NO. 12-16-00089-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

SETH DELL BIRD, APPELLANT	*§*	***APPEAL FROM THE***
V.	*§*	***COUNTY COURT AT LAW NO. 1***
THE STATE OF TEXAS, APPELLEE	*§*	***MIDLAND COUNTY, TEXAS***

MEMORANDUM OPINION

Seth Dell Bird appeals his conviction for driving while intoxicated. In two issues, Appellant contends that the evidence is not legally sufficient to support his conviction and the trial court abused its discretion when it denied his two motions for mistrial. We affirm.

BACKGROUND

Midland Police Department Officers Allen Chilson and Austin Poe were en route to a special assignment when they observed Appellant driving on a grassy area in front of a restaurant in Midland, Texas. They were surprised to see a vehicle being operated in such a manner and immediately suspected that the driver might be intoxicated. As a result, Chilson and Poe decided to initiate a traffic stop.

Chilson activated his emergency lights. In response, Appellant continued driving forward, backed up, and drove forward again before stopping his vehicle. Chilson and Poe approached the vehicle and detected the strong odor of alcohol. Appellant was in the driver's seat, and another man was in the passenger's seat. Chilson requested Appellant's identification. Appellant responded that he needed to exit the vehicle to obtain it. Chilson noted that Appellant's eyes were bloodshot and his face was flushed.

When Chilson asked Appellant where he was going, Appellant claimed he was trying to turn onto Wadley Avenue, but had missed the turn. Chilson and Poe noted that Wadley Avenue was located to the south of the loop and Appellant was stopped north of the loop. Both officers concluded that Appellant did not know where he was.

Chilson had Appellant perform standardized field sobriety tests. According to Chilson, Appellant exhibited several clues of intoxication while performing the tests. Concluding that Appellant was intoxicated, Chilson arrested Appellant and requested consent for a blood draw to determine his blood-alcohol level. Appellant refused to consent to the blood draw.

Poe conducted a search of Appellant's vehicle and found four open beer cans and two open liquor bottles. Two of the beer cans in the front cabin area of the vehicle were within both Appellant's and his passenger's reach. Poe stated that both cans still were cold to the touch and contained fluid. Poe discovered the liquor bottles, both of which contained fluid, in the back of the vehicle.

Appellant was charged by information with driving while intoxicated. A jury found Appellant "guilty" as charged. Following a bench trial on punishment, the trial court sentenced Appellant to confinement for six months. This appeal followed.

LEGAL SUFFICIENCY

In his first issue, Appellant argues that the evidence is legally insufficient to support his conviction. Specifically, Appellant contends that the evidence is insufficient to show that he was intoxicated driving on the grassy area in front of the restaurant.

Standard of Review and Applicable Law

In Texas, the ***Jackson v. Virginia***[1] legal sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See* ***Jackson***, 443 U.S. at 316–17, 99 S. Ct. at 2786–87. The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***id.***, 443 U.S. at

[1] 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

319, 99 S. Ct. at 2789. The evidence is examined in the light most favorable to the verdict. ***Id.*** A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See* ***Tibbs v. Florida***, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2217–18, 72 L. Ed. 2d 652 (1982). This familiar 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 the basic facts to ultimate facts. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789.

Under this standard, we may not sit as a thirteenth juror and substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence. *See* ***Dewberry v. State***, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also* ***Brooks***, 323 S.W.3d at 899. Instead, we defer to the factfinder's resolution of conflicting evidence unless the resolution is not rational. *See* ***Brooks***, 323 S.W.3d at 899–900. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and, therefore, defer to that determination. ***Clayton v. State***, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). 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. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime charged. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The sufficiency of the evidence is measured against the elements of the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." ***Id.***

Here, to meet its burden of proof, the State was required to prove that Appellant was intoxicated while operating a motor vehicle in a public place. *See* TEX. PENAL CODE ANN. § 49.04(a) (West Supp. 2016). "Intoxicated" is defined as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body" or "having an alcohol concentration of 0.08 or more." ***Id***. § 49.01(2) (A), (B) (West 2011).

