Affirmed and Opinion filed October 21, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-00502-CR

———————————

ELIZABETH B. HATCH , Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 725,771

O P I N I O N

A jury found Elizabeth B. Hatch, appellant, guilty of driving while intoxicated and sentenced her to 5 years' confinement and a $5,000.00 fine, probated. In three points of error, appellant complains (i) that the trial court erred in admitting evidence of two prior DWI convictions during the guilt or innocence phase of the trial, and (ii) that the evidence is legally and factually insufficient. We affirm.

On June 20, 1996, during a routine afternoon patrol along West Lake Houston Parkway in Harris County, Texas, deputy constable John Key observed appellant's gray Ford Mustang spin out, fishtail and speed away from a traffic stoplight. When he flashed his lights and attempted to pull her vehicle over, appellant accelerated away from him. During the ensuing chase, appellant's car struck the curb three times, weaved in and out of traffic, and continued to speed thirty miles per hour over the posted speed limit. After a second constable joined the chase, appellant finally stopped her vehicle and pulled over. Deputy Key testified that appellant had a strong odor of alcohol and bloodshot eyes. She failed field sobriety tests administered at the scene and became argumentative and aggressive. Key arrested her on suspicion of driving while intoxicated. Appellant refused to perform videotaped sobriety tests and refused to take a breath alcohol test. A cup containing an alcoholic beverage was found inside her vehicle. Appellant countered the allegations of her intoxication by stating that the Ford Mustang was her husband's "vintage" vehicle and difficult to control, and that she had taken a prescription medication earlier that day.

In her first point of error, appellant contends the trial court erred in admitting evidence of her two previous DWI convictions during the guilt or innocence phase of trial. Appellant argues that the Texas legislature intended that prior DWI convictions set out in a charging instrument are to be admissible only in the punishment phase of trial. Appellant concedes that this argument is a departure from precedent.

According to appellant, section 49.09 of the Texas Penal Code, addressing enhanced offenses and penalties, refers to enhancement of punishment and therefore only allows the admission of previous DWI convictions during the punishment phase of a trial. Texas law is clear that in a felony DWI indictment, the prior convictions are jurisdictional and not solely for enhancement. *Maibauer v. State*, 968 S.W.2d 502, 507 (Tex. App. – Waco 1998, pet. ref'd). The prior intoxication-related offenses, whether they are felonies or misdemeanors, serve the purpose of establishing whether the instant offense qualifies as a felony driving while intoxicated, and are elements of the offense of driving while intoxicated. They define the offense as a felony and are admitted into evidence as part of the State's proof of its case-in-

chief during the guilt-innocence phase of trial. *Gibson v. State,* 995 S.W.2d 693 (Tex. Crim. App. 1999). As such, the court did not err in allowing the State to read the indictment containing the previous convictions or present evidence of them during the guilt-innocence phase.

We overrule appellant's first point of error.

In her second and third points of error, appellant contends that the evidence is legally and factually insufficient to support her conviction for DWI.

The standard of review for a challenge to the legal sufficiency of the evidence is whether, reviewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Cr. App. 1995), *cert. denied*, 516 U.S. 1051, 116 S. Ct. 717 (1996); *Thomas v. State*, 915 S.W.2d 597, 599 (Tex. App. – Houston [14th Dist.] 1996, pet. ref'd).

If we determine the evidence is legally sufficient, we then consider whether the evidence is factually sufficient. To conduct a factually sufficient review, we do not view the evidence through the prism of "in the light most favorable to the prosecution." *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The jury is the judge of the facts. TEX. CODE CRIM. PROC. ANN. Art. 36.13; *Cain*, 958 S.W.2d at 407.

As the exclusive judge of the credibility of the witnesses and the weight to be given their testimony, the jury is free to reject appellant's version of the facts whether contradicted or not. *Wilkerson v. State*, 881 S.W.2d 321, 324 (Tex. Crim. App.), *cert. denied*, 513 U.S. 1060, 115 S. Ct. 671 (1994). It was within the province of the jury to reconcile the conflicts and contradictions in the evidence. *See Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982).

"We find the evidence, when viewed in the light most favorable to the verdict, is legally sufficient to support appellant's conviction for DWI beyond a reasonable doubt. Further, we find that when viewed without the prism of "in the light most favorable to the prosecution," the evidence is factually sufficient, supports appellant's conviction, and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129.

Appellant's second and third points of error are overruled.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed October 21, 1999.
Panel consists of Justices Draughn, Lee and Hutson-Dunn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe L. Draughn, Norman Lee and D. Camille Hutson-Dunn sitting by assignment.