COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00167-CR

DAVIN SCOTT MCINTYRE AKA DAVID SCOTT MCINTYRE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 355TH DISTRICT COURT OF HOOD COUNTY
TRIAL COURT NO. CR13534

MEMORANDUM OPINION[1]

Appellant Davin Scott McIntyre aka David Scott McIntyre appeals his third-degree felony conviction for driving while intoxicated (DWI).[2] He contends only that the evidence is insufficient to support his conviction. We hold that the evidence is sufficient, and we affirm the trial court's judgment.

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[1]*See* Tex. R. App. P. 47.4.

[2]*See* Tex. Penal Code Ann. § 49.04(a) (West Supp. 2017).

Background

One evening in May 2016, McIntyre walked into a convenience store at a Granbury gas station and attempted to buy beer. The store's clerk, Heather Longest, noticed that McIntyre smelled like alcohol, and because she believed that he "shouldn't be drinking anymore," she refused to sell him the beer. McIntyre asked her where he could cash a check, and "it took [her] three times to explain to him how to get to Walmart." According to Longest, when McIntyre left the store, he got into a car and "peeled off, almost hitting another car coming down the lane." Longest called 9-1-1. She told the dispatcher that McIntyre was "really drunk," stated that he had peeled out of the store's parking lot, and gave descriptions of his car and of his probable destination.

Dustin Causey, a Granbury police officer, received the 9-1-1 dispatch and found McIntyre, who had driven to another gas station. When Officer Causey approached McIntyre, he noticed that McIntyre was slow to respond to his questions, that his eyes were glassy, and that he smelled like alcohol. Officer Causey asked McIntyre to perform three standardized field sobriety tests.[3] Officer Causey saw six out of six possible clues of intoxication on the horizontal-gaze-nystagmus test, three out of eight possible clues on the walk-and-turn test,

[3]At trial, Officer Causey testified about his training in administering standardized field sobriety tests, and he explained that he had "quite a bit" of experience in investigating DWIs.

and two out of four possible clues on the one-legged stand test.[4] Officer Causey arrested McIntyre for DWI.

McIntyre told Officer Causey that he had drunk one sixteen-ounce beer. Upon consensually searching McIntyre's car, Officer Causey found an empty forty-ounce beer bottle and a cold, unopened forty-ounce beer bottle. McIntyre consensually provided a sample of his blood, and a later test of the blood revealed an alcohol concentration of .065 along with the presence of oxycodone.

A grand jury indicted McIntyre for DWI; for jurisdictional and sentence-enhancement purposes, the indictment alleged that he had four prior DWI convictions, including two felony convictions.[5] At a jury trial, he pleaded not guilty.

A pharmacist testified that oxycodone is a powerful controlled substance that doctors prescribe for pain relief. The pharmacist explained that oxycodone causes drowsiness and sedation and that when combined with alcohol, oxycodone can interfere with thought processes. He explained that the synergistic effect of alcohol and oxycodone may cause intoxication.

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[4]The trial court admitted a visual and audio recording that showed Officer Causey making contact with McIntyre and conducting the standardized field sobriety tests.

[5]*See* Tex. Penal Code Ann. § 12.42(d) (West Supp. 2017) (providing that when a defendant has two prior felony convictions and is convicted of a felony, the defendant generally faces punishment at confinement from twenty-five years to life), § 49.09(b)(2) (West Supp. 2017) (providing that a person commits a third-degree felony when the person drives while intoxicated and has two prior DWI convictions).

McIntyre testified about his history of health problems and their causes. He explained that a back injury had required him to take pain medication and that a 1991 motorcycle accident had damaged some of his motor skills, including his speech and his ability to balance while standing. He asserted that on the night of his arrest, his injuries had caused his appearance of being drunk when he was actually sober.

McIntyre conceded that he had known that he was not supposed to take oxycodone and drink alcohol at the same time because doing so could impair his ability to drive. He told the jury that he did not have a prescription for oxycodone at the time of his arrest and that he had taken his girlfriend's prescription to relieve his pain. He testified that a malfunctioning engine, rather than intoxication, had caused his peeling out from the convenience store's parking lot. When a prosecutor asked him whether drinking one sixteen-ounce beer had given him a blood alcohol concentration of .065, he testified, "Apparently so."

