Opinion issued October 13, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00746-CR

JACOB MATTHEW KIFFE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1195811

OPINION

A jury convicted Jacob Matthew Kiffe of driving while intoxicated. *See* TEX. PENAL CODE ANN. § 49.04 (West 2011). Kiffe stipulated to two prior

convictions of driving while intoxicated. The trial court assessed his punishment at three years' community supervision, with a suspended sentence of five years' confinement. On appeal, Kiffe contends that the evidence is legally and factually insufficient to support his conviction of driving while intoxicated. Alternatively, he maintains that the single standard of review announced in *Brooks v. State*[1] is unconstitutional, and that the evidence is insufficient under the former standard of review for factual sufficiency challenges. We affirm.

Background

In December 2008, during the morning hours, Suzette Floyd was driving her vehicle southbound along Highway 6 with her son, Curtis. Kiffe was driving his vehicle northbound along the same highway. Kiffe's vehicle was swerving as it approached the Floyds. Kiffe nearly rear-ended the vehicle in front of him, but at the last moment again swerved, clipping the rear driver-side door of that vehicle. Kiffe then crossed into oncoming traffic and struck the front of the Floyds' vehicle. Both airbags deployed in the Floyd's vehicle, which was totaled in the collision. Suzette was uninjured, and Curtis suffered minor injuries.

Immediately after the collision, Suzette, Curtis, and Kiffe exited their vehicles. Suzette stated that Kiffe appeared drunk. According to Suzette, Kiffe staggered when he walked, slurred his speech when he spoke, and had the smell of

[1] *See Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010).

alcohol on his breath. Curtis also thought Kiffe was drunk. Curtis testified that Kiffe had a "discombobulated look on his face" and staggered around as if he could not maintain his balance. He said that Kiffe looked "just . . . out of it." Both Suzette and Curtis said that Kiffe appeared uninjured.

State Trooper C. Terry was the first police officer to arrive at the scene of the accident. Kiffe told Trooper Terry that the accident was his fault. Trooper Terry observed that Kiffe had an unstable gait, pinpointed pupils, and slurred speech. Based on these characteristics and his experience as a state trooper, Trooper Terry concluded that Kiffe was intoxicated. He did not smell alcohol on Kiffe, but believed he was under the influence of a narcotic. He did not conduct a field sobriety test on Kiffe because EMS was in route to provide him with medical attention. Kiffe informed Trooper Terry that he had not consumed any alcohol and had not taken any medications. He did not reveal any medical conditions or injuries. Trooper Terry stated that Kiffe had no observable injuries at the accident scene.

EMS technicians took Kiffe to the hospital. While in route, Kiffe told the technicians that he had taken "1/2 a bar of Xanax" the night before the accident. He denied any alcohol or drug use on the day of the accident. He said that he had a history of seizures, depression, and anxiety and complained of right leg pain. He told the technicians that he thought a seizure might have caused the accident. At

the hospital, blood tests were conducted on Kiffe, which revealed no alcohol to be present in his system. Medical personnel did not test for the presence of controlled substances. The medical records indicate, however, that Kiffe had "confused, abnormal speech," and no head trauma. His cardiovascular and respiratory systems were normal. But he was not oriented to time and had very slurred speech. Medical personnel wrote an initial diagnosis of "suspected opiate [illegible] intoxication," and his departure diagnosis was "[a]pparent intoxication opiates/m."

Trooper Terry also observed Kiffe at the hospital. Kiffe still had pinpointed pupils and a dazed expression on his face. Terry requested a urine sample from Kiffe for urinalysis testing, but Kiffe refused to give a sample. Terry arrested Kiffe for driving while intoxicated. On the way to the police station, Kiffe slurred his speech, was very talkative, and eventually fell asleep.

Dr. Joseph Toothaker-Alvarez, Kiffe's expert witness, diagnosed Kiffe with severe depression and panic disorder. He also noted that Kiffe had a history of insomnia. Dr. Toothaker-Alvarez said that psycho-motor retardation, like that Kiffe exhibited, is a symptom of major depression. An individual who suffers from psycho-motor retardation may have a slowed thought process, slowed speech, and flat affect. An observer could misinterpret these symptoms as signs of intoxication. Dr. Toothaker-Alvarez also testified that a seizure or a head injury can cause dozing-off, pinpoint pupils, unstable gait, and slurred speech. He opined

that nothing in Kiffe's medical records indicated a diagnosis of narcotic intoxication. He described the records as reflecting "routine blood tests." He testified that Kiffe's respiratory rates were a "subtle sign" that Kiffe was not abusing narcotics.

