Affirmed and Memorandum Opinion filed August 17, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00528-CR

JOSE MARIA PELAYO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 1932164

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

Jose Maria Pelayo appeals his conviction for the Class B misdemeanor offense of driving while intoxicated (DWI). *See* Tex. Penal Code § 49.04(a), (b) (West 2015). In two issues, appellant contends: (1) the trial court abused its discretion in denying his motion to suppress evidence that was a product of his arrest; and (2) the evidence is legally insufficient to support his conviction. We affirm.

BACKGROUND

In the early morning hours of November 28, 2013, Officers Emanuel and Martin of the Houston Police Department and an unidentified deputy were parked in downtown Houston, Harris County, Texas. At around 3:05 a.m., Emanuel and Martin heard a loud bang. The deputy alerted Emanuel and Martin that a Hummer had just flipped. Emanuel and Martin observed the Hummer on its driver's side and in the middle of the roadway. Two parked cars were hit.

Appellant was standing up inside of the Hummer. Martin recognized that appellant was an HPD officer. Emanuel gave appellant a "thumbs-up" to see if he was okay. Appellant returned the gesture. The officers observed no injuries on appellant. According to both Emanuel and Martin, appellant did not smell like alcohol, his speech was not slurred, and his eyes were not red or glassy. Martin asked appellant if appellant had been drinking. Appellant did not respond. Emanuel and Martin did not believe appellant was intoxicated, just "shaken up."

Sergeant Babineaux was dispatched to the accident scene. Upon his arrival, Babineaux observed appellant's vehicle on its side and two impacted, parked cars. When Babineaux approached appellant, appellant laughed and behaved as if he personally knew Babineaux. Babineaux, who did not recognize appellant, attempted to ask appellant basic questions about the accident and then whether appellant had "been drinking." Appellant looked at Babineaux but did not respond to Babineaux's questions. Babineaux believed that appellant's behavior was "very bizarre."

Babineaux suspected appellant was intoxicated because appellant: had glassy eyes; had a faint odor of alcohol on his breath; was "unstable," "unbalanced" and "staggering a little bit"; was behaving "bizarre[ly]"; and was unresponsive to questioning. Although Babineaux included the odor of alcohol on appellant's breath in the offense report, he did not include other signs of intoxication, such as red,

glassy eyes or staggering gait. After about ten minutes of contact with appellant, Babineaux had appellant arrested.

Next, Officer Lassalle was called to the scene. Lassalle was a member of the DWI task force and is certified as a drug recognition expert. Lassalle arrived at five in the morning to conduct standard field sobriety tests on appellant. His dash-cam captured the tests on video, which the jury reviewed. Lassalle attempted to perform the horizontal gaze nystagmus test, but appellant said he did not want to do it and would not do it. He told Lassalle, "I know what you are doing, and I'm going to get fired." Lassalle attempted to administer the head-tilt test, also known as the Rhomberg test. Appellant estimated thirty seconds to be approximately twenty-two seconds, which was outside the normal range of plus or minus five seconds. He also had a two-inch, circular sway. Lassalle attempted to conduct the walk-and-turn test, but appellant told him, "I'm not doing it," and he said he could not do it because he could not walk on the line. Lasalle disagreed because appellant walked to where they were standing without problems. Lassalle attempted to administer the one-leg-stand test. Appellant asked if the test was a part of a criminal or departmental investigation, and when told it was criminal, he refused to do the test. Lassalle requested a sample of appellant's blood, but appellant refused.

Lassalle believed appellant was intoxicated. The basis for Lassalle's opinion was appellant's: inconsistent statements, odor of alcohol on his breath, performance on the Rhomberg test, and failure to maintain a single lane.

Before trial, appellant moved to suppress all evidence obtained as a result of his warrantless arrest on the grounds that it was made without probable cause. The trial court heard evidence on the motion during the State's case-in-chief and heard arguments on it outside the jury's presence. The trial court denied appellant's motion based on the following facts, which it found constituted probable cause for his arrest:

1. Appellant was in an accident in the early morning hours.
2. Appellant hit a parked car in the accident.
3. Appellant failed to keep a proper lookout.
4. Appellant then over-corrected by flipping his own car.
5. The faint odor of an alcoholic beverage;
6. Appellant's unsteadiness;
7. Appellant's silence in the face of questioning;
8. Appellant's odd behavior or "inappropriate laughter"; and
9. Appellant's red, glassy eyes.

The trial court based its last five findings on Babineaux's testimony.