A person's refusal to submit to the taking of a specimen of blood is admissible at trial. *See* TEX. TRANSP. CODE ANN. § 724.061 (West 2011). A factfinder may infer guilt from a driver's refusal to submit to the taking of a blood specimen. *See* ***Finley v. State***, 809 S.W.2d 909, 913 (Tex. App.–Houston [14th Dist.] 1991, pet. ref'd).

Application

In the instant case, the record reflects that Chilson and Poe each had received training to recognize when someone is intoxicated by drugs or alcohol. The record further indicates that from the moment they saw Appellant driving on the grassy area in front of the restaurant, Chilson and Poe suspected that Appellant might be intoxicated and they began an investigation. Chilson testified that during the investigation, Appellant was uncooperative, argumentative, and loud. He further testified that Appellant had bloodshot eyes, a flushed face, and his vehicle smelled of alcohol.

Chilson had Appellant perform three standardized field sobriety tests. Chilson determined that Appellant exhibited six signs of intoxication during the horizontal gaze nystagmus test. He testified that a person is impaired if he exhibits four to six clues on this test. On the walk-and-turn test, Chilson determined that Appellant exhibited three signs of intoxication. He testified that a person is impaired if he exhibits three or four clues on this test. Appellant also underwent the one-leg-stand test, even though Appellant indicated that he had an injured hip that would make taking this test difficult for him. Even so, Chilson concluded that Appellant exhibited two signs of intoxication on this test. Chilson testified that he believed this test required three clues to determine that an individual is intoxicated. Based on the totality of his observations of Appellant, Chilson concluded that Appellant was intoxicated and placed him under arrest.

The record further reflects that Poe conducted an inventory search of Appellant's vehicle and found six alcoholic beverage containers, including two open beer cans, which were cold to the touch and contained fluid, in the vehicle's front cabin. The evidence also indicates that Chilson requested Appellant's consent for a blood draw to be used to determine Appellant's blood-alcohol level, but Appellant refused to consent to the blood draw.

In sum, several pieces of evidence were presented which would enable a factfinder reasonably to conclude that Appellant was intoxicated. First, Appellant was driving in a grassy area not typically subjected to vehicle traffic. Second, he was confused concerning his location.

Third, his vehicle smelled of alcohol, and several open containers of alcohol, including two beers that were cold to the touch, were found inside. Fourth, he had bloodshot eyes and a flushed face. Fifth, he gave indications or clues of intoxication in each of the standardized field sobriety tests administered by Chilson. Sixth, Appellant admitted that he had been drinking alcohol that day. Finally, Appellant refused consent to a blood test to determine his blood alcohol level.

Yet, Appellant raised some evidence contravening the evidence that he was intoxicated. Appellant contested Chilson's investigation and expertise. Indeed, the record reflects that Chilson was a relatively inexperienced officer. But he was certified to perform the horizontal gaze nystagmus test. While Appellant's cross examination of Chilson raised some questions regarding Chilson's familiarity with the horizontal gaze nystagmus test, the jury was free to discount that evidence in light of Chilson's testimony that he properly performed the horizontal gaze nystagmus test. *See* ***Wesbrook v. State***, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) (jury is exclusive judge of credibility of witnesses and it is exclusive province of jury to reconcile conflicts in evidence).

Furthermore, in their respective testimonies, Chilson and Poe conceded that Appellant's passenger was intoxicated. As a result, Appellant argued that the smell of alcohol from the vehicle emanated solely from Appellant's passenger. However, the jury was not required to draw such an inference. Appellant had admitted to drinking alcohol that day, exhibited several signs of intoxication, and was in close proximity to two open beer cans in the vehicle's cabin. Thus, a reasonable jury could infer that the smell of alcohol from within the vehicle emanated both from Appellant and his passenger.

Appellant also complained that Chilson recorded the traffic stop, but the video of the stop was unavailable at the time of trial. However, Chilson stated that the police department lost many videos when it switched servers.

