Affirmed and Opinion filed December 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00588-CR

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MICHAEL DAVID THIBODEAUX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 98-50388

O P I N I O N

This is an appeal from a conviction for driving while intoxicated ("DWI"). In three points of error, appellant Michael David Thibodeaux complains the evidence was both legally and factually insufficient to sustain the conviction, and that the trial court erred in admitting a police officer's testimony regarding appellant's performance on field sobriety tests. We affirm.

I. BACKGROUND

In December 1998, appellant caused a minor car accident by running into the back of

a car stopped at a red light. Appellant and the occupants of the other car then drove their vehicles to a nearby parking lot to avoid traffic. Appellant attempted to pay for the damage at the scene, but the occupants of the other car opted to call the police. Arriving at the scene shortly thereafter, the police asked appellant to take a breath test. Appellant refused. An officer then administered field sobriety tests to appellant, including the Rhomberg test[1] and the walk-and-turn test. Appellant failed these tests and exhibited other signs of intoxication, including slurred speech and a strong odor of alcohol. Appellant was arrested and charged with the misdemeanor offense of DWI.

During the jury trial, the officer who administered the field sobriety tests opined that appellant was "probably intoxicated." The jury found appellant guilty and sentenced him to eighteen months' probation. Appellant now challenges the evidence as legally and factually insufficient to establish that he was intoxicated while operating a motor vehicle and lacked normal use of his mental and physical faculties, due to the introduction of alcohol into his body. He also asserts the trial court erred in admitting the testimony of the officer.

II. LEGAL SUFFICIENCY OF THE EVIDENCE

Appellant's second point of error alleges the state failed to prove each element of the offense of DWI beyond a reasonable doubt, including the manner of intoxication. In reviewing the legal sufficiency of the evidence, we examine whether a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). In doing so, we view the evidence in the light most favorable to the verdict. *Id.* We may not re-assess the weight and credibility of the evidence. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). Instead, our task is to determine whether the jury reached a rational conclusion. *Id.*

Under the Texas Penal Code, a person is intoxicated when:

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[1] The Rhomberg test requires that the participant stand with heels together, hands at side, tilting the head slightly back and estimating the passage of thirty seconds while keeping the eyes closed. *See Hartman v. State*, 2 S.W.3d 490, 491 (Tex. App.—San Antonio 1999, pet. ref'd); *Chapnick v. State*, 25 S.W.3d 875, 877 (Tex. App.—Houston [14th Dist.] 2000, pet. filed).

(1) he is without normal use of his mental or physical faculties, because of the introduction of alcohol into his body; or

(2) his alcohol concentration is 0.08 or more.

TEX. PEN. CODE ANN. § 49.01 (Vernon Supp. 2000).

The information alleged introduction of alcohol as the manner of intoxication.[2] However, appellant did not take the breath test. Thus, to sustain a legal sufficiency challenge, the state had a duty to prove, beyond a reasonable doubt, that appellant operated a motor vehicle (1) without normal use of his mental and physical faculties (2) because of the introduction of alcohol into his body. *See id.*

Testimony during trial revealed that appellant failed two field sobriety tests, drove his vehicle into the back of a car stopped for a red light, slurred his speech, had glassy or glazed looking eyes, and smelled of alcohol even from as far away as five to six feet. These circumstances suggest appellant's 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.) (stating that peculiar manner of driving, inability to find driver's license, difficulty exiting car, loud voice, cursing, glassy eyes, smell of alcohol, and nonsensical statements suggested impairment of appellant's mental and physical faculties); *State v. Savage*, 905 S.W.2d 272, 274 (Tex. App.—San Antonio 1995), *aff'd*, 933 S.W.2d 497 (Tex. Crim. App. 1996) (finding officer's testimony about a recent puddle of water beneath appellant's car and appellant's poor performance on field sobriety tests were sufficient evidence to support conviction); *Kennedy v. State*, 797 S.W.2d 695, 697 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (finding sufficient evidence of intoxication where officer observed defendant had red glassy eyes, slurred speech, and a strong odor of alcohol on his breath). The jury is entitled to judge the

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[2] The information charged, in relevant part:

> Michael David Thibodeaux . . . while intoxicated, namely not having the normal use of his mental and physical faculties by reason of the introduction of ALCOHOL into his body, operate[d] a motor vehicle in a public place." Appellant's operation of a motor vehicle in a public place is not at issue.

credibility of the witnesses and may choose to believe all, some, or none of a person's testimony. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). In light of testimony from the police officer and the other witnesses, we find the jury could have rationally concluded beyond a reasonable doubt that appellant was intoxicated, by introduction of alcohol into his body. Thus, the evidence is legally sufficient to support appellant's conviction. Appellant's second point of error is overruled.

III. FACTUAL SUFFICIENCY OF THE EVIDENCE

In his first point of error, appellant claims the evidence was factually insufficient to sustain a conviction for DWI. In reviewing the evidence for factual sufficiency, we consider all the evidence presented by both the state and the defendant. *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000). We will reverse the conviction only if we find the verdict 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). If we find sufficient competent evidence of probative force to support the finding, a factual sufficiency challenge cannot succeed. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex. App.—El Paso 1996, no pet.). In reviewing all of the evidence, we afford great deference to the jury's findings. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997) (construing *Clewis*, 922 S.W.2d at 129); *Jones v. State*, 944 S.W.2d 642, 647, 648-49 (Tex. Crim. App. 1996). If we find the evidence factually insufficient, we must provide a detailed explanation outlining our reasons for so finding. *See Cain*, 958 S.W.2d at 407.