The jury convicted appellant of the Class B misdemeanor offense of DWI. The trial court assessed punishment at 180 days in jail, probated for nine months, and a fine of $500.00. The trial court denied appellant's motion for new trial following a hearing. Appellant timely appealed.

DISCUSSION

I. Probable cause for arrest

In his first issue, appellant contends that the trial court abused its discretion in denying his motion to suppress because it credited Babineaux's testimony to support its findings. Appellant asserts that Babineaux's testimony was not credible because Babineaux omitted, in the offense report, observations that tend to show appellant was intoxicated (unsteady gait and red, glassy eyes), yet recalled such observations two years later when Babineaux testified at trial.

Alternatively, appellant argues that even crediting Babineaux's testimony, the evidence does not support a finding of probable cause. Specifically, appellant argues that some factors (in isolation) do not indicate appellant was intoxicated. Appellant

also challenges the trial court's consideration of other factors to find probable cause, such as appellant's abrupt silence. We address each of appellant's arguments in turn.[1]

A. Standard of review and applicable law

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We afford almost total deference to the trial court's determination of historical facts, provided that those determinations are supported by the record. *Id.*; *see State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011). We review de novo the trial court's application of law to those facts. *Valtierra*, 310 S.W.3d at 447.

In a motion-to-suppress hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Id.*; *Smith v. State*, 491 S.W.3d 864, 870 (Tex. App.—Houston [14th Dist.] 2016, pet ref'd). The trial court may make reasonable inferences from the evidence presented. *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). When, as here, the trial court makes express findings of fact, we view the evidence in the light most favorable to the ruling and determine whether the evidence supports the fact findings. *Valtierra*, 310 S.W.3d at 447. We sustain the trial court's ruling if it is

[1] The State argues in a footnote that "it is not obvious the appellant preserved this issue because he did not obtain a ruling until after the evidence was admitted." The record shows that appellant filed a pre-trial motion to suppress. During Lasalle's testimony but before Lasalle testified about events occurring after appellant's arrest, appellant brought his pre-trial motion to the trial court's attention, arguing that no probable cause existed to support appellant's arrest, and requested that the trial court "throw everything out." The trial court replied that it was not ready to do so and stated "we are going to keep going." Because the trial court addressed appellant's objection and directed Lasalle to finish his testimony (about post-arrest evidence), it implicitly denied appellant's motion. *See Ramirez v. State*, 815 S.W.2d 636, 650 (Tex. Crim. App. 1991) (trial court "implicitly overruled" the defendant's objection to the State's question by directing the witness to answer the question). Accordingly, appellant sufficiently preserved this issue for review. *See* Tex. R. App. P. 33.1(a)(2)(A).

supported by the record and is correct on any theory of law applicable to the case. *Id.* at 447–48.

Probable cause for a warrantless arrest exists if, at the moment the arrest is made, the facts and circumstances within the arresting officer's personal knowledge or of which he has reasonably trustworthy information are sufficient to warrant a reasonable belief that the person arrested had committed or was committing an offense. *See Amador*, 275 S.W.3d at 878; *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005). A finding of probable cause necessitates more than bare suspicion but less than would justify a conviction. *Amador*, 275 S.W.3d at 878. The test for probable cause is an objective one; it is unrelated to the subjective beliefs of the arresting officer and it requires a consideration of the totality of the circumstances facing the arresting officer. *Id.* We may not apply a piecemeal or "divide and conquer" approach in determining probable cause. *Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007).

"A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." *See* Tex. Penal Code § 49.04(a). Chapter 49 of the Texas Penal Code provides two alternative definitions of intoxication. *Id.* § 49.01(2) (West 2015). A person is intoxicated if the person has a loss of the normal use of mental or physical faculties by reason of the introduction of alcohol. *Id.* § 49.01(2)(A). Or, a person is intoxicated if the person has a blood alcohol concentration (BAC) of .08 or more. *Id.* § 49.01(2)(B). Appellant's BAC does not appear in the record and accordingly the impairment definition is applicable here. *See Kirsch v. State*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010).

