Affirmed and Memorandum Opinion filed June 23, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00371-CR

DIXIE LUCEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 167th District Court
Travis County, Texas
Trial Court Cause No. D-1-DC-17-203933

MEMORANDUM OPINION

Appellant Dixie Lucey was convicted of felony driving while intoxicated ("DWI"). On appeal, appellant argues: (1) the trial court erred by allegedly not asking her how she would plead before trial; (2) the trial court improperly applied the standard for "reasonable doubt" during the guilt and innocence phase of the trial; (3) the evidence is legally insufficient to sustain her conviction; and (4) the evidence is legally insufficient to support a felony conviction for DWI. We overrule

appellant's points of error and affirm the trial court's judgment.[1]

I. BACKGROUND

On the night of June 8, 2017, Austin Police Officer Matthew Jackson and his partner responded to a call regarding a female "passed out" in a vehicle at an intersection. When Officer Jackson arrived at the scene, the vehicle was stopped at a green light, but proceeded through the intersection when other drivers honked their horns. According to Officer Jackson, the vehicle was being driven recklessly. The car was driving very erratically, left its lane of travel multiple times, and almost hit a construction barrier. Officer Jackson testified that they had to drive in between two lanes so no one could pass because he feared another car getting swiped. Although Officer Jackson used his police sirens and activated his police lights, it took several minutes to get appellant's attention and make the traffic stop.

When Officer Campos, a DWI enforcement officer, arrived at the scene, he observed that appellant spoke "in a mush-mouth way." Officer Campos has extensive training in conducting field sobriety tests. He drove appellant to a nearby parking lot to interview her and conduct field-sobriety tests. Appellant was unsteady on her feet and was not able to respond to questions appropriately. Officer Campos did not smell any alcohol, and appellant testified that she had not consumed any alcohol. Appellant also denied taking any medications. The walk-and-turn test and the one-leg-stand test revealed signs of intoxication. Based on his own observations, the results of the field-sobriety tests, and the information provided by Officer Jackson about the movement of appellant's vehicle, Officer Campos determined that appellant "had lost the normal use of her mental and physical faculties either due to

[1] The Texas Supreme Court ordered the Third Court of Appeals to transfer this appeal to the Fourteenth Court of Appeals. We must therefore decide the case in accordance with the precedent of the Third Court of Appeals if our decisions otherwise would have been inconsistent with that court's precedent. *See* Tex. R. App. P. 41.3.

the introduction of medication or narcotics or a combination of both." He arrested appellant for driving while intoxicated.

Officer Herbert searched appellant and found three pills. He also performed an inventory search of appellant's vehicle and found Tramadol pills in the driver's door and Wellbutrin in a baggy near the center console. Officer Campos read appellant a statutory warning and requested a sample of her blood, but she refused to provide a sample.. She was taken to jail and refused to participate in a drug recognition evaluation.

Officer Campos obtained a search warrant, and two samples of appellant's blood were drawn. Toxicologists at the Texas Department of Public Safety analyzed one of those samples, which tested positive for hydrocodone and venlafaxine,[2] as well as O-Desmethylvenlafaxine, which is a metabolite of venlafaxine. At appellant's request, a third-party laboratory tested her blood sample on September 13, 2017. The test revealed venlafaxine, as well as dimethylvenlafaxine.

Appellant was charged with the felony offense of driving while intoxicated. The indictment was enhanced with two prior DWI convictions. After a bench trial, the trial court found appellant guilty as alleged in the indictment. The trial court assessed appellant's punishment at imprisonment for a term of ten years, suspended that sentence, and placed appellant on community supervision for a period of five years.

Appellant filed a motion for new trial, which was denied. Appellant timely filed a notice of appeal.

[2] Venlafaxine is marketed as the anti-depressant Effexor.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF GUILT

In her third issue, appellant challenges the legal sufficiency of the evidence to support the trial court's finding of guilt.

1. STANDARD OF REVIEW

In determining whether the evidence is legally sufficient to support the conviction, "we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)); *see also Braughton v. State*, 569 S.W.3d 592, 607–08 (Tex. Crim. App. 2018). We presume that the factfinder resolved conflicting inferences in favor of the verdict, and we defer to its determination of the evidence's weight and credibility. *Id.* at 608; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). In a bench trial, the trial court "is the sole judge of the credibility of the witnesses and may accept or reject any part or all of the testimony given by State or defense witnesses." *Deloach v. State*, No. 03-13-00049-CR, 2015 WL 756759, at *1 (Tex. App.—Austin Feb. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (quoting *Johnson v. State*, 571 S.W.2d 170, 173 (Tex. Crim. App. 1978)). The legal sufficiency of the evidence is measured by the elements of the offense as defined by the hypothetically correct jury charge for this case. *Malik v. State*, 953 S.W.2d, 234, 240 (Tex. Crim. App. 1997).