Appellant argues he presented evidence contrary to a finding of intoxication. Specifically, he points to the testimony of Mr. and Mrs. Schultz, the occupants of the car he rear-ended. Mrs. Schultz testified that appellant seemed to have normal use of his mental and physical faculties. According to Mrs. Schultz, appellant was able to safely back up his vehicle and drive it to a nearby parking lot, a maneuver that required him to traverse lanes of traffic, yield, and use a turn signal. Appellant was able to offer a $100.00 settlement of the claim to one of the occupants of the car he rear-ended, and was able to produce his driver's license and

proof of insurance. He parked his car within the parking space, got out of his car at a normal speed, and appeared to walk normally. Appellant points out that he did not spill coffee on his clothing, urinate, defecate, or vomit on himself, and that he did not appear to need support either from the police officer or from leaning on his own automobile. Mrs. Schultz did not hear appellant squeal his tires when driving into the parking lot or observe him fall down when he got out of his car. Nevertheless, appellant admitted causing a traffic accident, albeit minor, by running into the back of another vehicle stopped at a red light. Afterward, appellant reportedly told one of the other car's occupants that he needed some coffee to help "sober up." Mrs. Schultz testified that appellant smelled of alcohol immediately after the accident. She also testified that she smelled alcohol on appellant's breath from as far away as five to six feet, and that appellant's eyes looked "glassy" or "glazed." Although appellant denied that he had drunk anything, the police officer testified that appellant slurred his speech and smelled of alcohol. Moreover, appellant failed two field sobriety tests: the "walk-and-turn" test and the Rhomberg test. Further, appellant refused to take the breath test, which can be considered as evidence of intoxication. TEX. TRANS. CODE ANN. § 724.061 (Vernon 1999) (stating that "[a] person's refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person's trial."); *Mody v. State*, 2 S.W.3d 652, 654–55 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (finding motorist's refusal to give specimen of blood or breath relevant and admissible); *Finley v. State*, 809 S.W.2d 909, 913 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (stating that the jury could consider defendant's failure to submit to breath test as evidence of DWI).

Reviewing the evidence, we do not find the guilty verdict 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 record contains competent evidence of probative force to support the finding that appellant was guilty of the offense charged. Therefore, appellant's factual sufficiency challenge fails. Appellant's second point of error is overruled.

IV. ADMISSION OF POLICE OFFICER'S TESTIMONY

In his third and final point of error, appellant complains the trial court erred in admitting Officer Blunt's testimony that appellant was "probably intoxicated" because the officer was not properly qualified as an expert under Texas Rule of Evidence 702. However, appellant has failed to make appropriate citations to the record and to legal authorities in support of his position. A party asserting error on appeal must demonstrate that the record supports the contention raised by specifying the place in the record where matters upon which he relies or of which he complains are shown. *See* TEX. R. APP. P. 38.1(h); *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1995, no writ). Having failed to do so, appellant has waived any error.

Even if appellant had adequately briefed his complaint, he still would not be entitled to appellate review of this point based on his waiver in the court below. To preserve appellate review, the complaining party must demonstrate that he lodged an objection and stated the basis therefor "with sufficient specificity to make the trial court aware of the complaint." TEX. R. APP. P. 33.1(a)(1)(A). It is well established that a party's failure to object at trial to a witness's competency or qualifications to testify is a waiver of that complaint, cannot be raised for the first time on appeal, and is not, therefore, an issue preserved for our review. *See id.*; *Wilson v. State*, 7 S.W.3d 136, 145 (Tex. Crim. App. 1999).

Although appellant has not directed the court to the place in the record containing the objectionable testimony, we note the following exchange took place during the state's direct examination of Officer Blunt:

MS. BEAUMONT:	Now, Officer, have you had an occasion to come into contact [with] few or many intoxicated people over the years?
OFFICER BLUNT:	Many intoxicated.
MS. BEAUMONT:	And, based on your experience and your training as a police officer, and having watched intoxicated Defendants, and having the Defendant perform the two field sobriety tests, did you form an opinion as to whether or not the Defendant was intoxicated?

OFFICER BLUNT: Yes, I believe at the time that he was probably intoxicated.

MS. BEAUMONT: Was it your opinion that the Defendant had lost the normal use of his mental faculties?

OFFICER BLUNT: Yes, ma'am.

MS. BEAUMONT: And was it your opinion that the Defendant had lost the normal use of his physical faculties?

OFFICER BLUNT: Yes.

MS. BEAUMONT: And, why do you say that, Officer?

OFFICER BLUNT: Well, basically, in as far as talking to him and noticing his speech, and through the tests given.

Because appellant failed to timely object to the officer's qualifications to render an expert opinion on the results of the sobriety tests, he has failed to preserve this issue for appellate review. Accordingly, appellant's third and final issue is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed December 7, 2000.

Panel consists of Justices Yates, Wittig and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).