TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00132-CR

Kelly Sue Collins, Appellant

v.

The State of Texas, Appellee

**FROM THE COUNTY COURT AT LAW NO. 2 OF WILLIAMSON COUNTY
NO. 15-05823-2, THE HONORABLE LAURA B. BARKER, JUDGE PRESIDING**

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

A jury convicted appellant Kelly Sue Collins of driving while intoxicated, *see* Tex. Penal Code § 49.04(a), and the trial court assessed her punishment at confinement for 365 days in the county jail, *see id.* § 49.09(a), but suspended imposition of the sentence and placed her on community supervision for 20 months, *see* Tex. Code Crim. Proc. art. 42A.053(a)(1). On appeal, appellant challenges the sufficiency of the evidence supporting her conviction and complains about the fine amount ordered in the written judgment of conviction. Finding no reversible error, we sustain appellant's complaint about the fine, modify the judgment of conviction accordingly, and affirm the trial court's judgment of conviction as modified.

BACKGROUND

On the night of August 28, 2015, appellant left her boyfriend's residence in her White Chevrolet Malibu to go to the store get ice and cigarettes.[1] She had driven about a quarter mile when she lost traction on the road and slid through a stop sign into an intersection.[2] Appellant then attempted to correct her position by reversing but backed her car onto the guardrail on the side opposite of the road. Appellant got out of the immobilized car and removed her dog from inside. The record indicates that a neighbor stopped at the accident scene and spoke to appellant, who was "acting hysterically," so the neighbor called 911.

Appellant called her boyfriend and "hysterically" informed him of her predicament. She then walked back to her boyfriend's house. She left the car's engine running, left the car unlocked, and left her purse in the car. Appellant's boyfriend went with his brother to the intersection to assess the situation. One of them entered appellant's car and turned off the engine.

John Pokorny, a deputy with the Williamson County Sheriff's Office, was dispatched at 9:44 p.m. to the scene of a motor vehicle accident and a report of people fighting. The deputy immediately activated his emergency lights and sped to the location. As he traveled, he received an update from the dispatcher notifying him that there was no longer fighting at the scene. Deputy Pokorny arrived at the accident scene at 9:48 p.m. He found appellant's car lodged on the guardrail and the two brothers standing near it. Deputy Pokorny confirmed that no one was fighting, and discussed with the two men what had happened. At his request, appellant's boyfriend called

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[1] Appellant was the only person in the car but she had her dog with her.

[2] The testimony reflected that the road appellant was driving on was being resurfaced; it was covered with tar and had loose gravel on it.

appellant to have her return to the scene. The deputy testified that the distance from the boyfriend's house to the accident scene was "a short walk" taking, at a slow pace, "probably three minutes maybe."

While waiting for appellant to return to the scene, Deputy Pokorny asked the men if appellant had been drinking. Appellant's boyfriend started to admit that they had been drinking for several hours, but then stopped and corrected himself before implicating appellant.[3] Her boyfriend then denied knowing if appellant was intoxicated. Appellant arrived back at the scene about seven minutes after her boyfriend called her, which was approximately 14 minutes after Deputy Pokorny responded to the dispatch call and activated his emergency lights and the dash-cam recorder in his patrol car. The deputy asked appellant what had happened. As she told him, he noticed a "strong odor of metabolized alcohol" on her breath. Deputy Pokorny explained that, in his experience, alcohol has a "distinctive odor" after the body metabolizes it. According to the deputy, that smell would not come from someone who drank alcohol recently or a few minutes prior. Instead, that odor would only be present if someone had already metabolized the alcohol by the process of digestion. Deputy Pokorny also observed that appellant was "unsteady on her feet." Because she had been in an accident, however, the deputy did not begin an investigation into appellant's intoxication before EMS had an opportunity to examine her.[4] Because the deputy suspected that appellant was

[3] According to the deputy, in response to his question about whether the men knew if appellant had been drinking, appellant's boyfriend initially began saying "we had" but stopped himself and changed it to "I've been drinking for about two or three hours." Deputy Pokorny noted the correction.

[4] The dash-cam recording shows that EMS arrived on the scene shortly after Deputy Pokorny but before appellant returned to the scene. The record further reflects that appellant denied being hurt, made no complaints about pain, and did not receive any treatment from EMS.

intoxicated and had been at the time of the accident, he turned the case over to Nathan Fox, a trooper with the Department of Public Safety, who arrived at the scene about 20 minutes after Pokorny, to investigate whether appellant had been driving while intoxicated.

