However, Payavla, a fingerprint examiner for Harris County Sheriff's Department, testified that he had had the opportunity to take appellant's fingerprints at trial in the instant cause—State's exhibits 4 and 5—and that appellant's fingerprints on State's exhibits 4 and 5 matched the fingerprints on the jail card. Accordingly, the State sufficiently proved that appellant was the same individual identified on the jail card.

Furthermore, the jail card reflected that appellant was convicted of two DWIs in cause numbers 9404881 and 9321643. State's exhibit 2—a judgment in cause number 9321643 convicting a "Joe Marrone" of DWI—and State's exhibit 3—a judgment revoking probation in cause number 9404881 against "Jesse Marrone" for DWI—were admitted. The judgments reflected DWI convictions on October 7, 1993 and March 7, 1994. After comparing the cause numbers on the jail card to the cause numbers on the two judgments, Payavla testified that they relate to the same DWI offenses. Appellant, however, contends that the judgments in cause numbers 9404881 and 9321643 were not sufficient to prove that he was the same individual convicted in those causes because (1) his name was not spelled correctly on the judgments, (2) the fingerprints on one of the judgments were smeared, (3) Payavla did not compare the jail card fingerprints to the

prints on the judgments, and (4) the second judgment was not the final judgment but a "judgment revoking probation."

While evidence of a certified copy of a final judgment and sentence may be a preferred and convenient means of proving prior convictions, the State may prove the existence of a prior conviction and the defendant's identity as the person convicted in a number of ways: (1) the defendant's admission or stipulation, (2) testimony by a person who was present when the person was convicted of the specified crime and can identify the defendant as that person, or (3) documentary proof that contains sufficient information to establish both the existence of a prior conviction and the defendant's identity as the person convicted. *Flowers*, 220 S.W.3d at 921–22. Moreover, there is no "best evidence" rule in Texas requiring that the fact of a prior conviction be proven with any document, much less any specific document; any type of evidence, documentary or testimonial, might suffice. *Id.*

Here, Payavla compared appellant's fingerprints taken at trial to the fingerprints on the jail card. Payavla testified that the fingerprints taken at trial from appellant matched the fingerprints on the jail card. Accordingly, the fingerprint comparison proved that appellant was the same individual identified on the jail card. Furthermore, the jail card reflected that appellant had been twice convicted of DWI in cause numbers 9404881 and 9321643. Two judgments in these causes were admitted, reflecting that the defendant in those causes had in fact been convicted of DWI. Although the State did not admit the *final judgment* for the 1994 conviction and the State did not compare the prints on either judgment to the jail card fingerprints, the State was not necessarily required to do so to meet its burden in light of other documentary evidence and Payavla's testimony. The jail card, appellant's trial fingerprint cards, the two judgments in cause numbers 9404881 and 9321643, and Payavla's testimony sufficiently showed two convictions existed and appellant was the individual convicted of those offenses.

Appellant also argues that by not introducing the mandates in cause numbers 9404881 and 9321643, the State failed to prove that the prior DWIs were final. Appellant's argument is without merit. After the State establishes a defendant has been previously convicted, the appellate court must presume that the conviction was final when faced with a silent record regarding such. *Jones v. State*, 77 S.W.3d 819, 823–24 (Tex. Crim. App. 2002); *Diremiggio v. State*, 637 S.W.2d 926, 928 (Tex. Crim. App. 1982). As discussed above, the State proved with legally and factually sufficient evidence that appellant was previously convicted of two DWIs. Moreover, there is nothing in the record before us establishing that appellant appealed those convictions or otherwise challenged them. *See Jones*, 77 S.W.3d at 824 ("Only when there is evidence that the defendant actually perfected an appeal is the conviction deemed to be lacking finality."). Accordingly, appellant has failed to overcome the presumption of finality. *See id.* We overrule appellant's first and second issues.[1]

IV. SUFFICIENCY ON APPELLANT'S FELONY DWI CONVICTION

In appellant's third and fourth issues, he contends that the evidence is legally and factually insufficient to support his conviction. Specifically, appellant contends that the evidence is insufficient on the element of intoxication. The term "intoxicated" means not having the normal use of mental or physical faculties by reason of the introduction of alcohol into the body or having an alcohol concentration of 0.08 or more. *See* Tex. Penal Code § 49.01(2). Because appellant did not submit to any scientific method of determining his level of alleged intoxication, the State's theory of prosecution was that appellant had lost the normal use of his mental or physical faculties as set forth in section 49.01(2)(A). *See id.*