The scope of our review is all of the evidence, whether it was properly or improperly admitted at trial. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We consider both direct and circumstantial evidence, as well as any

reasonable inferences that may be drawn from the evidence. *Balderas v. State*, 517 S.W.3d 756, 766 (Tex. Crim. App. 2016). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper*, 214 S.W.3d at 13.

Appellant was charged with the offense of driving while intoxicated. "A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE § 49.04. The definition of the term "intoxicated" means "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body." *Id*., § 49.01(2)(A). Penal Code section 49.04, entitled "Driving While Intoxicated," requires the State to prove that a defendant lost her faculties by reason of the introduction of a substance into her body, but it does not require the State to prove what substance caused the loss of the normal use of mental or physical faculties. *Gray v. State,* 152 S.W.3d 125, 132 (Tex. Crim. App. 2004). The law also does not require any particular amounts or levels of drugs, either solely or in combination. TEX. PENAL CODE §49.01(1)–(2). A conviction for the offense of driving while intoxicated may be supported solely by circumstantial evidence. *Kuciemba v. State,* 310 S.W.3d 460, 462 (Tex. Crim. App. 2010).

2. RELEVANT AUTHORITY AND EVIDENCE OF INTOXICATION

Impairment in the ability to speak is relevant evidence of being intoxicated. *Griffith v. State*, 55 S.W.3d 598, 601 (Tex. Crim. App. 2001). Evidence of intoxication also includes slurred speech, unsteady balance, and staggered gait. *Cotton v. State*, 686 S.W.2d 140, 142 n. 3 (Tex. Crim. App. 1985). "Also relevant as evidence of intoxication is a refusal to take a blood-alcohol test." *Griffith*, 55 S.W.3d at 601. The testimony of a police officer that an individual is intoxicated is probative

evidence of intoxication. *Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (citing *Gruber v. State*, 812 S.W.2d 368, 370 (Tex. App.—Corpus Christi 1991, pet. ref'd)); *see also Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979) (holding officer's opinion that defendant was intoxicated was legally sufficient to support DWI conviction when based on officer's experience and observed facts, including defendant swerved his car across lane-divider, he appeared disorderly, his speech was "mush-mouthed," his eyes were red, his breath smelled of alcohol, and he swayed when walking or standing).

Here, Officer Jackson and Officer Campos observed appellant's loss of physical and mental faculties in her unsteady balance and disorientation. Officer Jackson observed and testified to appellant's erratic driving. Officer Campos, observed that appellant spoke "in a mush-mouth way." Based on his own observations, the results of the field-sobriety tests, and the information provided by Officer Jackson about the movement of appellant's vehicle, Officer Campos determined that appellant "had lost the normal use of her mental and physical faculties either due to the introduction of medication or narcotics or a combination of both." The video of appellant from Officer Campos's vehicle on the night of the incident confirms appellant had lost control of her physical faculties. Based on his own observations, the results of the field-sobriety tests, and the information provided by Officer Jackson about the movement of appellant's vehicle, Officer Campos determined that appellant "had lost the normal use of her mental and physical faculties either due to the introduction of medication or narcotics or a combination of both." Appellant refused to provide a blood sample and refused participate in a drug recognition evaluation. Under the decisions discussed above, such evidence is legally sufficient to prove appellant was intoxicated.

Notwithstanding evidence that appellant did not have the normal use of her

faculties, appellant argues that the evidence is insufficient to prove the cause of the loss of faculties was the introduction of a controlled substance into her body. Appellant asserts that in light of the small amount of hydrocodone in the State's toxicology report and because there is no scientific literature or studies describing the synergistic effects of venlafaxine and hydrocodone, the trial court could not reasonably have inferred that appellant's lack of physical and mental faculties was due to a controlled substance, a drug, a dangerous drug, a combination of two or more of these substances, or any other substance in her body. We disagree.

The record contains the following evidence regarding the presence of controlled substances in appellant's body:

- A blood draw and analysis performed by the State's toxicology laboratory demonstrated that appellant had hydrocodone and venlafaxine in her system.
- With regard to the hydrocodone, expert forensic toxicologist, Edward Padilla, testified that the level of hydrocodone detected was below the generally accepted "therapeutic range" but above their administrative cut-off, Padilla testified that hydrocodone causes drowsiness, dizziness, lack of motor coordination, slurred speech and blurred vision. He further testified that hydrocodone affects each person differently and that it was possible that a person could manifest outward symptoms of the drug even at low blood concentration levels.
- With regard to the venlafaxine and its metabolite, a second expert toxicologist, Dana Baxter, testified that appellant had both venlafaxine and its metabolite in her system in the generally accepted "therapeutic range." The testing done by the State's laboratory did not provide a quantitation for the venlafaxine or its metabolite; however, the venlafaxine must be in the generally accepted "therapeutic range" in order to appear on the report. Baxter also testified that venlafaxine can cause drowsiness, dizziness and slowed reaction times when the drug is in a person's system.
- Baxter also testified that she was aware of no specific literature regarding the combination of hydrocodone and venlafaxine. However, she testified that both drugs are depressants and taking them together could have an additive effect.

