TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00315-CR

William Arnold Zellmar, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 27TH JUDICIAL DISTRICT
NO. 73840, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING

MEMORANDUM OPINION

A jury convicted appellant William Arnold Zellmar of felony driving while intoxicated, *see* Tex. Penal Code §§ 49.04(a) (defining offense of driving while intoxicated), 49.09(b) (enhancing offense to third degree felony if defendant has twice been previously convicted of offense relating to operation of motor vehicle while intoxicated), and assessed his punishment, enhanced pursuant to the repeat offender provision of the Texas Penal Code, at confinement for twenty years in the Institutional Division of the Texas Department of Criminal Justice. *See id.* § 12.42(a).[1] In two points of error, appellant challenges the sufficiency of the evidence to support his conviction and argues that the State engaged in impermissible jury argument. For the following reasons, we affirm the judgment of conviction.

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[1] The record reflects that appellant had three prior convictions for DWI, which were used to enhance the instant DWI offense to a third degree felony, and a prior felony conviction for DWI, which was used to enhance the punishment range to a second degree felony.

BACKGROUND[2]

The jury heard evidence that, on September 10, 2014, Kristy Monroe was at home with her children when appellant "was knocking at the door and he was just sitting out there at [their] back porch." Monroe had never met appellant. When she asked him if she could help him with something, he responded that he wanted to buy a vehicle that was sitting in her yard. She told him it was not for sale and then asked him to leave several times, but appellant refused to do so. Monroe called 9-1-1 to report what had happened and that she thought that appellant was "drunk" because of the way he was talking and acting. After Monroe's husband came home, appellant and the husband had a physical altercation, and appellant then drove away in his truck. The police arrived a short time later. While the police were at Monroe's home, appellant drove by in his truck "really, really slow" but then he "sped up and took off." One of the police officers was able to "catch up to the vehicle and initiate a stop." Another officer who had been at Monroe's home also went to the location of the stop.

The officers investigated appellant for driving while intoxicated, conducting field sobriety testing, questioning appellant, and searching the truck with appellant's consent. The officers found several empty alcoholic beverage containers, and appellant admitted drinking alcohol approximately an hour and a half before being pulled over. Appellant was arrested and transported to the intoxilyzer room where he was given additional field sobriety testing and DIC-24 statutory

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[2] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

warnings.[3] After giving appellant the statutory warnings, the officer requested a breath specimen from appellant, but appellant refused to provide one.

The jury trial occurred in April 2016. The State's witnesses were Monroe and two officers who responded to the disturbance call and subsequent stop. They testified about their interactions and observations of appellant on September 10, 2014. Monroe testified that appellant was "slurring his speech" and that she told the 9-1-1 operator that she thought that appellant was "drunk" and that because "of the way he was talking and the way he was kind of stumbling around there had to be something wrong with him." The officers testified that they smelled the odor of alcohol coming from appellant; that there were numerous empty alcoholic beverage containers in the truck; that appellant was unable to follow the officers' instructions, maintain his balance, or complete the field sobriety tests; and that appellant admitted to the officers that he drank alcohol approximately an hour and a half prior to the traffic stop. One of the officers testified that, based on his interactions with appellant, appellant "was too impaired to be driving." The State's exhibits included audio and video recordings of the traffic stop and of appellant in the intoxilyzer room and the parties' stipulation to appellant's prior convictions.

The jury found appellant guilty of felony DWI. The same jury assessed his punishment at confinement for twenty years. This appeal followed.

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[3] The "Form DIC-24 . . . is the written component of the statutory warning required in cases where a peace officer requests a voluntary blood or breath specimen from a person." *State v. Neesley*, 239 S.W.3d 780, 782 n.1 (Tex. Crim. App. 2007) (citing Tex. Transp. Code § 724.015).

ANALYSIS

Sufficiency of the Evidence

In his first point of error, appellant argues that the evidence was insufficient to support his conviction "where no evidence was presented regarding [his] blood alcohol content." Appellant focuses on one of the officer's alleged lack of experience and his failure to obtain a warrant for a blood draw when the officer "easily" could have done so "[i]n this day and age of technological advances and the ease of email or fax communications" and argues that the officer's opinion that appellant was intoxicated "simply should not be enough." Appellant urges that the jury would have had "actual evidence" to determine if appellant was intoxicated if a warrant had been obtained and that the jury's "verdict of guilt was based on nothing more than speculation, which is forbidden."

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 313–14 (1979); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). In our sufficiency review we must consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense. *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.); *see Jenkins v. State*, 493 S.W.3d 583, 599

(Tex. Crim. App. 2016); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318–19. We consider only whether the factfinder reached a rational decision. *See Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016) (observing that reviewing court's "role on appeal 'is restricted to guarding against the rare occurrence when a fact finder does not act rationally'") (quoting *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010)).

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. art. 38.04; *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we must defer to the credibility and weight determinations of the factfinder. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016); *Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015). In addition, we must "'determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.'" *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Clayton*, 235 S.W.3d at 778).

To establish that appellant committed the DWI offense charged here, the State had to prove that appellant operated a motor vehicle in a public place while intoxicated and that he had twice before been previously convicted of a DWI offense. *See* Tex. Penal Code §§ 49.04(a),

49.09(b). Appellant stipulated to the prior DWI convictions and does not dispute that he was operating a motor vehicle in a public place at the time of the traffic stop. Appellant restricts his sufficiency challenge to the element of intoxication. *See id* § 49.01(2) (defining "intoxicated" to include "(A) not having the normal use of mental or 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, or any other substance into the body; or (B) having an alcohol concentration of 0.08 or more").