[1] Appellant also argues that the first DWI conviction was not final before the second DWI was committed. However, appellant misreads the judgments. The judgment in cause number 9321643 reflects that appellant's probation was revoked on March 16, 1994, but he was originally ***convicted*** of the offense in the cause on October 7, 1993. The judgment in cause number 9404881 reflects that appellant was subsequently convicted on March 7, 1994. Thus, the judgments reflect that appellant was convicted in cause number 9404881 on October 7, 1993 and subsequently convicted in cause number 9321643 on March 7, 1994.

At trial, Deputies Whitlock and Ramirez testified that they observed appellant driving erratically, swerving into the deputies' lane of traffic and nearly forcing the deputies' vehicle off the road. Furthermore, Deputy Ramirez testified that when he stopped appellant, he observed appellant having difficulty standing upon exiting his vehicle: appellant was swaying and had to use the side of his vehicle to maintain his balance. Deputies Whitlock and Gonzalez also testified that they observed appellant's "very" unsteady balance. Appellant became belligerent with the deputies after the traffic stop, waving his arms in "an aggressive manner" and yelling at the deputies. Deputy Whitlock smelled a strong odor of alcohol emitting from appellant's breath and person. Appellant's eyes were red, watery, and bloodshot. His speech was also slurred.

Additionally, when the deputies inventoried appellant's vehicle, they discovered two beer cans cold to the touch—one opened, one closed. The opened beer can was on the driver's side of the vehicle, and the closed can was on the front passenger's side. The deputies' testimony of appellant's erratic driving, difficulty in exiting his car, slurred speech, blood-shot eyes, unsteady balance, and smell of alcohol all establish that appellant's mental and physical faculties were impaired. *See Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979) (stating an officer's testimony that a person was intoxicated provided sufficient evidence to establish the element of intoxication); *Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (stating the testimony of a police officer that an individual is intoxicated is probative evidence of intoxication). Furthermore, the results of the HGN test indicated appellant was intoxicated. *See Emerson v. State*, 880 S.W.2d 759, 768–69 (Tex. Crim. App. 1994) (reasoning that the HGN is a highly reliable indicator of intoxication).

Appellant attempted to rebut the deputies' testimony with the testimony of his common law wife, Bonnie Grimes. Grimes testified that appellant's eyes were frequently red because he worked at an automobile body shop. Grimes testified that appellant's speech was naturally slurred due to a speech impediment and a previously broken jaw.

Grimes testified that appellant had an unsteady balance because he had recently suffered a foot injury. He underwent surgery and was required to wear an orthopedic boot. The State attempted to challenge Grimes's testimony: on cross examination, Grimes testified that she could not recall the name of appellant's doctor or the name or location of the doctor's office. Grimes also did not have any documentation evidencing appellant's alleged foot injury. Moreover, Deputy Ramirez testified that appellant never complained about pain in his leg or foot, and although appellant told Deputy Whitlock he had a broken foot, Deputy Whitlock observed no evidence of a foot injury. Deputy Whitlock testified that he did not observe appellant wearing a foot cast and that appellant did not appear to be in pain. Similarly, Deputy Gonzalez testified that he did not observe a cast or orthopedic boot and that appellant did not appear to be in pain when he walked.

At trial, the jury was entitled to judge the credibility of the witnesses and choose to believe all, some, or none of the testimony of the witnesses. *See Markey v. State*, 996 S.W.2d 226, 230 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The jury in this case was presented with the State's documentary evidence and testimony from the deputies and Grimes.[2] It was within the jury's exclusive province to reconcile the conflicting evidence. *Jones v. State,* 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Apparently, the jury chose to believe the deputies' testimony rather than Grimes's testimony. We find the evidence to be legally and factually sufficient to support appellant's conviction and overrule appellant's third and fourth issues.

[2] The State introduced the videotape recording of appellant in a jail detention room after his arrest. It is unclear from the recording as to whether appellant was wearing an orthopedic boot or foot cast.

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Anderson, and Senior Justice Mirabal.*

Do Not Publish — TEX. R. APP. P. 47.2(b).

* Senior Justice Margaret Garner Mirabal sitting by assignment.