Affirmed and Opinion filed January 10, 2002.

In The

Fourteenth Court of Appeals

NOS. 14-01-00125-CR and 14-01-00126-CR

QUANG THANH DANG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause Nos. 861,519 and 861,518

O P I N I O N

A jury found appellant Quang Thanh Dang guilty of two charges of intoxication manslaughter. *See* TEX. PEN. CODE ANN. § 49.08 (Vernon Supp. 2002). The jury assessed punishment at seven and one-half years confinement on each charge. The trial court rendered judgment on the verdict and ordered the sentences to run consecutively. We affirm.

FACTUAL BACKGROUND

The charges arose from a four-car accident. As the driver of a Jeep was entering the freeway, he struck a white Honda from behind. A third vehicle, a truck, then struck the Jeep from behind, spinning the Jeep 180 degrees so that it was facing the oncoming traffic. Two women, the driver and the passenger of the truck, got out and approached the driver of the Jeep and asked whether he was okay. Before the driver of the Jeep could respond, a red Honda crashed into the Jeep and also struck the two women, killing both.

When the police began their investigation, they learned the driver of the red Honda was no longer at the scene of the accident. During the investigation, a woman at the scene heard the officers were looking for the person involved in the accident, and the woman told the officers the person was inside a video store on the service road adjacent to the accident scene. Officer Larry Ferguson walked to the video store and located appellant. Ferguson asked appellant whether he had been in an accident, and appellant said he had, but could not remember what he had hit. Ferguson walked appellant back to the accident scene, where he turned appellant over to DWI task force officer Michael Adams.

Adams had attended the 29-week academy and had attended numerous courses in the detection of driving while intoxicated and standardized field sobriety tests. He had investigated many driving while intoxicated cases and had administered the field sobriety and horizontal gaze nystagmus (HGN) tests many times.

Adams told appellant he would like appellant to perform some exercises to assist in determining appellant's intoxication level. Appellant agreed, and Adams administered the HGN test. Adams looks for the following three factors in each eye: lack of smooth pursuit, presence of nystagmus at maximum deviation, and onset of nystagmus before a 45-degree deviation. It is possible for a person to exhibit six "clues"—one for each factor in each eye. Appellant exhibited all six clues. Adams testified, without objection, that 88 percent of

people who exhibit four clues would have a blood alcohol level of 0.08, and 96 percent of people who exhibit all six clues would have a blood alcohol level of at least 0.08.

Adams then administered the Romberg balance test, which required appellant to stand with his feet together and his head tilted back slightly while he estimated 30 seconds. Appellant estimated 29 seconds, but exhibited a circular sway. Based on this test, Adams concluded appellant was experiencing physical impairment.

Adams next administered the one-leg stand test, during which appellant was to raise one foot about six inches off the ground and count out loud for 30 seconds or until told to stop. Out of four possible clues on this test, appellant exhibited two, and Adams concluded from this test appellant had lost normal use of his physical faculties.

Finally, Adams administered the finger-to-nose test, which required appellant to tilt his head back with his eyes closed and then to touch the tip of his nose with the index finger of whichever hand Adams instructed him to use. Appellant missed his nose each of six times and swayed during the exercise, indicating to Adams appellant had lost use of his physical faculties.

Adams also observed that appellant swayed while he was standing and walking, slurred his speech, and had bloodshot eyes and a strong odor of alcoholic beverage on his breath. In addition, appellant seemed somewhat confused about what was happening. Based on his observations and his training and experience, Adams concluded appellant had lost normal use of his mental and physical faculties because of the introduction of alcohol into his body. Adams testified appellant's mental faculties were "somewhat impaired," but not to the extent of his physical faculties.

Following the tests, Adams arrested appellant for driving while intoxicated. After appellant refused to give a sample of his blood or breath, officers took him to a hospital where a mandatory blood sample was taken at 2:20 a.m., two hours after appellant's arrest. Subsequent testing showed a blood alcohol concentration of 0.17. Without objection from

the defense, Debbie Stephens, the police toxicologist who performed the two tests on appellant's blood sample, testified it was possible, but not likely, appellant's blood alcohol concentration was below 0.08 at the time he was driving. Stephens explained appellant's blood alcohol concentration could have been below 0.08 at the time of accident only if appellant consumed a very large amount of alcohol within 15 minutes of the accident. By "a very large amount," Stephens meant at least nine standard drinks.

DISCUSSION

In a single issue, appellant challenges the legal and factual sufficiency of the evidence to support his conviction of intoxication manslaughter. Specifically, he challenges the sufficiency of the evidence to prove he was intoxicated. He does not challenge the sufficiency of the evidence on the other elements of the offense.

Penal Code section 49.01(2) provides:

> "Intoxicated" means:
>
> (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.