Trooper Fox arrive on the scene at 10:09 p.m. He spoke with appellant's boyfriend and his brother, and they told him that the accident happened about 20 minutes prior to Fox's arrival. In addition, one of the men commented that Deputy Pokorny had arrived "very quickly" after the accident. The two men explained that they had walked approximately a quarter mile from their house to the accident scene after appellant called them. Trooper Fox conceded that "the math [didn't] add up" regarding the accident occurring 20 minutes before his arrival, as that 20-minute time frame suggested that the accident happened approximately five minutes before the 911 call about the accident was received. He explained, though, that from his exchange with the men, he understood the accident to have happened immediately before the 911 call was made. Also, based on that exchange, he understood that the men came to the accident scene immediately after appellant's accident.

Trooper Fox also spoke to appellant about what had happened. She told him that she slid through the intersection at the stop sign and then backed up over the guardrail. Appellant admitted to the trooper that she had had "a couple" of Miller Lite beers to drink. During their contact, Trooper Fox noticed that appellant had watery eyes and slurred speech. He asked appellant to perform standardized field sobriety tests, which she failed. She exhibited the maximum possible number of clues on the horizontal gaze nystagmus test (six of six), five of eight possible clues on the walk-and-turn test, and the maximum possible number of clues on the one-leg-stand test (four of

four). She had problems maintaining her balance during all of the tests, including "a noticeable sway back and forth" during the HGN test, and had difficulty following the trooper's instructions and directions.

Based on appellant's performance on the field sobriety tests and the signs of intoxication that he observed, Trooper Fox concluded that appellant was intoxicated. He indicated that her signs of intoxication were not consistent with the recent consumption of alcohol, such as during the time frame between appellant leaving the accident and later returning.[5] Trooper Fox opined that appellant "had consumed a sufficient amount of an impairing substance to appreciably impair her mental and physical capabilities," and he believed that "that substance was alcohol." Therefore, he concluded that she was intoxicated at the time of the accident and arrested her for driving while intoxicated. After her arrest, Trooper Fox gave appellant the opportunity to provide a sample of her breath or blood, but she refused.

DISCUSSION

Appellant raises two points of error. In her first point of error, she challenges the sufficiency of the evidence supporting her conviction for driving while intoxicated. In her second point of error, she complains about the amount of the fine ordered in the trial court's written judgment of conviction.

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[5] Given various factors—the time of the 911 and dispatch calls, the arrival of law enforcement officers, the arrival of appellant's boyfriend and his brother, and the details given by appellant and the two men—the prosecutor asked the trooper about whether appellant's intoxication was consistent with alcohol consumption during a time interval of up to 30 to 40 minutes between the accident and his contact with her.

Sufficiency of the Evidence

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 (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 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; *see Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). 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 key question is whether 'the evidence presented actually supports a conclusion that the defendant committed the crime that was charged.'" *Id.* (quoting *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007)).

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). When the record supports conflicting reasonable inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that resolution. *Cary*, 507 S.W.3d at 757; *Blea*, 483 S.W.3d at 33; *Murray*, 457 S.W.3d at 448–49.

Because factfinders are permitted to make reasonable inferences, "[i]t is not necessary that the evidence directly proves the defendant's guilt; circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone can be sufficient to establish guilt." *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)); *see Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016); *Nowlin*, 473 S.W.3d at 317. The standard of review is the same for direct and circumstantial evidence cases. *Jenkins*, 493 S.W.3d at 599; *Nowlin*, 473 S.W.3d at 317; *Dobbs*, 434 S.W.3d at 170.

A person commits the offense of driving while intoxicated when the person is intoxicated while operating a motor vehicle in a public place. Tex. Penal Code § 49.04(a). As relevant here, a person is intoxicated when she does not have the normal use of her mental or physical faculties by reason of the introduction of alcohol into the body. *Id.* § 49.01(2)(A), (B). For the evidence to be sufficient to support a conviction for driving while intoxicated, there must be a temporal link between a defendant's intoxication and her driving. *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010); *McCann v. State*, 433 S.W.3d 642, 649 (Tex. App.—Houston [1st Dist.] 2014, no pet.). That is, the evidence must show that the defendant was intoxicated when she actually operated the vehicle. This link may be established by direct or circumstantial evidence. *See Kuciemba*, 310 S.W.3d at 462 (holding that while there must be temporal link between defendant's intoxication and driving, DWI conviction "can be supported solely by circumstantial evidence"); *accord Dansby v. State*, 530 S.W.3d 213, 228 (Tex. App.—Tyler 2017, pet. ref'd); *Woods v. State*, No. 09-16-00416-CR, 2017 WL 3974927, at *3 (Tex. App.—Beaumont Aug. 30, 2017, no pet.) (mem. op., not designated for publication); *McCann*, 433 S.W.3d at 649; *Scillitani v. State*, 343 S.W.3d 914, 917 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

