TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00226-CR

James Gregory Beall, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 207TH JUDICIAL DISTRICT
NO. CR-15-0485, HONORABLE JACK H. ROBISON, JUDGE PRESIDING

MEMORANDUM OPINION

A jury convicted appellant James Gregory Beall of felony driving while intoxicated, *see* Tex. Penal Code §§ 49.04(a) (defining offense of driving while intoxicated), 49.09(b) (enhancing offense to third degree felony if defendant has twice been previously convicted of offense relating to operation of motor vehicle while intoxicated), and assessed his punishment at confinement for eight years in the Texas Department of Criminal Justice and a $2,000 fine. In one point of error, appellant challenges the sufficiency of the evidence to support his conviction. Because we conclude that the evidence was sufficient to support the judgment of conviction, we affirm.

BACKGROUND[1]

The jury heard evidence that, around 7:00 p.m. on March 12, 2015, appellant was pulled over by police officers with the Texas State University Police Department in Hays County for failing to stop at a stop sign. One of the officers was being trained by the other officer in the Department's field training program. The trainee officer approached appellant's vehicle on the passenger side and spoke to him through the partially-open passenger-side window. The officer observed a "big dog" "roaming freely" in the vehicle and an unopened beer in the front passenger seat. During the initial contact with the officer, appellant was attempting to smoke a cigarette and use his phone.

Appellant was detained upon confirmation of an out-of-state warrant, handcuffed, and placed in the back seat of the officers' patrol car. After he was placed in the patrol car and approximately thirty minutes after the traffic stop was initiated, the officers began a DWI investigation of appellant. The trainee officer advised appellant that he smelled alcohol coming from his person and asked him if he had been drinking. Appellant stated that he had "a couple of beers at the river." When the officer asked appellant if he would participate in field sobriety testing, appellant refused to do so. The officer then placed him under arrest for DWI. After he was

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[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

transported to the police station and given DIC-24 statutory warnings,[2] appellant refused to provide a breath specimen.

The jury trial occurred in March 2016. The witnesses to testify were the two officers at the scene of the traffic stop. The officers testified about the traffic stop, their observations of appellant, and their reasons for concluding that he was driving while intoxicated. The officers' stated reasons included appellant's admission that he was returning from the river where he had been drinking and his refusal to participate in field sobriety testing. Their observations included that appellant smelled of alcohol, his eyes were red and bloodshot, and he was slurring his words, unsteady on his feet, having a hard time following instructions, and repeatedly asking to use the restroom. The State's evidence also included the video recording from the body cam worn by the trainee officer, and appellant stipulated to a 2006 DWI conviction in Hays County and a 2010 DWI conviction in Travis County.

After the State closed, appellant moved for an instructed verdict, which was denied. Both sides thereafter rested, and the case was submitted to the jury. The jury found appellant guilty of felony DWI. No witnesses were called during the punishment phase of the trial but evidence was admitted of appellant's criminal history. The jury assessed punishment at confinement for eight years and a $2,000 fine. The trial court entered judgment in accordance with the jury's verdict. This appeal followed.

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[2] The "Form DIC-24 . . . is the written component of the statutory warning required in cases where a peace officer requests a voluntary blood or breath specimen from a person." *State v. Neesley*, 239 S.W.3d 780, 782 n.1 (Tex. Crim. App. 2007) (citing Tex. Transp. Code § 724.015).

ANALYSIS

In his sole point of error, appellant argues that "the evidence is insufficient to support the jury's verdict of guilty where not one witness testified that Appellant lost the normal use of his mental or physical faculties or had an alcohol concentration of .08 or higher." Appellant further argues that the evidence was insufficient to prove a temporal connection—"that appellant was intoxicated *at the time of driving*."

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 313–14 (1979); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). In our sufficiency review we must consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense. *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.); *see Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318–19; *see Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We consider only whether the factfinder reached a rational decision. *See Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016) (observing that

reviewing court's role on appeal "is restricted to guarding against the rare occurrence when a fact finder does not act rationally") (quoting *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010)).

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. art. 38.04; *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). 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 must defer to the credibility and weight determinations of the factfinder. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016); *Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015). In addition, we must "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." *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Clayton*, 235 S.W.3d at 778).