Classic signs of intoxication include slurred speech, bloodshot eyes, odor of alcohol, unsteady balance, and staggering gait. *Cotton v. State*, 686 S.W.2d 140, 142 n.3 (Tex. Crim. App. 1985). This court has found probable cause for the offense of

DWI when the appellant had been driving and appeared intoxicated based on the appellant's bloodshot eyes, slurred speech, odor of alcohol on his breath, evasiveness to questions, and a moment of confusion. *Chilman v. State*, 22 S.W.3d 50, 56 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); *see also Reynolds v. State*, 902 S.W.2d 558, 560 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (finding probable cause for DWI where officer observed defendant driving and defendant had slurred speech, bloodshot eyes, unstable balance, and an odor of alcoholic beverage on his breath); *Segura v. State*, 826 S.W.2d 178, 183 (Tex. App.—Dallas 1992, writ ref'd) (finding probable cause for DWI where appellant had bloodshot eyes, slurred speech, difficulty steadying himself, and an odor of an alcoholic beverage on his breath).

B. Existence of probable cause

Viewing the evidence in the light most favorable to the ruling and allowing reasonable inferences therefrom, the evidence shows that Babineaux had sufficient knowledge to form a reasonable belief that appellant was driving while experiencing a loss of the normal use of his mental or physical faculties. Appellant caused a traffic accident; he hit a parked car and then overcorrected, flipping his own car. Nothing in the record suggested there was an obstruction in the roadway that caused the accident. Appellant had a faint odor of alcohol on his breath, glassy eyes, and "a little bit" of a staggering gait. *Cotton*, 686 S.W.2d at 142 n.3. Appellant laughed when approached by Babineaux, despite the serious situation (a car accident and police inquiry into his consumption of alcohol), and was then abruptly unresponsive to Babineaux's questions.

We reject appellant's argument that we should discount Babineaux's testimony. Appellant relies on *Anderson v. Bessemer City* to support his contention. 470 U.S. 564, 574–76 (1985). The *Anderson* Court deferred to a trial court's findings and held that deference "is the rule, not the exception" partly because a trial court is

in a unique position as listener of a witness's "variations in demeanor and tone of voice" that bear on its "understanding of and belief in what is said." *Id.* at 575. However, a fact finding may be "clearly erroneous"[2] when, although there is evidence to support it, the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Id.* at 574. The *Anderson* Court gave general illustrations of when an appellate court may find such error:

> [d]ocuments or objective evidence may contradict the witness'[s] story; or the story itself may be so inherently implausible on its face that a reasonable factfinder would not credit it. Where such factors are present the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Id. Appellant provides no objective evidence contradicting Babineaux. While the offense report omitted some of the factors to which Babineaux later testified, it did not present evidence that was contradictory such that we have a "definite and firm conviction that a mistake was committed." *See id.* at 574–75. Nor was Babineaux's testimony implausible on its face that a reasonable fact finder would not credit it. *See id.* at 575–77. Accordingly, as the *Anderson* Court did, we defer to the trial court's fact findings based on Babineaux's testimony. *See id.* at 577.

We reject appellant's argument that the trial court should not have placed "great weight" on the staggering-gait factor because Emanuel testified that appellant appeared normal. The trial court was entitled to weigh the evidence and credit Babineaux's testimony that appellant had a "little bit" of a staggering gait. *See id.* at 575; *Smith*, 491 S.W.3d at 870.

Next, appellant argues that each factual finding in isolation does not support

[2] The applicable rule in *Anderson* was Federal Rule of Civil Procedure 52(a), which stated: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." 470 U.S. at 573.

the existence of probable cause. For example, appellant states "the odor of alcohol alone . . . . is clearly insufficient to justify a warrantless arrest for the offense of DWI." We reject this argument because we are prohibited from applying a piecemeal or "divide and conquer" approach in determining probable cause. *Wiede*, 214 S.W.3d at 25. Rather, the applicable standard demands that we consider the "totality of the circumstances." *Id.*

Appellant asserts that his silence in the face of questioning may not be considered in a probable-cause determination. Appellant directs us to *Miranda v. Arizona*, 384 U.S. 436, 438 (1966), and the privilege against self-incrimination under the Fifth Amendment to the United States and Texas Constitutions. Appellant never preserved a *Miranda* challenge here. Further, pre-arrest, pre-*Miranda* silence is not protected by the Fifth Amendment, and may be used against a defendant. *Salinas v. State*, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012), *aff'd Salinas v. Texas*, 133 S. Ct. 2174 (2013). Appellant also asserts that his laughter cannot support a probable cause determination because it is irrelevant. We disagree. Appellant's laughter occurred after he flipped his car, hit another car, and police inquired into his alcohol consumption. Babineaux described the laughter and abrupt silence as "bizarre." Appellant's laughter, considered in context, was unusual and is indicative, to a slight degree, of appellant's loss of the normal use of his mental faculties.