Dr. Toothaker-Alvarez stated that Xanax induces a state of euphoria and that its effects last for hours. If abused, Xanax can affect a person's central nervous system and impair his cognitive abilities and performances. Opiates likewise affect a person's central nervous system in a way that impairs motor skills. Kiffe reported to Dr. Toothaker-Alvarez that, although he was not receiving treatment for his problems from a physician or psychiatrist, he took Valium on a daily basis and Vicodin on an intermittent basis. Dr. Toothaker-Alvarez testified that both Valium and Vicodin affect the central nervous system, and if a person used them together one of the drugs could cause the other to have a more potent affect on the central nervous system.

Discussion

Sufficiency of the Evidence

1) 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, 54 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). 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, 61 L.Ed.2d 560 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L.Ed.2d 368 (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.

An appellate court determines 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. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (citing *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007)). In viewing the record, direct and circumstantial evidence are treated equally. *Id.* Circumstantial evidence is as probative as direct

evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Id.* An appellate court presumes that the factfinder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778. An appellate court also defers to the factfinder's evaluation of the credibility and weight of the evidence. *See Williams*, 235 S.W.3d at 750.

A person is guilty of driving while intoxicated "if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04(a). Driving while intoxicated is a third-degree felony if it is shown at trial that the defendant has previously been convicted "two times of any other offense relating to the operating of a motor vehicle while intoxicated...." *Id.* § 49.09(b)(2).

2) Analysis

Kiffe claims that the evidence was insufficient to prove that he was intoxicated by use of alcohol or drugs. For purposes of the statute, proving an exact intoxicant is not an element of the offense. *Gray v. State*, 152 S.W.3d 125, 132 (Tex. Crim. App. 2004). Circumstantial evidence may prove that a person has lost the normal use of his mental or physical faculties by reason of introduction of a controlled substance or drug into his body. *See Smithhart v. State*, 503 S.W.2d 283, 284 (Tex. Crim. App. 1973). A lack of balance and slurred speech can prove intoxication. *Griffith v. State*, 55 S.W.3d 598, 601 (Tex. Crim. App. 2001) ("Since

the definition of 'intoxicated' includes 'not having the normal use of mental or physical faculties,' any sign of impairment in the appellant's ability to speak would be circumstantially relevant to whether he was legally intoxicated while driving.") (quoting TEX. PENAL CODE § 49.01(2)(A)); *see also Cotton v. State*, 686 S.W.2d 140, 142 n. 3 (Tex. Crim. App. 1985) (noting that evidence of intoxication includes slurred speech, unsteady balance, and staggered gait). Also, as a general rule, the testimony of an officer that a person is intoxicated provides sufficient evidence to establish the element of intoxication for the offense of DWI. *See Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979) (reasoning that officer's testimony that person was intoxicated provided sufficient evidence to establish element of intoxication); *see also Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (stating that the testimony of a police officer that individual is intoxicated is probative evidence of intoxication).

The Floyds and Trooper Terry observed Kiffe's loss of physical and mental faculties in his slurred speech, unstable gait, and pinpointed pupils. The Floyds thought that Kiffe appeared drunk. Based on his experience, Trooper Terry believed that Kiffe was intoxicated and under the influence of a narcotic because he did not smell alcohol on Kiffe. Kiffe's driving was erratic. Before the collision, Kiffe was swerving in and out of his lane. He hit the vehicle in front of him and then drove into on-coming traffic.

