Affirmed and Opinion filed January 6, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00070-CR

BILLY JOE COVINGTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 31,459

O P I N I O N

Appellant Billy Joe Covington (Covington) was convicted by a jury of Driving While Intoxicated (DWI), enhanced to a felony by prior DWI convictions. A judge sentenced him to ten years incarceration in the Texas Department of Criminal Justice, Institutional Division, probated, and ordered that he attend alcohol counseling as a condition of his probation. In two points of error, Covington challenges his conviction on legal and factual sufficiency grounds. We affirm.

I.
Factual Background

According to the record, Covington was observed by two Texas DPS officers driving his car out onto a highway in front of another vehicle, causing that vehicle to take evasive action to avoid hitting him. The officers immediately turned on their overhead flashing lights and pulled him over. Based on their observations at the scene and Covington's performance during the field sobriety tests, the officers arrested Covington and took him to the police station where he refused to take a breath test. After hearing this evidence and other evidence proffered by the defense, the jury convicted Covington of felony DWI.[1]

II.
Legal Sufficiency

In his first point of error, Covington argues the evidence was legally insufficient to convict him of DWI. When reviewing legal sufficiency, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the verdict only if a rational trier of fact could not have found all the elements of the offense beyond a reasonable doubt. *See Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). A person commits the offense of driving while intoxicated if the person is intoxicated while driving a motor vehicle in a public place. *See* TEX. PEN. CODE ANN. § 49.04(a) (Vernon Supp. 2000). The definition of "intoxicated" includes "not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body." *See* TEX. PEN. CODE ANN. § 49.01(2)(A) (Vernon 1994).

Here, the State offered the testimony of the two arresting officers, Officer Rex Walker and Lt. Allan Spears. Both officers attested to Covington's lack of balance, jerky eye

[1] Covington was charged and convicted of felony DWI based on four prior DWI convictions. *See* TEX. PEN. CODE ANN. § 49.09(b) (Vernon Supp. 1999); *see also Gibson v. State*, 995 S.W.2d 693 (Tex. Crim. App. 1999) (noting the prior intoxication-related offenses serve the purpose of establishing whether the instant offense qualifies as a felony driving while intoxicated offense). Appellant's sufficiency challenges to the evidence do not reference the evidence relating to his prior convictions.

movement, slurred speech, and inability to recite the alphabet the night of his arrest. All of these factors demonstrate that Covington did not have the normal use of his physical faculties. Further, both officers testified that Covington smelled strongly of alcohol and concluded from their observations he was intoxicated. This indicates that the reason Covington did not have normal use of his faculties was by reason of the introduction of alcohol into his body. Thus the State introduced evidence proving the elements of driving while intoxicated. *See Irion v. State*, 703 S.W.2d 362, 364 (Tex. App.—Austin 1986, no pet.) (holding opinion testimony of officers, standing alone, is sufficient to prove the element of intoxication). Moreover, Covington's refusal to take a breath test may be considered by the jury as evidence that he was intoxicated. *See Finley v. State*, 809 S.W.2d 909, (Tex.App.—Houston [14th Dist.] 1991, pet. ref'd). Therefore, we cannot say a rational jury could not have found all the elements of driving while intoxicated beyond a reasonable doubt. *See Clewis*, 922 S.W.2d at 132. Accordingly, we overrule Covington's first point of error.

III.
Factual Sufficiency

Covington's second point of error challenges the factual sufficiency of the evidence. In reviewing a factual sufficiency challenge, the court of appeals "views all the evidence without the prism of 'in the light most favorable to the prosecution' and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See id.* at 129. Covington argues the evidence of intoxication is not factually sufficient because he presented testimony by a physician that he was suffering from a head injury when he was arrested for DWI. However, at the time of his arrest, the officers asked him if he had any head injuries, and he responded that he did not. Nevertheless, Covington asserts that this injury, and not intoxication, was the reason he failed the field sobriety test.

Covington called Dr. David Barr, a family practitioner, who testified that approximately one month after he was arrested, Covington came to him complaining of a

head injury resulting from an on the job accident six weeks prior to the office visit. Barr performed various tests on Covington to test for neurological problems, and based on what Covington told him and his lack of balance during the exams, Barr referred him to a neurologist for further testing. Covington did not tell Barr he had been arrested for DWI, nor did Covington produce any records from the emergency room at Brazosport Hospital, where he told Barr he went following his injury.

Although Barr's testimony offered an alternative explanation for Covington's lack of balance during the field sobriety test, his explanation did not address why Covington smelled strongly of alcohol, had slurred speech, and was unable to recite the alphabet the night of his arrest. The jury heard this testimony and the testimony of the officers and convicted Covington of felony DWI. Appellate courts should only exercise their fact jurisdiction to prevent a manifestly unjust result. *See id*. at 135. Thus, this Court is not free to reweigh the evidence and set aside a jury verdict merely because we feel a different result is more reasonable. *Id*. The jury must have found, in order to reach a verdict of guilty, that Covington's loss of the normal use of his physical and mental faculties was due to the introduction of alcohol into his body, implicitly rejecting the alternative that his behavior was normal based on his alleged head injury. In deciding a factual sufficiency point of error, a court of appeals does not find facts; it only "unfinds" a vital fact. *Id*. at n. 19. We decline, based on our review of the evidence, to unfind the jury's fact determination here regarding the origin of Covington's poor balance. Accordingly, after reviewing all of the evidence, we cannot say the jury's guilty verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129.

We overrule Covington's second point of error and affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed January 6, 2000.

Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.

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