- Appellant did produce a toxicology test analysis report from an independent laboratory, which also concluded there was venlafaxine and its metabolite in appellant's system. No information was provided regarding the administrative cut-offs or testing protocol of the third-party laboratory. The third-party laboratory did not report any finding for hydrocodone.
- Appellant's husband testified that appellant had been treated for pain management for various nerve and physical conditions for many years, and she was also taking daily anti-depressants.

The State's expert toxicologists testified that appellant had prescription medication in her system in a quantity that could cause her to lose her mental and physical faculties. Further, a blood toxicology analysis performed by the State determined that appellant had prescription medications in her system, including hydrocodone. A toxicology expert testified that hydrocodone can cause appellant's loss of control as observed by Officers Jackson and Campos, even though the levels detected at the time of testing were lower than the generally accepted "therapeutic range." Such evidence is legally sufficient to support a finding that appellant was intoxicated by the prescription medications in her body.[3]

Appellant presented evidence that her poor performance on the field-sobriety tests was caused by her pre-existing foot surgery or drowsiness from her schedule and life circumstances. However, the factfinder could have weighed the evidence,

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[3] *See Landers v. State,* 110 S.W.3d 617, 620–21 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding evidence sufficient to support felony DWI conviction when appellant admitted ingesting prescription medication and appeared sluggish, stumbled, had poor coordination, and slurred her words); *Paschall v. State,* 285 S.W.3d 166, 177 (Tex. App.—Fort Worth 2009, pet. ref'd) (holding the evidence was sufficient to support a felony DWI conviction where defendant admitted on a medical intake sheet that he was taking two prescription drugs, central nervous system depressants, that cause persons intoxicated by their use to exhibit slurred speech, affected balance, abnormal gait, and constricted pupils, and police officer observed these characteristics in defendant); *Kiffe v. State,* 361 S.W.3d 104, 109 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (defendant's admission of taking Xanax the night before the incident and valium on a daily basis, along with testimony of the defendant's behavior from officers and witnesses was sufficient to convict defendant of DWI); *Harkins v. State,* 268 S.W.3d 740, 751 (Tex. App.—Fort Worth 2008, pet. ref'd) (holding evidence sufficient to convict defendant of DWI when State presented evidence defendant had taken the drug Soma and two witnesses testified Soma can cause impairment).

considered appellant's defense, and concluded the defense was not persuasive.[4]

Applying the applicable standards of review, we conclude that the evidence is legally sufficient to prove beyond a reasonable doubt that appellant was intoxicated by "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body." *See* TEX. PENAL CODE § 49.04 (2)(A).

We overrule appellant's third issue.

B. SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FELONY CONVICTION

Section 49.09(b) provides that the offense is a third-degree felony if the person has two prior DWI convictions. *See* TEX. PENAL CODE § 49.09(b). In her fourth issue, appellant argues that the evidence is legally insufficient to support the conviction for felony DWI because there is no testimony that appellant was the same person that was previously convicted, and the State failed to enter certified copies of two or more judgements bearing appellant's name into evidence. "In a prosecution for driving while intoxicated, subsequent offense, it is essential that the accused be identified as the same person previously convicted. The prior judgment alone, containing the same name as the accused's, is insufficient to supply the

[4] *See Paradoski v. State*, 477 S.W.3d 342 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (defendant's alternate explanation that she suffered a TIA which caused her symptoms does not render the evidence that she was impaired by reason of prescription medications insufficient); *Crouse v. State*, 441 S.W.3d 508, 515 (Tex. App.—Dallas 2014, no pet.) (holding that although appellant presented an alternative explanation for impairment, factfinder's role is to resolve conflicts and the factfinder was free to accept or reject evidence presented by either side); *Davy v. State*, 67 S.W.3d 382, 396 (Tex. App.—Waco 2001, no pet.) (holding that jury could disbelieve testimony that defendant's poor performance on field-sobriety tests was based on lack of sleep and a "bad leg" rather than medications); *Harkins v. State*, 268 S.W.3d 740, 751 (Tex. App.—Fort Worth 2008, pet. ref'd) (jury could have concluded that defense of physical impairments or drowsiness caused by sleep apnea was unpersuasive).

identification." *White v. State*, 634 S.W.2d 81, 82 (Tex. App.—Austin 1982, no writ) (citing *e.g.*, *McGrew v. State*, 367 S.W.2d 702 (Tex. Crim. App. 1963)).