After the jury received the parties' evidence and arguments, it found McIntyre guilty of felony DWI. The jury then heard punishment evidence and arguments, found the indictment's sentence-enhancement allegations true (based in part on his pleas of true), and assessed seventy-five years' confinement. The trial court sentenced him accordingly, and he brought this appeal.

Evidentiary Sufficiency

In his only point, McIntyre argues that the evidence is insufficient to support his conviction. In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to 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, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599. The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Jenkins*, 493 S.W.3d at 599.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). 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 determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the

verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015).

A person commits DWI when the person is "intoxicated while operating a vehicle in a public place." Tex. Penal Code Ann. § 49.04(a). "Intoxicated" means (1) "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" or (2) "having an alcohol concentration[6] of 0.08 or more."[7] *Id.* § 49.01(2) (West 2011).

McIntyre does not contest the sufficiency of the evidence to prove that he operated a vehicle in a public place. *See id.* § 49.04(a). He argues only that the evidence is insufficient to prove that he was intoxicated while doing so.

A jury may rely on direct or circumstantial evidence to find that a defendant is intoxicated. *See Paschall v. State*, 285 S.W.3d 166, 177 (Tex. App.—Fort Worth 2009, pet. ref'd). Characteristics that constitute evidence of intoxication include a defendant's erratic driving, his odor of alcohol, his glassy eyes, and his admission of alcohol consumption. *See Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010); *Cotton v. State*, 686 S.W.2d 140, 142–43 & 142 n.3

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[6]Alcohol concentration may be measured by the presence of alcohol in breath, blood, or urine. Tex. Penal Code Ann. § 49.01(1).

[7]The trial court's guilt-innocence jury charge provided only the first of these alternative modes of proving intoxication.

(Tex. Crim. App. 1985); *see also Carrasco v. State*, No. 02-17-00142-CR, 2018 WL 283790, at *5 (Tex. App.—Fort Worth Jan. 4, 2018, no pet.) (mem. op., not designated for publication) (adding that a jury may rely on the manner in which a defendant answers a police officer's questions in deciding the issue of intoxication). A jury may also consider a defendant's poor performance on standardized field sobriety tests as evidence of intoxication. *Zill v. State*, 355 S.W.3d 778, 786 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see Finley v. State*, 809 S.W.2d 909, 913 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) ("Texas courts consistently uphold DWI convictions based upon the opinion testimony of police officers who observed the defendant's unsatisfactory performance in field sobriety tests."). Finally, a pharmacist's testimony about the effect of drugs taken by a defendant may support a jury's finding of intoxication. *See Paschall*, 285 S.W.3d at 177–78.

The evidence showed that McIntyre drove erratically; Longest, the convenience store clerk, told the 9-1-1 operator that McIntyre was "drunk," and she testified that after she had refused to sell him beer, he had peeled out of the convenience store parking lot and had almost collided with a car. The jury also heard testimony from Longest and from Officer Causey about McIntyre's odor of alcohol. Next, the jury heard evidence that McIntyre had glassy eyes, that he had admitted that he had drunk alcohol (a fact that an empty forty-ounce beer bottle corroborated), that he had repeated difficulties in understanding Longest's directions to Walmart, that he had been slow to respond to Officer Causey's

questions, and that he had performed poorly on standardized field sobriety tests. Finally, the jury heard that a test of McIntyre's blood had showed the presence of alcohol and of oxycodone and that the combination of those substances may cause intoxication.

Under the authority cited above, the jury could have rationally relied on all of this evidence to conclude that McIntyre was intoxicated while he operated a motor vehicle in a public place. *See* Tex. Penal Code Ann. §§ 49.01(2)(A), 49.04(a). McIntyre argues that the evidence is nonetheless insufficient because, principally, the evidence was "undisputed that [he] suffered from a head injury" and the State allegedly did not present expert testimony concerning how alcohol combined with oxycodone caused his intoxication.