Appellant restricts her sufficiency challenge to the temporal link element. She does not dispute that the evidence showed that she was driving at the time of the accident. Nor does she dispute that the evidence showed that she was intoxicated at the time she encountered law enforcement officers upon her return to the accident scene. She maintains, however, that this evidence of driving and intoxication was insufficient to prove that she was intoxicated when she operated her vehicle at the time of the accident. She argues that the record contains no evidence

showing when the car accident occurred or whether she became intoxicated before driving and having the accident or after she left the accident scene but before she later returned and had contact with law enforcement. However, a factfinder may reasonably infer that a defendant operated a motor vehicle in a public place while intoxicated based upon the combined and cumulative force of all the evidence. *Murray*, 457 S.W.3d at 448–49.

In this case, the jury heard evidence of the circumstances of the accident, which occurred just a short distance away from appellant's departure location. While the road appellant was driving on was being resurfaced; no evidence suggested that the road conditions were unsafe, hazardous, or dangerous.[6] Yet, she was unable to successfully stop at the stop sign; she lost traction and slid into the intersection. Further, when she attempted to back up, she misjudged the maneuver and drove up onto the guardrail on the opposite side of the road. *See Kuciemba*, 310 S.W.3d at 462 (observing that inference of intoxication "is even stronger when the accident is a one-car collision with an inanimate object"). Immediately after the collision, appellant collected her dog from the car, called her boyfriend, and walked back to his house. However, she left the car running with the doors unlocked and left behind her purse in the unlocked car. A jury could reasonably infer that leaving in this manner suggested that she was in a hurry to leave the scene, *see Clay v. State*, 240 S.W.3d 895, 905 n.11 (Tex. Crim. App. 2007) ("Evidence of flight evinces a consciousness of guilt."), or that she was impaired in her thinking and reasoning.

[6] Trooper Fox explicitly rejected the contention that the gravel on the road was "clearly a hazard in the roadway," stating, "I don't think it's a hazard[.] I just think the person needs to drive how the road is built."

Further, the evidence also showed that the neighbor who called 911 had contact with appellant immediately after the accident—appellant told Deputy Pokorny that "the neighbors came right after it happened." The 911 call reported the one-car accident and indicated that people were arguing at the accident scene. One minute after the 911 call was received, Deputy Pokorny was dispatched; one minute after that, Trooper Fox was dispatched.[7] Dispatch informed Deputy Pokorny that the arguing had stopped just before he arrived on the scene, which was within five minutes of the 911 call. Upon the deputy's arrival, he encountered appellant's boyfriend and his brother, who were not arguing. The evidence indicated that appellant's boyfriend and his brother immediately went to the accident scene and turned off appellant's car. The deputy discussed what happened with the two men. Although appellant's boyfriend attempted to avoid incriminating appellant regarding her consumption of alcohol before the accident, a reasonable inference from his self-interruption and corrected statement was that appellant had been drinking with him before the accident but he was trying to cover for her—especially given the fact that the jury heard testimony that appellant admitted consuming alcohol on the night of the accident, although she gave no indication of when she consumed the alcohol.

In addition, when appellant returned to the accident scene, both law enforcement officers noted signs of intoxication: unsteady balance, watery eyes, slurred speech, and the odor of metabolized alcohol on her breath. *See Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App.

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[7] The record contains conflicting testimony about the time the 911 call was received. Deputy Pokorny reported that his documentation indicated that the call came in at 9:43 p.m. Trooper Fox stated that his documentation indicated that the call came in at 9:39 p.m. There is no conflict in the times that the officers were dispatched.

2010) (evidence that logically raises inference of intoxication includes, among other things, stumbling, swaying, slurring or mumbling words, inability to perform field sobriety tests or follow directions, and any admissions concerning what, when, and how much defendant had been drinking). Furthermore, both officers expressed their opinion, based on their training and experience, that the signs of intoxication that appellant exhibited—particularly the odor of metabolized alcohol on her breath—were not consistent with the recent consumption of alcohol.

Also, appellant failed the field sobriety tests administered and refused to provide a breath or blood specimen to law enforcement officers after being arrested. *See Bartlett v. State*, 270 S.W.3d 147, 153 (Tex. Crim. App. 2008) (defendant's refusal to submit to breath test "tends to show a consciousness of guilt"); *see also Derrick v. State*, No. 05-14-00802-CR, 2015 WL 2195185, at *3 (Tex. App.—Dallas May 8, 2015, no pet.) (mem. op., not designated for publication) (individual's refusal to submit to breath test "can support the inference that he believed he would fail the test because he thought he was intoxicated").

