Affirmed and Memorandum Opinion filed July 26, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00553-CR

DANIEL MEDELLIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1225374

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

Appellant, Daniel Medellin, appeals his felony conviction for driving while intoxicated as a third-offender.[1] He contends that the evidence was legally insufficient to support his conviction. We affirm.

[1] *See* Tex. Penal Code Ann. §§ 49.04(a), 49.09(b)(2) (Vernon 2011).

Background

Appellant was arrested for driving while intoxicated on July 23, 2010. Appellant was indicted on August 21, 2009 for the felony offense of driving while intoxicated as a third-offender. A two-day jury trial was held on June 16, 2010.

At trial, Houston Police Department Patrol Officer Mark Morris testified that he stopped appellant around 11:30 p.m. on July 23, 2009. According to Officer Morris, appellant was driving 50 miles per hour where posted signs indicated a 40-miles-per-hour speed limit and passing cars using the center left-turn-only lane. Officer Morris testified that a female passenger was in appellant's car. When he stopped appellant, Officer Morris smelled a "strong odor of alcohol" on appellant's breath, and appellant admitted to drinking alcohol. Based on his experience and training, Officer Morris concluded appellant was intoxicated. He called for a D.W.I. unit to come to the scene.

Houston Police Department D.W.I. Task Force Officer Joel Cuffy testified that he arrived at the scene in response to Officer Morris's call. Officer Cuffy testified that he is trained in administering standardized field sobriety tests, including the Horizontal Gaze Nystagmus test, the one-leg-stand test, and the walk-and-turn test. After confirming that appellant did not suffer from a head injury and was not on medication, Officer Cuffy administered three field sobriety tests on appellant. Officer Cuffy's in-car video camera captured appellant's performance of the field sobriety tests. The video recording does not have an audio component due to a malfunctioning microphone.

Officer Cuffy described the standard procedures for administering each of the three field sobriety tests that he asked appellant to perform. Officer Cuffy demonstrated the one-leg-stand test and the walk-and-turn test for the jury. He testified to observing six out of six possible clues of the influence of alcohol from appellant's performance of the Horizontal Gaze Nystagmus test; in each eye, appellant demonstrated a "lack of smooth pursuit, maximum deviation, and onset prior to 45 [degrees]." Officer Cuffy stated that appellant started to perform the one-leg-stand test, did not follow instructions, and refused to continue. Officer Cuffy also testified that, on the walk-and-turn test,

appellant "[could not] keep his balance. He used his arms from heel to toe, and he turned improperly." Based on his investigation and interaction with appellant, Officer Cuffy concluded that appellant "had lost his normal use of mental and physical faculties" and was intoxicated."

The video played for the jury shows appellant performing the Horizontal Gaze Nystagmus test with his back turned to the camera; appellant swayed slightly from side to side during this test. The video also showed appellant attempting to perform the one-leg-stand test a few times and giving up each time after a few seconds. The video showed appellant performing the walk-and-turn test, losing his balance at times, and using his arms to maintain balance. Finally, the video showed, and Officer Cuffy's testimony confirmed, that Officer Cuffy arrested appellant for driving while intoxicated. Officer Cuffy then took appellant to "central intox."

Houston Police Department D.W.I. Task Force Lieutenant Jay Chase testified he heard a commotion and saw appellant and Officer Cuffy in the "intoxilyzer area;" appellant was yelling that he was not "drunk." Lieutenant Chase testified he administered the Horizontal Gaze Nystagmus test on appellant and "[o]f six clues possible, [Lieutenant Chase] saw six clues." He observed other indicators consistent with being intoxicated: "a strong odor of alcoholic beverage;" "glassy eyes;" and "slurred speech." In Lieutenant Chase's opinion, appellant lacked the normal use of his mental faculties and was intoxicated on July 23, 2009.

Houston Police Department Officer Sherwin Johnson testified he was charged with the responsibility of collecting a breath sample from appellant to determine if he was intoxicated on July 23, 2009. Officer Johnson stated he read appellant the statutory warning regarding breath samples and asked appellant to sign the form. Appellant refused to submit a breath sample and refused to sign the form. Officer Johnson indicated appellant's refusal on the form and signed the form himself. The form, admitted into evidence, shows Officer Johnson's signature and appellant's refusal to sign the form. Officer Johnson testified he observed various signs of appellant's impairment,

such as "red, bloodshot eyes, slurred speech . . . and the distinct odor of alcohol on [appellant's] breath," and balance that was "a bit off." Officer Johnson did not testify to appellant's level of intoxication.

The State also introduced appellant's stipulations to two previous D.W.I. convictions into evidence.

Raymond Reyna, appellant's brother, testified that he met appellant and his wife at a Whataburger around 9:30 p.m.; appellant ate a "double meat cheeseburger" and drank a Sprite. Reyna did not notice any lack of coordination or smell of alcohol from appellant. He stated that appellant and his wife stayed at the Whataburger until about 10:45 p.m., and that appellant stated he was headed home. Reyna testified that appellant does not drink alcohol.

