Opinion issued July 7, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00278-CR

DONALD DUHON, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 08CR3556

MEMORANDUM OPINION

A jury convicted appellant, Donald Lee Duhon, Jr., of felony driving while intoxicated with one enhancement,[1] and assessed punishment at 10 years' confinement. In three points of error, appellant contends the evidence is insufficient and that he received ineffective assistance of counsel. We affirm.

BACKGROUND

Alyson Grady was in the drive-through at a Jack-in-the-Box restaurant in Santa Fe, Texas, when she heard a man in a red truck behind her screaming at her and revving his engine. Grady was frightened and called the Santa Fe police department.

A. Griswold, a detective with the Santa Fe police department, was on patrol and responded to the dispatch regarding Grady's call. Griswold saw the red truck described by Grady, which was driven by appellant, but he did not see appellant screaming or revving his engine. As Griswold continued to observe appellant, he

[1] DWI is a Class B misdemeanor unless it is shown that an offender has a previous conviction for a similar offense. Evidence of one previous conviction enhances the offense to a Class A misdemeanor; two previous convictions enhances the offense to a third-degree felony. *Ex parte Harrington*, 310 S.W.3d 452, 455 (Tex. Crim. App. 2010). Here, the State alleged two prior DWIs in the jurisdictional paragraphs to elevate his latest offense to a third-degree felony. *See* TEX. PENAL CODE ANN. § 49.09(b)(2) (Vernon Supp. 2010). In addition to these jurisdictional prior convictions, the State's indictment alleged a prior felony DWI conviction in an enhancement paragraph, raising appellant's offense to a second-degree felony. *See* TEX. PENAL CODE ANN. § 12.42(a)(3).

saw appellant leave the restaurant parking lot and change lanes without signaling. Based on the traffic offense committed in his presence, Griswold initiated a traffic stop of appellant.

Griswold asked appellant what happened at the restaurant, and appellant replied that there was no problem. Griswold asked appellant if he had had anything to drink. Appellant admitted that he had. When asked how much, appellant replied, "Not a lot." After checking appellant's identification and registration, Griswold asked appellant to get out of the truck. Appellant did so and told Griswold that he had a bad foot.

Griswold testified that appellant's clothes were disorderly—his shirt had a wet spot on it and his pants were unzipped. Appellant had red, bloodshot eyes, slurred speech, an unsteady gait, and the strong odor of alcohol on his breath.

Griswold asked appellant how much he had had to drink. After some hesitation, appellant stated that he had had six to eight beers since 5 o'clock in the afternoon. Griswold testified that six to eight beers over eight hours is an indicator of intoxication.

Griswold then asked appellant to perform several field sobriety tests. Appellant protested that his leg was injured. Griswold believed that if appellant's right leg was strong enough to drive, it was strong enough to perform some of the tests. Appellant agreed to perform some field sobriety tests.

First, Griswold performed the horizontal gaze nystagmus ("HGN") test. Griswold testified that HGN is detected in the human eye when alcohol or narcotics are introduced into a person's system. Appellant exhibited six out of six clues for HGN. Although a head injury can affect an HGN test, Griswold did not ask appellant whether he had a head injury because it did not appear that he did. There is nothing in the record to suggest that appellant had a head injury.

Next, Griswold asked appellant what was wrong with his leg. Appellant tried to pull up his pants leg, but Griswold told him to just tell him the problem. Appellant told Griswold that he had broken his leg three weeks before. Griswold testified that he believed appellant.

Griswold next had appellant perform the one-leg-stand test using his good leg. Griswold told appellant to raise his foot and count by 1000s until told to stop. Appellant raised his foot and began to count, but he did not count by 1000s. Appellant stopped counting at eight and asked Griswold if he said to stop at eight. Griswold told him no, he was not supposed to stop at eight and he was supposed to count by 1000s. Appellant tried again, this time counting by 1000s. He repeated one number and hesitated to say another. Griswold testified that appellant exhibited three of four clues on the one-leg-stand test—he did not follow instructions, did not have his toes in the right position, swayed, and put his foot down.

Appellant did not perform the walk-and-turn test because of his injured leg. Throughout the encounter, appellant repeatedly asked the officer if he could have the courtesy of calling a driver to come pick him up.

Griswold then advised appellant that he was under arrest for driving while intoxicated. Griswold asked for a breath specimen and advised appellant of the consequences of refusing. Appellant refused the breath test.

At trial, appellant called his friend Shardale Villarreal to testify. Villareal testified that she spent the afternoon with appellant on the day he was arrested. They were drinking beer and playing darts at a friend's house. Villareal testified that appellant probably had three or four beers between the hours of 2 p.m. and 5 p.m. She did not believe that appellant was intoxicated when he left to go home and take a nap. However, she did not know what, if anything, appellant had had to drink between the hours of 5 p.m. and midnight. Villarreal also testified that two or three weeks before he was arrested, appellant broke his leg and was in the hospital for 10 days. His cast had been off for about a week at the time of his arrest.

Villareal also testified that appellant called her as he was being pulled over and that she drove to the scene to see about him. Once there, the police asked her to leave.

SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant asserts that the State failed to prove that he had lost the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body, and that he was accordingly entitled to a directed verdict. We construe a challenge to a trial court's denial of a motion for directed verdict as a challenge to the sufficiency of the evidence. *Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 2003). In his second point of error, appellant contends the evidence is factually insufficient for the same reason.

A. Standard of Review

This Court reviews legal and factual sufficiency challenges using the same standard of review. *Ervin v. State*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (construing majority holding *of Brooks v. State*, 323 S.W.3d 893, 912, 926 (Tex. Crim. App. 2010)). Under this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the

evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750. Additionally, the evidence is insufficient as a matter of law if the acts alleged do not constitute the criminal offense charged. *Williams*, 235 S.W.3d at 750.

A person commits the offense of DWI if he "is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04(a) (Vernon 2003). Section 49.01(2) of the penal code provides two definitions for "intoxicated": (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;" and (B) "having an alcohol concentration of 0.08 or more." *Id.* § 49.01(2). Here, the indictment alleged only the first method of intoxication, i.e., that appellant "was intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol into the body."

B. Analysis

In this case, there was evidence that appellant (1) behaved irrationally in the restaurant drive-through by screaming at the driver in front of him and revving his

engine in a threatening manner; (2) committed a traffic offense when pulling out of the restaurant drive-through and changing lanes without signaling; (3) called someone to come pick him up even before he was pulled over; (4) had a disheveled appearance with a stained shirt and the zipper down on his pants; (5) had red, blood-shot eyes; (6) had a strong odor of alcohol on his breath; (7) had slurred speech; (8) admitted to drinking six to eight beers; (9) exhibited all six clues on his HGN test; (10) exhibited three of four possible clues on his one-leg-stand test; (11) repeatedly asked for the "courtesy" of calling a driver to take him home rather than facing arrest; and (12) refused to submit to a breath test. From this evidence, a rational factfinder could have found that appellant had lost the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body. *See Cotton v. State,* 686 S.W.2d 140, 142 n.3 (Tex. Crim. App. 1985) (listing several indicators of intoxication, including slurred speech, bloodshot eyes, unsteady balance, and staggered gait); *Soutner v. State,* 36 S.W.3d 716, 722–23 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (holding evidence of intoxication legally sufficient when defendant failed field sobriety test and arresting officer testified that he smelled alcohol on defendant's breath); TEX. TRANSP. CODE ANN. § 724.061 (Vernon 2011) ("A person's refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or

the result of an intentional failure to give the specimen, may be introduced into evidence at the person's trial.").

We overrule points of error one and two.

INEFFECTIVE ASSISTENCE OF COUNSEL

In his third point of error, appellant contends that he received ineffective assistance of counsel at trial. Specifically, appellant argues that counsel should have subpoenaed his medical records to corroborate Shardale Villarreal's testimony that appellant had suffered a "very nasty" leg injury a few weeks before he was arrested.

A. Standard of Review

The United States Supreme Court has established a two-pronged test for determining whether there was ineffective assistance of trial counsel. *Strickland v. Washington,* 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984). To prevail on a claim of ineffective assistance of counsel under *Strickland,* an appellant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Id.; Andrews v. State,* 159 S.W.3d 98, 101 (Tex. Crim. App. 2005); *Thompson v. State,* 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Under the first prong, the defendant must prove by a preponderance of the evidence that trial counsel's

representation objectively fell below professional standards. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). We consider the totality of the representation and the circumstances of the case, and not isolated errors; the right to effective assistance does not mean a right to error-free representation. *See Robertson v. State*, 187 S.W.3d 475, 483–84 (Tex. Crim. App. 2006). Under the second prong, a "reasonable probability" means a "probability sufficient to undermine confidence in the outcome." *Thompson*, 9 S.W.3d at 812. A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and therefore the appellant must overcome the presumption that the challenged action constituted "sound trial strategy." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009). Our review is highly deferential to counsel, and we do not speculate regarding counsel's trial strategy. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). To prevail, the appellant must provide an appellate record that affirmatively demonstrates that counsel's performance was not based on sound strategy. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *see Thompson*, 9 S.W.3d at 813 (holding that record must affirmatively demonstrate alleged ineffectiveness). If the record is silent regarding the reasons for counsel's conduct—as it usually is on

direct appeal—then the record is insufficient to overcome the presumption that counsel followed a legitimate trial strategy. *Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000); *Thompson*, 9 S.W .3d at 813–14; *see also Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) ("[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court . . . will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it.").

B. Analysis

Here, appellant did not file a motion for new trial and there is no evidence regarding why counsel chose not to subpoena appellant's medical records. Perhaps the records would not have corroborated Villareal's testimony. Perhaps counsel felt that Villareal's testimony was sufficient to establish appellant's injury, especially in light of Griswold's testimony that he believed appellant when appellant told him he was injured. On this record, appellant has failed to meet his burden to rebut the presumption that counsel's actions were reasonably professional and were motivated by sound trial strategy. *See Garcia*, 57 S.W.3d at 440; *Rylander*, 101 S.W.3d at 110.

Because appellant has failed to meet the first prong of the *Strickland* test, we need not address the issue of prejudice under prong two. *Rylander*, 101 S.W.3d at 110. Accordingly, we overrule point of error three.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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