TEX. PEN. CODE ANN. § 49.01(2) (Vernon Supp. 2002).[1]

The indictments for each charge alleged conjunctively that appellant operated a motor vehicle while intoxicated, "namely not having the normal use of his mental and physical faculties by reason of the introduction of alcohol into his body" and further operated a motor vehicle while intoxicated, "namely having an alcohol concentration of at least .08 in his blood." The jury charge contained the statutory definition of "intoxicated" set forth above. When, as here, the charging instrument alleges conjunctively different ways of committing

[1] "'Alcohol concentration' means the number of grams of alcohol per: . . .(B) 100 milliliters of blood." TEX. PEN. CODE ANN. § 49.01(1)(B) (Vernon Supp. 2002).

an offense and the jury is charged disjunctively, a general verdict finding a defendant guilty as charged in the indictment is proper and will support a conviction under either theory that is supported by the evidence. *Sims v. State*, 735 S.W.2d 913, 915 (Tex. App.—Dallas 1987, pet. ref'd); *see Vasquez v. State*, 665 S.W.2d 484, 486-87 (Tex. Crim. App. 1984), *overruled on other grounds by Gonzales v. State*, 723 S.W.2d 746 (Tex. Crim. App. 1987).

In reviewing the legal sufficiency of the evidence, we must view 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, 99 S. Ct. 2781, 2789 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

In conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict. Instead, we view the evidence in a neutral light favoring neither party. *See Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). When a defendant has put forth evidence contrary to the State's evidence, the complete and correct standard we must follow in conducting a *Clewis* factual sufficiency review "asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). In the present case, appellant did not put forth evidence contradicting the State's evidence of intoxication, so our focus is on the first part of the standard. *See id.* (stating, when defendant musters contrary evidence, standard of review allows him to argue on appeal that his evidence greatly

outweighed State's evidence so contrary finding is clearly wrong and manifestly unjust).[2] In conducting a factual sufficiency review, the appellate court must accord due deference to the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence. *Id*. at 9.

There was substantial evidence before the jury appellant did not have the normal use of his physical faculties. Appellant exhibited a circular sway on the Romberg balance test, exhibited two clues on the one-leg stand test, and missed his nose each of six times on the finger-to-nose test. Appellant's performance on these tests indicated to Adams appellant's physical faculties were impaired. In addition, Adams also observed that appellant swayed while he was standing and walking and that he slurred his speech. An officer's testimony can suffice as proof of intoxication for purposes of establishing the legal sufficiency of the evidence. *See Hawkins v. State*, 964 S.W.2d 767, 769 (Tex. App.—Beaumont 1998, pet. ref'd).

There was also evidence appellant's blood alcohol concentration was at or above 0.08 when the car he was driving impacted the complainants. Appellant exhibited all six of the HGN clues, and, according to Adams' unobjected-to testimony, 96 percent of people exhibiting all six clues have a blood alcohol level of at least 0.08. The police toxicologist testified, based on a blood alcohol level of 0.17 two hours after appellant's arrest, it was not likely appellant's blood alcohol concentration was below 0.08 at the time of the accident.

The evidence was legally sufficient to support appellant's conviction.

Appellant does not argue there was evidence contradicting this evidence, but instead focuses on what he believes to be weaknesses in the State's evidence. He observes that Adams was the only officer to testify appellant had lost the normal use of his physical

[2] Although appellant presented evidence, the evidence related to the unavoidability of the accident, not to the issue of appellant's intoxication.

faculties and that the State emphasized the results of the blood tests.[3] Appellant criticizes the blood test evidence under the decision in *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001). *Mata* involved the admissibility of extrapolation evidence under the *Daubert/Kelly* rule.[4] In the present case, appellant did not object to the extrapolation evidence. Appellant also did not object to Adams' testimony relating the HGN to a probable level of blood alcohol concentration.

The evidence in the present case compares more than favorably with that in *Gowans v. State*, 995 S.W.2d 787, 791 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). In *Gowans*, no field sobriety tests were administered, and the reviewing court characterized the following evidence as being factually sufficient to support the verdict of intoxication manslaughter:

> The blood test, administered about one and one-half hours after the accident, indicated he [appellant] had an alcohol concentration of almost twice the legal limit when the test was administered. Weatherford [the investigating officer] spoke to the appellant within 20 minutes of the accident, and Weatherford smelled alcohol on the appellant's breath and person. There is no evidence the appellant drank anything alcoholic between the time of the accident and the blood test. Young testified he saw the appellant speed up and slow down several times in the short distance he was behind the appellant's car just before the accident. Taylor, who was present when the blood sample was taken from the appellant at 5:38 p.m., said he smelled alcohol on the appellant. The appellant told Weatherford and Taylor that he had had a bottle of malt liquor to drink. The evidence was factually sufficient to support the verdict.

Id.

Although appellant in the present case did not admit to drinking and only one officer testified about smelling alcohol on appellant's breath, the blood tests results showed an alcohol concentration of more than twice the legal limit and there is no evidence appellant

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[3] Under his legal sufficiency analysis, appellant also observes that two of the field tests were not "validated" tests. At least one of the two, however, was a certified field sobriety test.

[4] *See Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

drank anything between the time of the accident and the test. In addition, there was evidence of appellant's performance on the HGN and the field sobriety tests. After a neutral review of all of the evidence, we cannot say the evidence appellant was intoxicated at the time appellant drove his car into the complainants is so obviously weak as to undermine confidence in the jury's verdict. Accordingly, just as in *Gowan*, the evidence was factually sufficient to support the verdict.

We overrule appellant's sole issue, and affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed January 10, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

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