Appellant primarily focuses on the officers' failure to obtain a warrant for a blood draw. The State's theory at trial, however, was not based on appellant's blood alcohol concentration but his loss of "the normal use of mental or physical faculties by reason of the introduction of alcohol." *See id.* § 49.01(b)(2). Under this theory, evidence of appellant's blood alcohol concentration was not necessary to prove that appellant was intoxicated. Although one of the officers during his testimony agreed that blood alcohol testing was "probably more accurate" than field sobriety testing, he also explained the steps that he would have had to take to obtain a warrant for a blood draw and answered "No" when asked if he felt that a warrant was "necessary under the circumstances." The officer further testified that he was certified in field sobriety testing and that, in his opinion, appellant was intoxicated and "too impaired to be driving." He explained the basis for his opinion, including clues of intoxication that he observed from conducting the field sobriety testing and his observations of appellant. He testified that appellant's speech was "slow and slurred," he admitted drinking alcohol prior to driving, he was unable to follow instructions, his eyes were "bloodshot, kind of glossy," he had an "unsteady gait, used the vehicle for balance," and he was

emitting "the odor of metabolized alcohol." *See Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010) (listing "usual indicia of intoxication" as including "post-driving behavior such as stumbling, swaying, slurring or mumbling words, inability to perform field sobriety tests or follow directions, bloodshot eyes, any admissions by the defendant concerning what, when, and how much he had been drinking").

To support his position that the officer's testimony was insufficient to support a finding of intoxication, appellant also focuses on the officer's admission that he did not know appellant's physical or mental history at the time of the stop, evidence that appellant was injured in the altercation with Monroe's husband, and evidence that appellant had complained to the officer of ankle and leg pain when attempting to complete the field sobriety tests. The officer included appellant's complaint of ankle and leg pain in his report, and appellant's mother testified that she observed appellant "in a lot of pain" with a "huge bruise on his cheek that was bleeding" shortly before the traffic stop and that appellant told her what happened, including that the "man at the home" caused appellant's injury.[4] She also testified that appellant routinely used a cane and had knee pain when he was not taking medicine and that he took prescribed medication for a bipolar condition.

The jury, however, was the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. art. 38.04; *Blea*, 483 S.W.3d at 33; *Dobbs*, 434 S.W.3d at 170. The jury

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[4] The evidence showed that appellant lived with his mother and that he went home after the altercation with Monroe's husband before returning to Monroe's home. According to the testimony of the officer who transported appellant to the intoxilyzer room, appellant told the officer that "he had left to go to his home to retrieve a machete and go back to the complainant's address with intent of harming her husband." The officers found a machete in appellant's truck.

could have believed the officer's testimony, as well as the testimony of Monroe and the other officer, about the events of September 10, 2014, including their observations of appellant's appearance and actions that were consistent with appellant's loss of the "normal use of mental or physical faculties by reason of the introduction of alcohol." *See* Tex. Penal Code § 49.01(2)(A); *Kirsch*, 306 S.W.3d at 745; *see also Zill v. State*, 355 S.W.3d 778, 785–86 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("The testimony of a police officer regarding the defendant's behavior and the officer's opinion that the defendant is intoxicated provides sufficient support to uphold a jury verdict."). The jury also viewed and listened to the recordings from the traffic stop that showed appellant's interactions with the officers, his attempts at completing the field sobriety tests, and his refusal to provide a breath specimen after being given statutory warnings. In the video recordings, appellant was not limping or using a cane.

Viewing the evidence in the light most favorable to the verdict and assuming that the jury drew reasonable inferences in a manner that supports the verdict, we conclude that a rational jury could have found beyond a reasonable doubt that appellant did not have "the normal use of mental or physical faculties by reason of the introduction of alcohol" while he was driving his vehicle in a public place. *See* Tex. Penal Code §§ 49.01(2), .04(a); *Jackson*, 443 U.S. at 319. Thus, we conclude that the evidence was legally sufficient to support the jury's finding of intoxication and overrule appellant's first point of error.

Challenge to Closing Argument

In his second point of error, appellant argues that the State engaged in impermissible jury argument during the guilt-or-innocence phase of trial that resulted in harm to appellant.

Specifically, he challenges the following statements made by the prosecutor during closing argument:

- "This man [appellant] is out there driving the streets drunk all the time."
- "And remember, he's got at least three prior convictions that we have evidence on here today. He knows what these [field sobriety] tests are. He's done them before."
- "We cannot, cannot tolerate this behavior because if we do, it could be one of us that is meeting him at the next intersection."

To preserve error regarding jury argument, a defendant must object at trial and pursue his objection to an adverse ruling. *Cooks v. State*, 844 S.W.2d 697, 727 (Tex. Crim. App. 1992); *Barnes v. State*, 70 S.W.3d 294, 307 (Tex. App.—Fort Worth 2002, pet. ref'd); *see* Tex. R. App. P. 33.1(a). Here, the trial court sustained the appellant's objections to the first two statements recited above, and he did not request any other relief. As to the third statement, appellant objected but did not obtain a ruling. Thus, the record reflects that appellant failed to properly preserve any complaint for appellate review.

Preservation of error is a systemic requirement on appeal. *Darcy v. State*, 488 S.W.3d 325, 327 (Tex. Crim. App. 2016); *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Blackshear v. State*, 385 S.W.3d 589, 590–91 (Tex. Crim. App. 2012); *Wilson v. State*, 311 S.W.3d 452, 473–74 (Tex. Crim. App. 2010) (op. on reh'g). Accordingly, we overrule appellant's second point of error.

CONCLUSION

Having overruled appellant's points of error, we affirm the judgment of conviction.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

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