To establish that appellant committed the DWI offense charged here, the State had to prove that appellant operated a motor vehicle in a public place while intoxicated and that he had twice before been previously convicted of a DWI offense. *See* Tex. Penal Code §§ 49.04(a), 49.09(b). Appellant stipulated to his two prior DWI convictions and does not dispute that he was operating a motor vehicle in a public place at the time of the traffic stop. Appellant restricts his sufficiency challenge to the element of "intoxication." He argues that the State failed to prove that he did not have "the normal use of mental or physical faculties by reason of the introduction of

alcohol" or that he had "an alcohol concentration of 0.08 or more" at the time that he was operating his motor vehicle. *See id* § 49.01(2) (defining "intoxicated" to mean "(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; or (B) having an alcohol concentration of 0.08 or more").

Appellant focuses on evidence that, in his interactions with the officers, he "was compliant," pleasant, and did not pose a threat to the officers' safety; that he was able to provide his social security number, ask questions, and state that he was "flabbergasted" that he was being arrested for driving while intoxicated; and that the officers waited at least twenty-five minutes before beginning their DWI investigation. Appellant also relies on his age of fifty-eight to explain any difficulty exiting his vehicle and needing to use the restroom. He further focuses on evidence of the trainee officer's inexperience and lack of training, including that his investigation of appellant for DWI was his first such investigation, and appellant's exchange with the other officer at the police station after appellant asked the officer, "Do I sound drunk to you?" In response to this question, the officer answered that appellant had a "slur" in his speech during the traffic stop but that it was no longer as noticeable, and the officer and appellant discussed blood pressure medicine that appellant did not take that day and the last time that he had eaten, which was around 10:00 in the morning. Appellant further focuses on the trial judge's assessment of the evidence when ruling on appellant's motion for instructed verdict. The trial judge denied the motion but stated that "it [was] close" and that "[he]'d be real surprised if they [the jury] find him guilty under this state of evidence."

The jury, however, was the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. art. 38.04; *Blea*, 483 S.W.3d at 33; *Dobbs*, 434 S.W.3d at 170. Weighing the evidence, the jury could have resolved the evidence in favor of the State's theory that appellant did not have the normal use of his mental or physical faculties while he was driving his vehicle. *See* Tex. Penal Code § 49.01(2)(A); *Anderson v. State*, 416 S.W.3d 884, 889 (Tex. Crim. App. 2013) ("When the charge authorizes the jury to convict the defendant on more than one theory, as it did in this case, the verdict of guilt will be upheld if the evidence is sufficient on any theory authorized by the jury charge."). The jury could have believed the trainee officer's testimony that he arrested appellant for DWI based on the "totality of the circumstances" and the officer's version of events during the traffic stop and arrest, including his observations of appellant's actions that were consistent with a loss of physical or mental faculties. The officer explained the factors that he considered as follows:

> Just the smell of alcohol alone isn't enough to arrest somebody for DWI. I have to factor in the fact that he ran the stop sign, that he had a hard time following instructions, the odor of alcohol, unsteadiness on his feet and the—the need to urinate.

Other factors that the officer considered in his decision were appellant's slurred speech and bloodshot eyes, his admission to drinking, and his refusal to participate in field sobriety testing.

Although the trainee officer did not smell the odor of alcohol prior to placing appellant in the patrol car as his initial contact with appellant was only through the partially-open passenger-side window. The officer further explained that he did not get too close because of the "big dog" "roaming freely" in the vehicle. The officer also observed that appellant was attempting

to smoke a cigarette and that "[m]ainly people want to smoke a cigarette as quick as possible to try to mask the smell of alcohol." The other officer's testimony and the video recording from the body cam were consistent with the trainee officer's version of events. In the video recording, appellant admitted that he was on his way home from being at the river where he had been drinking and that he had not eaten since 10:00 in the morning, and he refused to participate in field sobriety testing or to give a breath specimen.

To support his position that the evidence was insufficient as to the element of intoxication, appellant cites cases that address the requirement of a "temporal link between the defendant's intoxication and his driving." *See Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010); *Stoutner v. State*, 36 S.W.3d 716, 721 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) ("Indications that the accused was intoxicated when the police arrived do not, in themselves, prove that the accused was intoxicated at the prohibited time, i.e., when the accused was driving."); *Weaver v. State*, 721 S.W.2d 495, 498–99 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd) (explaining that "absent any evidence in the record fixing the time of the accident or the driving upon a public place, the evidence is insufficient to show that the defendant drove at the time he was intoxicated"). Appellant argues that the State failed to prove a "temporal link" between appellant's alleged intoxication and his driving, focusing on the delay of at least twenty-five minutes between the initiation of the traffic stop and the DWI investigation.