To the extent that McIntyre relies on his alternative explanations—including his allegedly defective car and his injuries—of his erratic driving and of his pre- and post-driving acts, including his demeanor and his performance on the standardized field sobriety tests, the jury had discretion to reject his testimony.[8] *See Blea*, 483 S.W.3d at 33; *see also Bottenfield v. State*, 77 S.W.3d 349, 355 (Tex. App.—Fort Worth 2002, pet. ref'd) ("The jury is free to believe or

[8]McIntyre contends that his "motor skills, head injury, paralysis on the right side, [and] difficulty speaking and remembering may have been misinterpreted by [Longest], the officers, and the jury" as signs of intoxication. Although the evidence may have raised conflicting inferences about whether McIntyre's acts were probative of intoxication or were caused by other factors, our standard of review requires us to presume that the jury resolved any conflicting inferences in favor of the verdict and to defer to that resolution. *See Lovett v. State*, 523 S.W.3d 342, 347 (Tex. App.—Fort Worth 2017, pet. ref'd).

disbelieve the testimony of any witness, to reconcile conflicts in the testimony, and to accept or reject any or all of the evidence of either side."), *cert. denied*, 539 U.S. 916 (2003). The jury's guilty verdict served as an implicit rejection of McIntyre's defensive theories. *See Henson v. State*, 388 S.W.3d 762, 773 (Tex. App.—Houston [1st Dist.] 2012), *aff'd*, 407 S.W.3d 764 (Tex. Crim. App. 2013), *cert. denied*, 134 S. Ct. 934 (2014).

Furthermore, to the extent that McIntyre contends that the State failed to present expert testimony about how alcohol and oxycodone could have caused his intoxication, we reject that argument. The jury heard unobjected-to testimony from a licensed pharmacist who began working in that profession in 1981. The pharmacist described oxycodone and alcohol as "central nervous system depressants" that may interfere with thought processes. The pharmacist also testified that a person who had McIntyre's levels of alcohol and oxycodone would have diminished "skills over the same person who wasn't taking" those substances. We conclude that the jury could have rationally relied on this testimony. *See Paschall*, 285 S.W.3d at 177–78.

McIntyre relies on the decision of the court of criminal appeals in *Smithhart v. State*, 503 S.W.2d 283 (Tex. Crim. App. 1973), but that case is distinguishable. There, the State's sole witness was a police officer who "could not testify that [Smithhart's] taking valium tablets would influence [his] driving." *Id.* at 285. The court held that the "missing essential element [was] a showing which would connect the symptoms observed by [the officer] to a conclusion that [Smithhart]

was under the influence of a drug to a degree rendering him incapable of safely operating a vehicle." *Id.* at 286. The court also observed, however, that alcoholic intoxication is of "such common occurrence . . . that its recognition requires no expertise." *Id.*; *see also Garza v. State*, 442 S.W.2d 693, 695 (Tex. Crim. App. 1969) ("A non-expert witness may express his opinion that a person was drunk based on his observation of the accused."). We conclude that in this case, the pharmacist's testimony, along with the remaining evidence in the record, sufficiently showed that by reason of alcohol, oxycodone, or both, McIntyre did not have normal use of his mental or physical faculties.[9] *See* Tex. Penal Code Ann. § 49.01(2)(A).

Viewing the evidence in the light most favorable to the jury's verdict, we hold that a rational jury could have found the essential elements of DWI beyond a reasonable doubt. *See* Tex. Penal Code Ann. § 49.04(a); *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599. We overrule McIntyre's sole point.

[9]McIntyre also relies on a decision by one of our sister courts in *Delane v. State*, 369 S.W.3d 412 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). There, the court reversed a conviction on the ground that a trial court had erroneously admitted a police officer's testimony about the effects of medications that a defendant had taken. *Id.* at 419–24. *Delane* is distinguishable for two reasons: (1) the issue here is not evidentiary admission, but rather the sufficiency of the unobjected-to evidence to support McIntyre's conviction, and (2) here, the State presented more than a police officer's lay testimony about the effects of medication.

Conclusion

Having overruled McIntyre's only point, we affirm the trial court's judgment.

/s/ Wade Birdwell
WADE BIRDWELL
JUSTICE

PANEL: MEIER, GABRIEL, and BIRDWELL, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: April 19, 2018