AFFIRMED; Opinion Filed June 22, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00713-CR

DUKE FATHOL MCGEE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law
Rockwall County, Texas
Trial Court Cause No. CR18-1720

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Myers

Appellant Duke Fathol McGee appeals his conviction for the offense of speeding in a construction zone, workers present. A justice of the peace court found appellant guilty of this offense and assessed punishment at a $197 fine plus court costs. The appeal was heard de novo in the county court at law of Rockwall County, where appellant was again found guilty of the offense and a $200 fine imposed, plus court costs. From the county court's judgment appellant timely perfected this appeal. In one issue, he argues the State did not prove the existence of a construction zone, the presence of workers in the alleged construction zone, or the existence of proper signage marking the speed limit in the construction zone. We affirm.

DISCUSSION

In his sole issue, appellant attacks the statutory enhancement. He argues the State did not prove the existence of a construction zone, the presence of workers in the alleged construction zone, or the existence of proper signage marking the speed limit in the construction zone.[1]

When reviewing the sufficiency of the evidence after a bench trial, we apply the same *Jackson v. Virginia* standard that is applied in an appeal from a jury trial. *See Robinson v. State*, 466 S.W.3d 166, 173 (Tex. Crim. App. 2015) (citing *Jackson v. Virginia*, 443 U.S. 307, 309, 319 (1979)). Evidence is legally insufficient if, when viewed in a light most favorable to the verdict, a rational jury could not have found each element of the offense beyond a reasonable doubt. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). We will affirm the conviction if any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). We do not resolve conflicts of fact, weigh evidence, or evaluate the credibility of witnesses; this is the function of the trier of fact. *See Wesbrook*, 29 S.W.3d at 111; *Chance v. State*, 292 S.W.3d 138, 140 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). The jury may choose to believe or disbelieve any portion of the witnesses'

[1] Appellant argues the evidence is "factually insufficient," but the Texas Court of Criminal Appeals has abolished factual sufficiency review where the State has the burden of proof of beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Therefore, we will discuss whether the evidence at trial is legally sufficient.

testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Chance*, 292 S.W.3d at 140. When faced with conflicting evidence, we presume the trier of fact resolved conflicts in the prevailing party's favor. *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999); *Chance*, 292 S.W.3d at 140. We may overturn the verdict only if it is irrational or unsupported by proof beyond a reasonable doubt. *Chance*, 292 S.W.3d at 140.

Section 542.404 of the Texas Transportation Code pertains to the fines allowed for offenses committed in construction or maintenance work zones. *See* TEX. TRANSP. CODE ANN. § 542.404. The statute states that a driver risks doubled fines when the driver speeds in "a construction or maintenance work zone when workers are present[,]" and receives a "written notice to appear issued for the offense [which] states on its face that workers were present when the offense was committed." *Id*. at § 542.404(a). The full text of the statute provides as follows:

> (a) Except as provided by Subsection (c), if an offense under this subtitle, other than an offense under Chapter 548 or 552 or Section 545.412 or 545.413, is committed in a construction or maintenance work zone when workers are present and any written notice to appear issued for the offense states on its face that workers were present when the offense was committed:
>
> (1) the minimum fine applicable to the offense is twice the minimum fine that would be applicable to the offense if it were committed outside a construction or maintenance work zone; and
>
> (2) the maximum fine applicable to the offense is twice the maximum fine that would be applicable to the offense if it were committed outside a construction or maintenance work zone.
>
> (b) In this section, "construction or maintenance work zone" has the meaning assigned by Section 472.022.
>
> (c) The fine prescribed by Subsection (a) applies to a violation of a prima facie

> speed limit authorized by Subchapter H, Chapter 545, only if the construction or maintenance work zone is marked by a sign indicating the applicable maximum lawful speed.

Id. at § 542.404(a)-(c). "Construction or maintenance work zone" is defined as a portion of a highway or street:

> (A) where highway construction or maintenance is being undertaken, other than mobile operations as defined by the Texas Manual on Uniform Traffic Control Devices; and
>
> (B) that is marked by signs:
>
> (i) indicating that it is a construction or maintenance work zone;
>
> (ii) indicating where the zone begins and ends; and
>
> (iii) stating: "Fines double when workers present."

See id. § 472.022(e)(2)(A)-(B)(i)-(iii).

The record shows that on October 24, 2017, Matthew Zobel, a trooper with the Texas Department of Public Safety (DPS), was on the right shoulder of Interstate 30 in Rockwall County, Texas, when a motor vehicle drew his attention that was traveling at a speed above the limit. In that area, in the construction zone, the posted speed limit was 60 miles an hour (reduced from 70 miles an hour). Zobel used the "Stalker X2" radar—front as well as rear radar—to clock the vehicle's speed. Regarding the vehicle's speed, Zobel testified:

> Q. And what drew your attention to the defendant's vehicle?
>
> A. Just that he was traveling at a speed higher than traffic or just that he was traveling above—excuse me, traveling above the limit.
>
> Q. And in that time in that area, what was the posted speed limit?
>
> A. In that area in the construction zone, it is 60 miles an hour down from 70.
>
> Q. And in what—what did you clock the defendant as going as, as far as the speed?