We find these cases unhelpful to appellant's arguments. In *Kuciemba* and *Weaver*, police officers were responding to accidents that they did not witness, and the officers did not know the time that the accidents occurred, but the courts concluded that the evidence was sufficient to

support the temporal relationship between the defendants' driving and intoxication. *See Kuciemba*, 310 S.W.3d at 462–63 (concluding that combination of evidence that included defendant's failure to brake in one-car accident, his location behind steering wheel "still bleeding" when police arrived, and high-blood alcohol level at scene was sufficient to show temporal link between driving and intoxication); *Weaver*, 721 S.W.2d at 499–500 (concluding that evidence that included that defendant "had been drinking intermittently for several hours before the accident" at location approximately four miles from scene of accident and that officers found defendant "bleeding from the face" and leaning against truck at scene of accident was sufficient to corroborate defendant's admissions to officer that "he was operating the vehicle on the occasion in question"). The evidence here to support the "temporal link" was stronger: the officers witnessed appellant driving the vehicle prior to the traffic stop, and the video recording from the body cam showed appellant admitting that he was on his way home after being at the river drinking.

In *Stoutner*, although the officers witnessed the defendant driving his vehicle, the defendant's challenge concerned the State's alleged lack of evidence that the defendant did not consume alcohol between the time he drove the vehicle and the time an officer approached him, "a period of approximately 15 to 20 minutes." *See* 36 S.W.3d at 721–22. In that case, the police were responding to an accident that involved one of the defendant's friends, the defendant arrived in a separate vehicle during the investigation, and one of the officers instructed him to move to a parking lot adjacent to the accident scene. *Id.* at 718–19. During the initial contact with appellant, the officer did not detect signs of intoxication. Another officer thereafter approached the defendant in the adjacent parking lot and began a DWI investigation after smelling alcohol on his breath. *See id.*

at 719. In that case, the court also concluded that the evidence was sufficient to show the "temporal relationship" between the defendant's driving and intoxication. *See id.* at 722–23.

Similarly, although the trainee officer testified that he did not initially detect the odor of alcohol coming from appellant and the officers waited approximately thirty minutes before beginning the DWI investigation, it was for the jury to weigh this evidence in the context of the entirety of the evidence. *See id.*; *see also Jackson*, 443 U.S. at 319; *Temple*, 390 S.W.3d at 360. The jury could have believed the trainee officer's explanation for the delay in investigating appellant for DWI. The officer explained that he was focused on the out-of-state warrant and had limited contact with appellant prior to initiating the DWI investigation and that he had not been in close contact with appellant until appellant was in the patrol car and, at that point, "the odor was permeated inside our vehicle."[3] Thus, we conclude that the evidence was sufficient to show the "temporal relationship" between appellant's driving and intoxication. *See Stoutner*, 36 S.W.3d at 722–23.

Viewing the evidence in the light most favorable to the verdict and assuming that the jury drew reasonable inferences in a manner that supports the verdict, we conclude that a rational

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[3] In cross-examination, the officer testified as follows:

[Defense attorney]:	. . . And it is probably 30 minutes or so where my client is literally in the back of the [patrol] car and nobody is talking to him?
[Officer]:	Correct. Because we were waiting for the [out-of-state] warrant.
[Defense attorney]:	And nobody is observing him?
[Officer]:	No, sir.
[Defense attorney]:	And nobody is asking him questions about intoxication?
[Officer]:	Yes. Because I—we didn't have a clue at that time. It wasn't something that we were actively seeking. We were waiting for [the out-of-state] warrant.

jury could have found beyond a reasonable doubt that appellant did not have "the normal use of mental or physical faculties by reason of the introduction of alcohol" while he was driving his vehicle in a public place. *See* Tex. Penal Code §§ 49.01(2), 49.04(a); *Jackson*, 443 U.S. at 319. Thus, we conclude that the evidence was legally sufficient to support the element of intoxication and sustain the conviction of felony DWI. *See Anderson*, 416 S.W.3d at 889. We overrule appellant's point of error.

CONCLUSION

Having overruled appellant's point of error, we affirm the judgment of conviction.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: June 7, 2017

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