Moreover, Chilson admitted forgetting to mark a box in his report form indicating that he asked Appellant to submit to a blood test. However, Chilson testified that he did, in fact, make such a request to Appellant, and Appellant declined. *See* ***id.***

Further still, the record indicates that Chilson and Poe did not obtain a search warrant to obtain blood from Appellant. Chilson and Poe explained that they were working on a special assignment to apprehend burglars suspected of breaking into storage units. Chilson testified that,

as a result, the officers chose not to pursue a search warrant for Appellant's blood because time involved in obtaining a warrant would have hindered their special assignment duties.

Finally, Tammi Bird, Appellant's mother, testified that Appellant had a significant injury to his left hip that physically impaired his ability to stand and walk.

Based on our review of the record, we conclude that the evidence that Appellant was intoxicated was strong in spite of the various challenges that Appellant raised. Viewing the evidence supporting the verdict in the light most favorable to the prosecution, we conclude that a rational factfinder could have found beyond a reasonable doubt that Appellant was driving while intoxicated. *See* ***Brooks***, 323 S.W.3d at 899; *see also* TEX. PENAL CODE ANN. § 49.04(a). Appellant's first issue is overruled.

MOTIONS FOR MISTRIAL

In his second issue, Appellant contends that the trial court abused its discretion by denying his two motions for mistrial, each based on claims that the State engaged in improper closing argument.

Standard of Review and Applicable Law

We review the denial of a motion for mistrial under the abuse of discretion standard. ***Simpson v. State***, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). A trial court does not abuse its discretion if its decision is within the zone of reasonable disagreement. ***Archie v. State***, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007).

Mistrial is appropriate only for "highly prejudicial and incurable errors." *See* ***Wood v. State***, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). In most cases, the trial court's instruction to disregard will cure any error. *See* ***Wesbrook***, 29 S.W.3d at 115. We presume that an instruction to disregard will be obeyed by the jury. *See* ***Pierson v. State***, 426 S.W.3d 763, 778 (Tex. Crim. App. 2014). Mistrial is an extreme and exceedingly uncommon remedy that is appropriate only when it is apparent that an objectionable event at trial is so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant. ***Id.*** A trial court grants a mistrial "to end trial proceedings when faced with error so prejudicial that 'expenditure of further time and expense would be wasteful and futile.'" ***Simpson***, 119 S.W.3d at 272 (quoting ***Wood***, 18 S.W.3d at 648). Whether a particular error calls

for a mistrial depends on the peculiar facts and circumstances of the case. ***Hernandez v. State***, 805 S.W.2d 409, 413 (Tex. Crim. App. 1990).

Parties should use closing argument to facilitate the jury's proper analysis of the evidence presented at trial. *See* **Zambrano v. State**, 431 S.W.3d 162, 171 (Tex. App.–San Antonio 2014, no pet.). Proper argument consists of (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answer to argument of opposing counsel; and (4) a plea for law enforcement. ***Brown v. State***, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). To determine if the prosecuting attorney made an improper argument, the reviewing court must consider the entire argument in context, not merely isolated sentences. *See* **Rodriguez v. State**, 90 S.W.3d 340, 364 (Tex. App.–El Paso 2001, pet. ref'd).

We examine three factors to determine if impermissible jury argument requires a mistrial. ***Mosley v. State***, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). They are (1) the severity of the misconduct, (2) measures adopted to cure the misconduct, and (3) the certainty of the conviction absent the misconduct. ***Id.***

Closing Argument

In his brief, Appellant complains of two statements made by the State during its closing argument. After each of these statements, Appellant objected, requested that the trial court order the jury to disregard the statement, and moved for a mistrial. In each instance, the trial court sustained Appellant's objection and instructed the jury to disregard the statement, but denied Appellant's motion for mistrial.

Statement that Appellant Was Drinking and Driving

During closing argument, the State asserted that Appellant's intoxication is the only issue in the case. The State recounted the evidence and specifically referenced that six containers of alcohol, two of which were beer containers that were cold to the touch, were discovered in the vehicle. The State then asserted, "They were literally drinking while driving, ladies and gentlemen. That is what that tells you." Appellant did not object to this assertion.