Yolanda Medellin, appellant's wife, testified she was with appellant at the time of appellant's arrest. Medellin was seated in the passenger seat in appellant's car when Officer Morris pulled him over. According to Medellin, appellant told Officer Morris that he had not had any alcoholic beverages. She testified that she had not seen appellant drink the night he was arrested. She stated that he "hardly ever drinks" and she had "never" seen him drunk. She did not observe appellant slur his speech or lose his balance on July 23, 2009. Medellin stated she did not notice open containers of alcohol in the car or alcohol on appellant's breath the night appellant was arrested.

The State re-called Officer Cuffy. He testified that he saw three open beer cans in appellant's car, but he did not collect these cans because protocol did not require him to collect open containers of alcohol as evidence.

The jury found appellant guilty and assessed his punishment at confinement for 35 years. Appellant timely appealed.

Analysis

In his sole issue, appellant argues that the evidence is legally insufficient to support his conviction for driving while intoxicated.

In a legal sufficiency review, we examine all the evidence in the light most favorable to the verdict to determine whether a rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Although we consider everything presented at trial, we do not substitute our judgment regarding the weight and credibility of the evidence for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We presume the jury resolved conflicting inferences in favor of the verdict, and defer to that determination. *Clayton*, 235 S.W.3d at 778. We also 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. *Id*.

The indictment charged appellant with driving while intoxicated as a third offender. A person commits the offense of driving while intoxicated if he "is intoxicated while operating a motor vehicle in a public place." Tex. Penal Code § 49.04(a) (Vernon 2011). A person is intoxicated when he does not have "the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body." *Id.* § 49.01(2)(A) (Vernon 2011). Driving while intoxicated is ordinarily a Class B misdemeanor. *Id*. § 49.04(b). Misdemeanor driving while intoxicated 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) (Vernon 2011).

The prior intoxication convictions are elements of the felony driving while intoxicated 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).

On appeal, appellant does not dispute that he was operating a motor vehicle in a public place and that he had two prior convictions for driving while intoxicated. Rather,

appellant argues that the evidence does not establish that he was intoxicated. He argues that there was no evidence "he was swerving or not maintaining proper control of his vehicle." Appellant also contends that the scene video "is inconclusive at best" because it shows he (1) "stands upright during the initial interview and only has any kind of problem once the balance tests are initiated;" and (2) never stumbles or loses his balance "to any great degree." "To the extent he does struggle with the balancing tests, it can be explained by the fact that he is 48 years old, overweight, out-of-shape and performing tasks to which he is not accustomed." Finally, appellant contends that, although the police officers testified his speech was slurred, that evidence was unsupported because the "audio portion of the scene video was 'not working'" and his wife and brother testified that he had not been drinking that night.

The jury had substantial evidence from which it could infer that appellant was intoxicated. Officer Morris testified that appellant was speeding, had a strong odor of alcohol on his breath, and admitted drinking alcohol; based on his experience and training, Officer Morris concluded appellant was intoxicated. Arresting Officer Cuffy concluded based on his investigation and interaction with appellant that appellant had lost his normal use of mental and physical faculties and was intoxicated. The jury saw appellant's performance of the field sobriety tests and could compare it to Officer Cuffy's testimony. Further, Lieutenant Chase testified that, in addition to appellant displaying all six possible clues of the Horizontal Gaze Nystagmus test, he observed other indicators consistent with being intoxicated, including a strong odor of alcohol; glassy eyes; and slurred speech. According to Lieutenant Chase, appellant lacked the normal use of his mental faculties and was intoxicated. Finally, Officer Johnson testified that appellant refused to take a breath test and displayed various signs of impairment, including red, bloodshot eyes; slurred speech; and a distinct odor of alcohol on his breath.

This evidence is sufficient to establish that appellant was intoxicated. *See Cotton v. State*, 686 S.W.2d 140, 142-43 (Tex. Crim. App. 1985) (enumerating a nonexclusive list of signs recognized as evidence of intoxication, including odor of alcohol on person

or breath; slurred speech; bloodshot eyes; unsteady balance; and staggered gait); *Whisenant v. State*, 557 S.W.2d 102, 105 (Tex. Crim. App. 1977); *Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) ("testimony of a police officer that an individual is intoxicated is probative evidence of intoxication"); *Finley v. State*, 809 S.W.2d 909, 913 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (jury may consider refusal to provide breath sample as evidence of guilt). Any alleged conflicts in evidence or credibility challenges appellant pointed out on appeal we presume the jury resolved in the State's favor. *See Clayton*, 235 S.W.3d at 778; *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

We conclude there is legally sufficient evidence to support appellant's conviction. Accordingly, we overrule appellant's issue on appeal.

Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Boyce.
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