A. It was 73.

Zobel got onto the roadway and paced appellant's vehicle before coming into contact with him—issuing a citation to appellant for driving over the speed limit in a construction zone. Zobel answered "Yes" when asked whether there were any construction workers present that day:

> Q. And do you recall—you say in a construction zone. Did you also—were there workers present on that day?
>
> A. Yes.

He also testified as follows:

> Q. And, again, for what speed did you issue the citation?
>
> A. I believe it was 73 in a 60.
>
> Q. And you indicated it was a construction zone with workers present. When you indicate that on a citation, does that mean that there has to be workers in the immediate area where you pulled him over?
>
> A. No. It just means that they need to be in that construction area in that whether it's a hundred yards or, you know, up to, you know, over a mile long and such. But that construction area is not that big.
>
> Q. Were there signs at or near the location indicating what the current speed limit was on that day?
>
> A. Yes. And I always start positioning my car—if I'm going to enforce that law—after the first speed limit sign.
>
> Q. So you were—you were located—whenever you first observed the defendant pass—the speed limit sign, the one that says 60 miles per hour?
>
> A. Yes.
>
> Q. And those signs were clear and conspicuous to anyone who would have been going past them?
>
> A. Should have been.

Appellant argues that Zobel's testimony did not allow a rational trier of fact to determine where any alleged construction zone began or ended—it simply

asserted there was one. Appellant also argues that Zobel's testimony did not allow a rational trier of fact to determine if there were any workers present in the construction zone—again, it just asserted they were there. Furthermore, according to appellant, Zobel's testimony did not allow a rational trier of fact to determine if the required signage was posted—it only asserted the signage was there. Appellant claims such "simple assertions," without supporting facts or corroborative evidence, will not satisfy the "beyond a reasonable doubt" standard required for a conviction.

But in an analogous case, *Chance v. State*, a jury convicted the defendant of speeding in a construction zone with workers present and assessed a $200 fine. *Chance*, 292 S.W.3d at 139. Concluding a rational trier of fact could have found each element of the enhancement beyond a reasonable doubt, the appellate court stated:

> The trial testimony of both the citing officer and Chance establishes that Chance was exceeding the posted speed limit. Both witnesses testified that Chance was driving through a posted construction zone at the time he was pulled over. The citing officer testified that signs establishing the zone, as well as the doubling of fines, were posted within Chance's view at appropriate intervals along the roadway. Chance offered his photograph of the construction zone into evidence as proof that there were no workers present. However, the photograph shows only one directional perspective of the construction zone—facing west—and so does not depict the entire construction zone. Finally, the officer testified that there were workers present within the construction zone. Viewing this evidence in a light most favorable to the verdict, we believe that a rational jury could have found each element of the enhancement beyond a reasonable doubt.

Id. at 141.

In this case, the evidence is similarly sufficient for the trial court, as the rational trier of fact, to have reasonably found the essential elements of the offense

beyond a reasonable doubt. For example, there is legally sufficient evidence in this record for the trial court to have found, in the words of the statute, that "highway construction or maintenance is being undertaken." *See* TEX. TRANSP. CODE ANN. § 472.022(e)(2)(A). Zobel testified, "[T]hat construction area is not that big." Also, the "construction or maintenance work zone" was "marked by signs" that, as Zobel testified, "[s]hould have been" clear and conspicuous. *See id*. § 472.022(e)(2)(B)(i)-(iii). Moreover, he testified that he positioned his vehicle after the first speed limit sign. Thus, the trial court could have found "where the zone begins and ends." *See id*. § 472.022(e)(2)(B)(ii). Regarding appellant's assertion that Zobel's testimony about workers being present that day was in response to a leading question, it is well-known that our review of the sufficiency of the evidence requires us to consider *all* the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or whether it was submitted by the prosecution or the defense. *See, e.g*., *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *Boston v. State*, 373 S.W.3d 832, 836 (Tex. App.—Austin 2012), *aff'd*, 410 S.W.3d 321 (Tex. Crim. App. 2013).

Viewing the evidence in a light most favorable to the verdict, we conclude there is legally sufficient evidence to support the verdict. We overrule appellant's issue.

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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JUDGMENT

DUKE FATHOL MCGEE, Appellant	On Appeal from the County Court at Law, Rockwall County, Texas
No. 05-19-00713-CR V.	Trial Court Cause No. CR18-1720.
	Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Partida-Kipness and Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 22nd day of June, 2020.