According to the medical records, Kiffe was diagnosed with apparent intoxication by opiates. Kiffe admitted to consuming Xanax the night before the crash, and he admitted that he takes Valium on a daily basis and Vicodin on an intermittent basis. Dr. Toothaker-Alvarez testified that these drugs affect a person's central nervous system and can impair a person's cognitive abilities and performances. *See Paschall v. State*, 285 S.W.3d 166, 177 (Tex. App.—Fort Worth 2009, pet. ref'd) (holding that evidence was sufficient to support felony DWI conviction where defendant admitted on medical intake sheet that he was taking two prescription drugs, central nervous system depressants, that cause person intoxicated by their use to exhibit slurred speech, affected balance, abnormal gait, and constricted pupils, and police officer observed these characteristics in defendant); *Landers v. State*, 110 S.W.3d 617, 620–21 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding evidence sufficient to support felony DWI conviction when appellant admitted ingesting prescription medication and appeared sluggish, stumbled, had poor coordination, and slurred her words). In addition, Kiffe refused to submit to a urine analysis. *See* TEX. TRANSP. CODE § 724.061; *Bartlett v. State*, 270 S.W.3d 147, 153 n. 20 (Tex. Crim. App. 2008) (defendant's refusal to submit to breath test relevant to show consciousness of guilt). These pieces of evidence provide some proof that a jury

could credit in concluding that Kiffe had lost his normal physical or mental faculties due to an intoxicant.

Dr. Toothaker-Alvarez testified that other reasons could explain all of the symptoms observed by Trooper Terry, the Floyds, and the medical personnel. It is the responsibility of the fact finder, however, to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton*, 235 S.W.3d at 778. The jury could have reasonably chosen to place greater weight on the testimony of the witnesses, who observed Kiffe on the day of the offense, than Dr. Toothaker-Alvarez, who observed him months later.

Reviewing this evidence in the light most favorable to the verdict, we hold that a rational trier of fact could have found beyond a reasonable doubt that Kiffe was intoxicated while operating a motor vehicle in a public place. *See* TEX. PENAL CODE ANN. § 49.04. Accordingly, we hold that the evidence was legally and factually sufficient to support appellant's conviction. *See Jackson*, 443 U.S. at 319; *Laster*, 275 S.W.3d at 517; *Williams*, 235 S.W.3d at 750.

Challenge to Single Standard of Review

Kiffe maintains that the single standard of review that the Texas Court of Criminal Appeals announced in *Brooks v. State* is unconstitutional and that the evidence is insufficient under the former standard of review for factual sufficiency

challenges. *See* 323 S.W.3d 893(Tex. Crim. App. 2010) (Hervey, J., joined by Keller, J., Keasler, J., and Cochran, J. in plurality opinion) (Cochran, J. and Womack, J. concurring, in agreement that the *Jackson v. Virginia* standard is the applicable standard for all reviews of the evidence in criminal cases).

As an appellate court, we are duty bound to follow precedent issued by the Texas Court of Criminal Appeals in this matter. *Ervin*, 331 S.W.3d at 53. Although an intermediate appellate court's decision "shall be conclusive on all questions of fact brought before them on appeal or error," the Texas Court of Criminal Appeals has the authority to determine questions of law, including the standard of review that an intermediate appellate court must use in conducting factual review. *See* TEX. CONST. art. V, § 6(a) (providing for questions of fact to be resolved by intermediate appellate courts); *Roberts v. State*, 221 S.W.3d 659, 663 (Tex. Crim. App. 2007). In *Brooks*, the Court of Criminal Appeals directed intermediate courts to apply a single standard of review to legal and factual sufficiency challenges in criminal cases, using the *Jackson* standard. *Brooks*, 323 S.W.3d 893 at 901. The Court of Criminal Appeals determined that the *Clewis* standard should no longer be applied to review the factual sufficiency of the evidence, and instructed lower courts to follow the *Jackson* standard for the review of factual-sufficiency challenges. *Id.* In numerous later decisions, the Court of Criminal Appeals has reaffirmed its directive to the courts of appeals— not merely

as a plurality of the court, but instead by its now unanimous precedent. *See, e.g.*, *Martinez v. State*, 327 S.W.3d 727, 730 (Tex. Crim. App. 2010); *Griego v. State*, 337 S.W.3d 902, 903 (Tex. Crim. App. 2011) (per curiam). We are bound to follow the Court of Criminal Appeals, and we apply the *Jackson* sufficiency standard of review to complaints styled as legal or factual sufficiency challenges concerning the elements of a criminal offense. *Ervin*, 331 S.W.3d at 54. Accordingly, we reject Kiffe's challenge to the single standard of review announced in *Brooks*.

Conclusion

We hold that the evidence is legally and factually sufficient to support the conviction. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Jennings, Bland, and Massengale.

Publish. TEX. R. APP. P. 47.2(b).