However, evidence of prior convictions to satisfy a jurisdictional element of an offense "is not necessary if the accused stipulates to their existence because the statutory requirement has been satisfied." *Trotter v. State*, No. 03-18-00216-CR, 2019 WL 6223350, at *4 (Tex. App.—Austin Nov. 22, 2019, pet. ref'd) (mem. op., not designated for publication) (citing *Hernandez v. State*, 109 S.W.3d 491, 494 (Tex. Crim. App. 2003) (concluding that trial court erred in overruling defendant's motion to stipulate to prior convictions because defendant's "stipulation would have placed the prior convictions into evidence" and "satisfied the evidentiary requirements regarding stipulations while avoiding the unfair prejudice that would accompany further mention of the convictions")). Here, appellant's counsel clearly stipulated that appellant had two prior offenses:

> PROSECUTION: In addition, I had discussed with Mr. Chesnutt prior to today about the stipulation of the priors. Obviously this is a DWI 3rd, and so I believe that they were going to stipulate to the priors.
>
> DEFENSE: No objection to stipulating, Your Honor.

Appellant's position that this stipulation is insufficient because her counsel did not expressly stipulate that the prior judgments were against appellant is untenable because it is clear from the context that the State was asking appellant's counsel to stipulate to prior DWIs of appellant, and appellant's counsel stated he had no objection to stipulating.

We overrule appellant's fourth issue.

C. THE ALLEGED FAILURE TO READ THE INDICTMENT AND ASK FOR APPELLANT'S PLEA

In her first issue, appellant argues that her due process rights were violated because allegedly the indictment was not read and she was not asked how she

pleaded to the indictment. The record does not support this allegation. Although the reporter's record is silent as to whether the indictment was read and as to appellant's plea, the trial court's judgment states that appellant waived the reading of the indictment, and the trial court's docket sheet and the district clerk's information sheet indicate that appellant pleaded "not guilty," although the judgement incorrectly states that appellant pleaded guilty.

Further, appellant did not raise this issue at trial or in her motion for new trial, and raises it for the first time on appeal. "Unless the following matters were disputed in the trial court, or unless the record affirmatively shows the contrary, the court of appeals must presume: . . . (3) that the defendant was arraigned; (4) that the defendant pleaded to the indictment or other charging instrument." TEX. R. APP. P. 44.2(c)(3), (4). Appellant did not dispute this presumption in the trial court. Silence of the reporter's record is not sufficient to show a failure to read the indictment or a failure to receive appellant's plea. *Alvarez v. State*, No. 03-98-00676-CR, 1999 WL 546866, at *1 (Tex. App.—Austin July 29, 1999, no pet.) (mem. op., not designated for publication) (citing *Salinas v. State*, 888 S.W.2d 93, 101 (Tex. App.—Corpus Christi 1994, pet. ref'd)).

Appellant's first issue is overruled.

D. APPLICATION OF THE "REASONABLE DOUBT" STANDARD

In her second issue, appellant argues that the trial court improperly applied the "reasonable doubt" standard during the guilt and innocence phase of the trial. Appellant relies on a comment made by the trial court at the close of the evidence:

> THE COURT: So it's clear to me that Ms. Lucey had lost both the normal use of her mental and physical faculties. Whether that's directly attributable to whatever drugs were in her system I'm not altogether sure of at this point. I want to think about that. Let's take a short recess.

Appellant argues that because the trial judge "was not altogether sure" at the close

of the evidence as to whether the drugs in her system were directly attributable to the loss of the normal use of her mental and physical faculties, the judge was required to find her not guilty based on "reasonable doubt."

The trial judge could properly take the matter under advisement, as he did. The record does not show that the trial judge had reasonable doubt when he determined appellant's guilt. At the motion for new trial hearing, the judge explained that after further review of the evidence, he reached a decision of guilt "beyond a reasonable doubt":

> That was until I watched the video and observed Ms. Lucey's conduct not simply on the field sobriety tests but her actions in declining to participate in the DRE exam, which in my opinion constitutes an admission and is circumstantial evidence of guilt, and as circumstantial evidence of guilt, coupled with the fact of the field sobriety tests appearance and whatever pills were located on her person and in her vehicle, sufficient to satisfy me beyond a reasonable doubt.

Therefore, we overrule appellant's second issue.

III. Conclusion

For these reasons, we affirm the judgment of the trial court.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Jewell, and Poissant.

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