Subsequently, the State asserted that there were several reasons why the smell of alcohol emanated from Appellant's vehicle, and continued, "One, because he was actually consuming alcohol while he was in the truck. He was literally drinking and driving." Appellant objected that the State was arguing facts not in evidence and that the statement was outside of the four parameters of acceptable closing argument.

Statement that Appellant Could Have Brought His Passenger to Testify

Later, the State argued as follows:

> Now, [Appellant's counsel] said that we could have brought someone in here to testify about the fact that the server crashed or that we could have had the lieutenant come in here and testify to the fact that, you know, he was there or he could have gotten the blood draw or what have you. But [Appellant] himself could have brought his passenger in here.

Appellant objected that he has no burden of proof at all, the State's argument was a comment on his failure to present evidence, and the State's argument was outside the four parameters of acceptable closing argument.

After the trial court sustained Appellant's objection and instructed the jury to disregard the statement, the State continued its argument and reinforced to the jury that it has the burden of proof. The State further clarified that Appellant is not required to subpoena witnesses, but that he does have the ability to do so.

Analysis

Both statements by the State are proper closing arguments. *See* ***Brown***, 270 S.W.3d at 570. The statement that Appellant was "literally drinking and driving" is a reasonable deduction from the evidence that there were two open beer cans in close proximity to Appellant and his passenger that were cold to the touch. *See* ***id.*** Moreover, the statement that Appellant "could have brought his passenger in here" is an answer to argument of opposing counsel that the State could have provided more evidence to the jurors, but, for whatever reason, chose not to do so. *See* ***id.***

But even if we assume that the State's argument was improper, neither statement was the type of impermissible jury argument that requires a mistrial. *See* ***Mosley***, 983 S.W.2d at 259. The first statement at issue had been made previously by the State without objection by Appellant. *See* ***Temple v. State***, 342 S.W.3d 572, 603 (Tex. App.–Houston [14th Dist.] 2010), *aff'd,* 390 S.W.3d 341 (Tex. Crim. App. 2013) (defendant must object each time improper argument is made, or he waives complaint, regardless of how egregious the argument). Further, the trial court instructed the jury to disregard the statement and, based on our review of the record, the statement was not extreme, manifestly improper, nor did it inject new and harmful facts into the case or violate a mandatory statutory provision. *See* ***Faulkner v. State***, 940 S.W.2d 308, 312 (Tex. App.–Fort Worth 1997, pet. ref'd). Thus, we conclude that the trial court's

instruction to disregard cured any prejudicial effect. *See* ***id.*** Lastly, as set forth above, there were many other factors supporting a finding that Appellant was intoxicated. *See* ***Mosley***, 983 S.W.2d at 259.

Further still, the second statement at issue was not extreme, manifestly improper, or otherwise egregious. *See* ***Faulkner***, 940 S.W.2d at 312. Additionally, measures by both the trial court and the prosecuting attorney were implemented to cure any misconduct. *See* ***id.*** The trial court instructed the jury to disregard the statement, and the prosecuting attorney clarified the point attempting to be made by the statement.[2] *See* ***id.*** Finally, the jury was presented with strong evidence supporting a finding that Appellant was intoxicated.

For the foregoing reasons, we conclude that the trial court did not err in overruling Appellant's motions for mistrial. Appellant's second issue is overruled.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered January 25, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

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[2] We also note that in his voir dire examination of the potential jurors, Appellant made it clear that he had no burden to bring any witnesses or present any evidence. Appellant asked the venire members if any of them disagreed that Appellant should not be compelled to prove that he did not commit the crime, and there is no indication in the record that any venire member disagreed with Appellant.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JANUARY 25, 2017

NO. 12-16-00089-CR

SETH DELL BIRD,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the County Court at Law No 1
of Midland County, Texas (Tr.Ct.No. CR151586)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.