Affirmed and Opinion filed June 14, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00403-CR

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JULIO ANDRADE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th Judicial District Court
Harris County, Texas
Trial Court Cause No. 817,200

O P I N I O N

Appellant, Julio Andrade, appeals his conviction for the offense driving while intoxicated ("DWI"). We affirm.

I. BACKGROUND

Appellant's car struck the tail end of the complainant's, Mr. Ogiemwonyi's, vehicle. Mr. Ogiemwonyi's cousin, Adedeji Ogunbufunmi, had been following him home from work. After the complainant pulled over to inspect his vehicle for damage, appellant left the scene. The cousin followed appellant to the parking lot of an apartment complex. The complainant

arrived at the scene minutes later and eventually called the police because appellant was uncooperative and appeared to be intoxicated.

James T. Keene, a Houston police officer, arrived at the scene and interviewed the complainant, his cousin, and appellant. When Officer Keene asked appellant to step away from the car on which he was leaning, appellant appeared unbalanced and had a strong odor of alcohol about him. Officer Keene administered four field sobriety tests, all of which appellant failed. Officer Keene then arrested appellant for suspicion of driving while intoxicated.

Appellant was charged by indictment with the felony offense of driving while intoxicated. For jurisdictional purposes, the indictment listed two prior DWI felony convictions. Appellant pled "true" to these prior convictions. The indictment also alleged two prior felony convictions for possession and delivery of cocaine for punishment enhancement purposes. Appellant pled "not true" to these paragraphs.

A jury found appellant guilty of the charged offense. After finding the enhancement paragraphs true, the jury assessed punishment at fifty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant now challenges his DWI conviction, raising two points of error.

II. ISSUES PRESENTED FOR REVIEW

In his first point of error, appellant claims that the jury's verdict was so contrary to the great weight of the evidence as to be manifestly unjust. In his second point of error, appellant claims that the trial court committed reversible error in allowing the State to impeach him with the two prior felony convictions for possession and delivery of cocaine.

A. Prior Conviction Impeachment

In his second point of error, appellant complains that the trial court abused its discretion in allowing the State to impeach his credibility with evidence of the convictions for possession and delivery of cocaine. Specifically, appellant asserts that these convictions are inadmissible under Texas Rule of Evidence 609 because the prejudicial effect of these

convictions outweighs their probative value. *See* TEX. R. EVID. 609(a), providing:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

At trial, appellant objected to the impeachment on the basis that the prior convictions were not moral turpitude offenses. When the trial court pointed out that the State could impeach appellant with prior felony convictions, appellant's trial counsel stated "Right. I'm sorry. You're right." Appellant did not object on the basis that the evidence of prior convictions was more prejudicial than probative.

To preserve error for appellate review, a defendant's complaint on appeal must comport with the objection raised at trial. *See* TEX. R. APP. P. 33.1; *Santellan v. State*, 939 S.W.2d 155, 171 (Tex. Crim. App. 1997). To avoid waiver, a party must object, state the specific ground for the objection, and obtain an adverse ruling. TEX. R. APP. P. 33.1(a). The failure to object to a conviction offered for impeachment on the ground that its probative value is outweighed by its prejudicial effect and the failure to request the trial court to conduct the balancing test in Rule 609(a) waives any complaint on those bases. *Wood v. State*, 18 S.W.3d 642, 646 n.2 (Tex. Crim. App. 2000); *Williams v. State*, 906 S.W.2d 58, 62 (Tex. App.—Tyler 1995, pet. ref'd).

Because appellant did not object at trial to the prejudicial effect of his prior convictions outweighing any probative value, and because appellant did not request that the trial court perform the balancing test as provided in Rule of Evidence 609(a), appellant has not preserved these complaints for appellate review.

Appellant's second point of error is overruled.

B. Factual Sufficiency

In his first point of error, appellant argues that the "testimony of Appellant, combined

with the weakness of the testimony of the state's witnesses, rendered the jury's finding that Appellant was driving the automobile so contrary to the weight of the evidence as to be manifestly unjust." We view this argument as a challenge to the factual sufficiency of the evidence.

In reviewing evidence for factual sufficiency, we do not view the evidence in the light most favorable to the prosecution. *Clewis*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). Instead, we consider all the evidence and set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id*. (citations omitted). However, appellate courts "are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable." *Id*. at 135 (citations omitted). In other words, we will not substitute our judgment for that of the jury. *Id*. at 133. To find the evidence factually insufficient to support a verdict, we must conclude that the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Id.* at 135.