Finally, appellant argues that this case is controlled by *State v. Mosely*, 348 S.W.3d 435, 441 (Tex. App.—Austin 2011, pet. ref'd). *Mosely* is distinguishable. *Mosely* was a State's appeal. In *Mosely*, the defendant neither hit a parked car nor had a staggering gait.

Considering the totality of circumstances surrounding appellant's arrest, we conclude Babineaux had sufficient knowledge to form a reasonable belief that appellant was intoxicated and committed the offense of DWI. Therefore, the trial

court did not err in concluding probable cause existed for the arrest and denying appellant's motion to suppress. We overrule appellant's first issue.

II. Legal sufficiency

In his second issue, appellant contends the evidence is legally insufficient to support his conviction because the State failed to prove that he was intoxicated under the "impairment theory." *See* Tex. Penal Code 49.01(2)(A) (defining intoxication as a person's loss of the normal use of mental or physical faculties by reason of the introduction of alcohol).

A. Standard of review

When reviewing the legal sufficiency to support a conviction, we view all of the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Cary v. State*, 507 S.W.3d 761, 765 (Tex. Crim. App. 2016). We consider direct and circumstantial, as well as properly and improperly admitted, evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Circumstantial evidence alone may be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to a defendant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id.*

The factfinder is tasked with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015), *cert. denied*, —— U.S. ——, 136 S. Ct. 198, 193 L.Ed.2d 127 (2015). When the record supports conflicting inferences, appellate courts presume the factfinder resolved the conflicts in favor of the verdict,

and defer to that determination. *Id.* at 449. The evidence is legally insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an essential element of the offense. *Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012). "If a reviewing court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal." *Id.*

B. Applicable law

A person commits a Class B misdemeanor DWI if that person is intoxicated while operating a motor vehicle in a public place. Tex. Penal Code § 49.04(a). Again, the impairment theory of intoxication is at issue here. Classic signs of intoxication include slurred speech, bloodshot eyes, unsteady balance, and staggering gait. *See Cotton*, 686 S.W.2d at 142 n.3. Generally, evidence is sufficient to prove intoxication if the investigating police officer opines that a person was intoxicated based on observed signs of intoxication. *See Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979) (sufficient evidence based on arresting officer's opinion testimony after having observed defendant's conduct and demeanor); *Kiffe v. State*, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) ("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 DW[I.]"); *see also Jackson v. State*, 468 S.W.3d 189, 193 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (officer testimony that individual was intoxicated was probative evidence of intoxication).

Other probative evidence of intoxication is appellant's refusal to provide a breath or blood sample because it shows his consciousness of guilt. *Perez v. State*, 495 S.W.3d 374, 383 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing Tex. Transp. Code Ann. § 724.061 (West 2015)). Similarly, appellant's statements showing a consciousness of guilt may be probative evidence of his intoxication. *See*

id. (appellant conceded he was in trouble and stated he will serve time in prison).

C. Legally-sufficient evidence of intoxication

A rational trier of fact could have found that appellant was intoxicated based on the following evidence:

- Appellant's accident with a parked car; faint odor of alcohol, red glassy eyes, staggering gait, faint odor of alcohol, and bizarre behavior. *See Cotton*, 686 S.W.2d at 142 n.3 (identifying signs of intoxication to include slurred speech, bloodshot eyes, unsteady balance, and staggering gait). Additionally (according to Lasalle's testimony), appellant's failure to maintain a single lane in a car crash, inconsistent statements, odor of alcohol, and performance on the Rhomberg test;
- The opinions, which are based on the above facts, of police officers Babineaux and Lasalle. *See Annis*, 578 S.W.2d at 407 (holding officer's opinion that defendant was intoxicated was legally sufficient to support DWI conviction when based on officer's experience and observed facts, including erratic driving, disorderly appearance,"mush-mouthed" speech, red eyes, odor of alcohol on breath, and staggering gait); *Jackson*, 468 S.W.3d at 193 (officer testimony probative evidence of intoxication); and
- Lasalle's dash-cam video, which reflects appellant's: two-inch circular sway; refusal to do several field sobriety tests; refusal to give a blood sample; and statement indicating his consciousness of guilt ("I know what you are doing, and I'm going to get fired."). *See Perez*, 495 S.W.3d at 383.

Accordingly, the evidence is legally sufficient to support appellant's conviction. We overrule appellant's second issue.

CONCLUSION

Having overruled both of appellant's issues, we affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher Brown and Wise..
Do Not Publish — Tex. R. App. P. 47.2(b).