Although appellant complains that the evidence failed to show the exact timeline as to when she had the accident and her subsequent contact with the law enforcement officers who observed signs of intoxication, it is not necessary for the State to prove the exact time during which a defendant was "operating a motor vehicle" in order to prove that she drove while intoxicated. *See Paciga v. State*, No. 09-14-00424-CR, 2016 WL 6518605, at *5 (Tex. App.—Beaumont Nov. 2, 2016, no pet.) (mem. op., not designated for publication); *Paty v. State*, No. 01-14-00923-CR, 2016 WL 4375263, at *4–6 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.) (mem. op., not designated for publication); *Weems v. State*, 328 S.W.3d 172, 177 (Tex.

App.—Eastland 2010, no pet.); *see, e.g.*, *Warren v. State*, 377 S.W.3d 9, 14 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) ("[e]ven without knowing the time span between when the accident occurred and when [the officer] arrived," evidence was "sufficient to support a finding by the jury that [defendant] was intoxicated while he was driving"). The jury was provided the time frame of the events, which indicated that appellant returned to the accident scene showing signs of intoxication within 15 minutes of the 911 call (which the evidence indicated occurred immediately after appellant's accident) and Deputy Pokorny's dispatch (which the evidence showed occurred immediately after the 911 call was received). In addition, the jurors were able to watch the dash-cam recording from the trooper's patrol car and observe appellant's performance on the field sobriety tests after her return to the accident scene, which was approximately 25 minutes after the trooper's dispatch following the 911 call, and assess for themselves her level of intoxication.

While it is possible that appellant became intoxicated after the accident and before returning to the accident scene, the State was not required to disprove that possibility. *See Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015) ("beyond a reasonable doubt" does not require state to disprove every conceivable alternative to guilt). As sole judge of the weight and credibility of the evidence, the jury bore the burden of determining what to believe as to what time frame of consuming alcohol would account for the signs of intoxication that appellant exhibited and the law enforcement officers observed. *See Hooper*, 214 S.W.3d at 13.

Moreover, in assessing the legal sufficiency of the evidence, the reviewing court must "give deference to 'the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Jenkins*,

493 S.W.3d at 599 (citing *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 318–19)). Jurors are free to use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may reasonably be drawn from the evidence. *Boston v. State*, 373 S.W.3d 832, 837 (Tex. App.—Austin 2012), *aff'd*, 410 S.W.3d 321 (Tex. Crim. App. 2013); *Eustis v. State*, 191 S.W.3d 879, 884 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

From the evidence presented in this case and the reasonable inferences from it, the jury could have reasonably found that there was evidence that appellant was intoxicated at the time she was driving and had the accident. The record contains sufficient evidence from which the jury could reasonably conclude that the required temporal connection existed here. Therefore, the evidence is sufficient to support appellant's conviction for driving while intoxicated. *See Nowlin*, 473 S.W.3d at 317 ("[W]here the inferences made by the factfinder are reasonable in light of 'the cumulative force of all the evidence when considered in the light most favorable to the verdict,' the conviction will be upheld.") (quoting *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012)). Accordingly, we overrule appellant's first point of error.

Fine Amount

Courts are required to pronounce sentence orally in the defendant's presence. Tex. Code Crim. Proc. art. 42.03, § 1(a); *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004); *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002); *see Burt v. State*, 445 S.W.3d 752, 757 (Tex. Crim. App. 2014). A fine is part of the defendant's punishment and sentence and must be orally pronounced in his or her presence. *Taylor*, 131 S.W.3d at 502. The judgment, including

the sentence assessed, is merely a written manifestation of that oral pronouncement. *See* Tex. Code Crim. Proc. art. 42.01, § 1; *Burt*, 445 S.W.3d at 757; *Taylor*, 131 S.W.3d at 500; *Madding*, 70 S.W.3d at 135.

In this case, when the trial court orally pronounced appellant's sentence, the court ordered her to pay a $500 fine. However, the trial court's written judgment of conviction orders a fine in the amount of $4,000.

When there is a conflict between a trial court's oral pronouncement of a defendant's sentence and the sentence as reflected in the written judgment, the oral pronouncement controls. *Burt*, 445 S.W.3d at 757; *Taylor*, 131 S.W.3d at 500; *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003); *Madding*, 70 S.W.3d at 135. Accordingly, we sustain appellant's second point of error and modify the judgment of conviction to reflect a fine in the amount of $500.

CONCLUSION

Having concluded that the evidence is sufficient to support appellant's conviction for driving while intoxicated but that the written judgment of conviction contains error regarding the fine amount, we modify the judgment to reflect a fine in the amount of $500 and, as so modified, affirm the trial court's judgment of conviction.

Cindy Olson Bourland, Justice

Before Justices Puryear, Field, and Bourland

Modified and, as Modified, Affirmed

Filed: August 31, 2018

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