Affirmed and Opinion filed August 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00260-CR

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ANDREW MOTZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law Number Three
Harris County, Texas
Trial Court Cause No. 9832963

O P I N I O N

Over his plea of not guilty, a jury found Andrew Motz, appellant, guilty of driving while intoxicated. *See* TEX. PEN. CODE ANN. § 49.04 (Vernon Supp. 2000). The trial court assessed punishment at 180 days' confinement in the Harris County Jail. Appellant raises three points of error on appeal. We affirm the judgment of the trial court.

BACKGROUND FACTS

Appellant ate a bowl of soup and drank at least two glasses of wine at a shopping center restaurant one afternoon. After leaving the restaurant, appellant rear-ended another car and caused a four car accident.

Many people observed appellant's demeanor after the accident, including Berzat, the woman who was driving the vehicle appellant originally rear-ended. Immediately after the accident, Berzat observed appellant acting strangely. While everyone involved in the accident got out of their car and exchanged information, appellant remained inside his car for about ten to fifteen minutes, and then got into Berzat's car. While in Berzat's car, appellant was nervous and "strange looking" and appeared like he was "out of it." Berzat's daughters, who were also inside the vehicle, thought appellant appeared "out of it" as they watched appellant write down his name and insurance information several times. They also believed appellant was intoxicated because he "walked funny," wrote slowly, and slurred his speech.

Two other individuals at the accident scene believed appellant exhibited signs of intoxication. Rawlins, a tow-truck driver, was parked near the accident scene, and noticed that appellant stayed in his car and slurred his speech. Rawlins also smelled alcohol in appellant's car and described appellant "as though he had been partying or something." Additionally, Police Officer Johnson noticed appellant's eyes were red and bloodshot, and smelled the aroma of alcohol on appellant's clothing. After he investigated the accident scene, Johnson found appellant asleep in his patrol car and believed appellant was under "the influence of something."

As Johnson questioned appellant, appellant told him he had consumed two glasses of wine, and Johnson smelled the odor of alcohol on his breath. Appellant also told Johnson that he rear-ended Berzat because he reacted too slowly when she applied her brakes. Appellant performed two field sobriety tests, and based on his behavior and appellant's poor performance on these tests, Johnson concluded appellant was intoxicated and arrested him for DWI. Appellant refused to submit to a breath test to determine his blood alcohol concentration level.

DISCUSSION AND HOLDINGS

In three points of error, appellant contends that the evidence is insufficient to support his DWI conviction. Specifically, appellant contends that the evidence the State produced at trial was insufficient to prove that he was intoxicated beyond a reasonable doubt.

We apply different standards when reviewing the evidence for factual and legal sufficiency. When reviewing the legal sufficiency of the evidence, this court 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. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See 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. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict. Instead, we consider all the evidence equally, including the testimony of defense witnesses and the existence of alternative hypotheses. *See Orona v. State*, 836 S.W.2d 319, 321 (Tex. App.—Austin 1992, no pet.). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996).

The jury is the sole judge of the facts, the witnesses' credibility, and the weight to be given the evidence. *See Clewis*, 922 S.W.2d at 129; *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Therefore, the jury may choose to believe or disbelieve any portion of the witnesses' testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Contradictions or conflicts between the witnesses' testimony do not destroy the sufficiency of the evidence; rather, they relate to the weight of the evidence, and the credibility the jury assigns to the witnesses. *See Weisinger v. State*, 775 S.W.2d 424, 429 (Tex.

App.—Houston [14th Dist.] 1989, pet. ref'd). The jury exclusively resolves conflicting testimony in the record. *See Heiselbetz v. State*, 906 S.W.2d 500, 504 (Tex. Crim. App. 1995). A reviewing court may not substitute its conclusions for that of the jury, nor may it interfere with the jury's resolution of conflicts in the evidence. *See id.*

Driving while intoxicated is proven when the evidence shows that the defendant was "intoxicated while operating a motor vehicle in a public place." *See* TEX. PEN. CODE ANN. § 49.04 (a) (Vernon Supp. 2000). The State may prove intoxication by showing that the defendant did not have the normal use of his physical or mental faculties by reason of the introduction of alcohol into the body, or that the defendant had an alcohol concentration of 0.08 or more. *See* TEX. PEN. CODE ANN. § 49.01 (2)(A). Because appellant refused to submit to a breath test to determine his blood alcohol concentration level, the evidence must show that appellant's mental and physical faculties were impaired.

Appellant argues that the evidence shows that his impairment after the accident could have been the result of trauma, injury, or shock from the accident, or the result of his medical problems. Thus, appellant contends the evidence is insufficient because the State did not "exclude every reasonable hypothesis of innocence." Texas, however, has expressly rejected the "reasonable hypothesis of innocence analytical construct" for weighing the sufficiency of circumstantial evidence. *See Geesa v. State*, 820 S.W.2d 154, 155 (Tex. Crim. App.1991).

In addition, in a reply brief, citing to various portions of Officer Johnson's testimony, appellant argues that Officer Johnson was unsure whether appellant was intoxicated. Even though Officer Johnson may have made some concessions to the testimony he gave on direct examination, this was an issue for the jury to resolve. *See Weisinger*, 775 S.W.2d at 429. In light of the witnesses' observations, we find that the jury could have rationally concluded appellant was intoxicated. As we stated, appellant told Officer Johnson that he consumed two glasses of wine before he caused the four car accident. Appellant behaved oddly after the accident, fell asleep in the patrol car, had red, bloodshot eyes, smelled of alcohol, had slurred speech, and performed poorly on the field sobriety tests; these all suggest that his mental and

physical faculties were impaired. *See, e.g., Markey v. State*, 996 S.W.2d. 226, 230 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (evidence of appellant's peculiar manner of driving, inability to find his license, difficulty in getting out of the car, loud voice, cursing, glassy eyes, smell of alcohol once in the patrol car, and nonsensical statements suggested that his mental and physical faculties were impaired); *Kennedy v. State*, 797 S.W.2d 695 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (evidence of intoxication was sufficient where officer observed defendant had red glassy eyes, slurred speech, and a strong odor of alcohol on his breath). We find the evidence sufficient to support appellant's conviction for driving while intoxicated; the jury's verdict was not so contrary to the overwhelming weight of he evidence to be clearly wrong and unjust. Appellant's three points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 10, 2000.

Panel consists of Justices Hudson, Fowler and Edelman.

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