The complainant testified that appellant was driving the vehicle that hit his vehicle. The complainant formed an opinion that appellant was intoxicated at the time because: (1) appellant's breath smelled of liquor; (2) appellant lacked coordination, staggered, seemed disoriented, slurred his speech, and kept spitting on complainant as they talked; and (3) appellant attempted to entertain the complainant and his cousin while waiting for the police by singing "Peru, Peru."

The complainant's cousin also testified that appellant was driving the vehicle that hit the complainant's vehicle. Like the complainant, the cousin also opined that appellant was intoxicated because (1) appellant became belligerent and began pushing the cousin around; (2) appellant's breath smelled of alcohol; (3) appellant's eyes were red, and he seemed in a stupor; (4) appellant leaned on a car for support; and (5) appellant tried to get away from the parking lot.

Officer Keene testified that appellant confirmed facts given by the complainant and his

cousin, specifically that appellant admitted he had been in a minor accident and that he had driven that vehicle to the apartment complex where he lived. Both the complainant and his cousin indicated to the officer that appellant was the driver of the car that hit the complainant's vehicle. Officer Keene observed that the damage on both the appellant's and complainant's cars matched. Upon arriving at the parking lot, Officer Keene noticed that appellant was leaning against a car. When the officer asked appellant to step away from the car, appellant appeared "unsteady" and "lacked solid balance." Appellant had a strong odor of alcohol about him. His steps were uncertain and his movements seemed deliberate and halted. Appellant failed each of the four field sobriety tests administered to him: the HGN test; the walk-and-turn test; the Rhomberg test; and the one leg stand. Officer Keene testified that appellant exhibited the maximum number of clues on the HGN test, six, and correlated that to at least a 0.1 blood alcohol content level. During the one-leg stand, appellant swayed, used his arms for balance, and dropped his foot four times before quitting the test, despite the officer's instructions to continue the test where he had left off. When the Rhomberg test commenced, appellant immediately began to sway "front to back and side to side." Officer Keene had to stop the test after one minute had elapsed when appellant failed to stop the test after thirty seconds as instructed. Appellant appeared to struggle to process the information Officer Keene had given him. The officer had to repeat the information many times. When Officer Keene arrested appellant, Officer Keene had to help him walk. The officer testified that appellant exhibited "most of the classic problems that drunk people have." The officer described how appellant initially denied that he had drunk anything that day. Later, appellant stated he had consumed one glass of wine, and then asserted again that he had not had anything to drink that day. Based on these observations, Officer Keene opined that appellant had lost the normal use of his mental and physical faculties by the introduction of alcohol into his body.

John Nickell, a Houston police officer and Breathalyzer operator at the time of appellant's arrest, testified that he read appellant a statutory warning for the breath test. He warned appellant about the consequences of either refusing to take or of taking and failing the test. He offered appellant a breath test, but appellant refused.

Appellant testified in his own defense at trial. Appellant admitted he owned the car in question but claimed that he was not driving it at the time of the alleged collision. Appellant testified that his car never collided with the complainant's vehicle. Moreover, appellant claimed that a good friend of his from Mexico City, was interested in purchasing the car and was test driving it with appellant as a passenger. Appellant testified that neither the complainant nor his cousin could have observed him as the driver because the windows in both their cars were tinted. Appellant further testified that he had only one glass of wine, with dinner, and that he did not consume the wine until after he arrived back at his apartment. Appellant claimed that it was after this dinner and single drink in the apartment that the complainant and his cousin arrived and began accusing him of hitting the complainant's car. Appellant also maintained that he could not call his Mexico City friend to testify on his behalf because his friend had gone back to Mexico, and although appellant once had the friend's phone number in his apartment, the owner had thrown it away along with appellant's other property after his arrest. Finally, appellant asserted that as far as he knew, he performed all of the field sobriety tests correctly. On cross-examination, the State impeached appellant's credibility with proof of appellant's prior felony convictions for possession and delivery of cocaine.

The jury was entitled to believe or disbelieve all or any part of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Mere contradiction of a witness's trial testimony will not suffice to overturn a conviction for factual sufficiency. *Turner v. State*, 4 S.W.3d 74, 83 (Tex. App.— Waco 1999, no pet.). We must give due deference to the jury's assessment of the credibility of the witnesses and the weight to be given their testimony. *See Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000). Viewed as a whole, the evidence strongly supports the jury's finding that appellant was intoxicated from an introduction of alcohol into his system. Accordingly, we find the evidence in this case factually sufficient to support the jury's verdict. Appellant's first point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed June 14, 2001.

Panel consists of Justices Edelman, Frost, and Senior Justice Murphy.[*]

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

[*] Senior Chief Justice Paul C. Murphy sitting by assignment.