COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LUIS CARLOS GONZALEZ, Appellant,	§	No. 08-14-00175-CR
v.	§	Appeal from the
THE STATE OF TEXAS, Appellee.	§	County Court at Law No. 1 of El Paso County, Texas
	§	(TC# 20120C10735)

O P I N I O N

Luis Carlos Gonzalez was convicted of a Class A misdemeanor of driving while intoxicated and sentenced to one year in jail, probated for fifteen months.[1] On appeal, Appellant contends the trial court erred in denying his motion to suppress because the arresting officer lacked reasonable suspicion to detain him and probable cause to arrest him for DWI. He also contends the trial court's Article 38.23 instruction to the jury improperly commented on the weight of the evidence. Because we conclude the trial court did not abuse its discretion in denying the motion to suppress and did not erroneously submit its Article 38.23 instruction, we affirm.

FACTUAL SUMMARY

Appellant filed a pretrial motion to suppress but did not present it to the court until after the

[1] *See* TEX. PENAL CODE ANN. § 49.04(a, d) (West Supp. 2016).

trial had commenced. By that time, the jury had already heard the testimony of the two witnesses who had come upon Appellant's vehicle crashed in a ditch, as well as the testimony of the officer who had detained and arrested Appellant.

Edgar Alvarez and Enrique Archuleta, Jr. were driving home shortly before midnight on June 2, 2012 when Archuleta noticed a white truck with its front end down inside a sandy ditch. He saw that someone was inside the truck and suggested to Alvarez that they stop to see if he was injured. The two men saw Appellant clumsily climb and fall out of the driver's side door of the truck and become "full of dirt." Although Archuleta acknowledged that he did not see the vehicle in motion, he concluded that Appellant must have been driving the truck because Appellant was alone, he had opened the driver's side door to exit the vehicle, and the headlights and tail lights were still illuminated. Alvarez had not seen Appellant driving the truck or witnessed an accident, but he thought Appellant was "pretty injured," and called out to him. Appellant did not answer and remained on the ground for a time, but then moved to the driver's side tire and began digging the tire out of the sand. Realizing that something was not right, Alvarez called 911 from his cell phone. As Alvarez was making the call, Appellant rose and began stumbling away from the scene toward a nearby McDonald's restaurant. Both Alvarez and Archuleta testified that Appellant was wearing a dark shirt and dark pants.

Shortly thereafter Alvarez saw a state trooper and flagged him down. Alvarez and Archuleta told the trooper what they had seen, and at the trooper's request, Alvarez accompanied the trooper in his vehicle to look for Appellant. Alvarez informed the trooper that the man he had seen in the truck was now walking toward the McDonald's restaurant and was wearing a dark t-shirt and dark jeans. They intercepted Appellant at a truck stop near the McDonald's, and

Alvarez positively identified Appellant to the trooper, telling him that he was 100 percent certain Appellant was the person he had seen getting out of the truck. When Appellant pulled out his wallet to show the trooper his identification, Alvarez saw it was "full of just the sand." Alvarez also heard the trooper ask Appellant "if he had been drinking tonight because he could smell his breath when he was talking to him," and heard Appellant emphatically answer "no, no, no, no" and became angrier with every question asked.

Trooper Daniel Martinez testified that he was concluding an unrelated traffic stop when he was informed by a private citizen about a crash that had recently occurred. Martinez broadcast this information over the Department's radio and then drove to the scene, arriving shortly before midnight, where he saw Alvarez on the side of the road waiving at him. Martinez testified that Alvarez and Archuleta informed him about the circumstances of the crash and described the suspected driver they had seen leaving the scene. Alvarez accompanied Martinez as he drove toward the last known location of the suspected driver. They soon located Appellant who was wearing the same clothing as that described by Alvarez and Archuleta.

Trooper Martinez stopped and exited his vehicle, identified himself to Appellant, and instructed Appellant to step in front of the vehicle so that he would be within view of the dash camera, but Appellant refused and repeatedly stated, "I'm not driving." Martinez again identified himself and instructed Appellant to comply. Martinez explained that there had been a crash and a witness had given a description that matched Appellant. During the detention, the trooper observed that Appellant was "walking in a staggering manner," that he was wearing clothes as described by the witnesses, that his clothes were in disarray, that he was covered in dirt as described by the witnesses, and that he "had an odor of alcohol emanating from his person, from

his breath[.]"

When Martinez asked Appellant to produce some identification, Appellant had difficulty locating his wallet, and when he found it, a substantial amount of dirt fell from it. Trooper Martinez was able to identify Appellant from his driver's license. He observed red contusions on Appellant's chest that stretched from the left of his "neck shoulder area" to the mid-portion of his right ribcage which were consistent with injuries from a seatbelt locking during a crash and with Appellant being in the driver's seat.

Trooper Martinez returned to his vehicle and had Alvarez confirm that Appellant was the driver observed inside the vehicle. Appellant overheard the conversation and denied that he had been driving. At this point, Martinez had not yet arrested Appellant. Meanwhile, the Department of Public Safety determined from the license plates that the truck was registered to the same address noted on Appellant's driver's license. At that point, Trooper Martinez believed Appellant had been driving the truck while in intoxicated and placed him under arrest for DWI. His probable cause to arrest was based on several factors: (1) the witnesses' account of the crash scene and Appellant's flight therefrom, (2) Appellant's description matched the witnesses' description of the "driver," (3) the truck registration address matched Appellant's driver's license address, (4) Appellant's disheveled clothes and his wallet were covered in dirt, (5) the emanation of alcohol from Appellant's breath and person, (6) Appellant was wearing a wrist band usually distributed at establishments that sell alcohol, and (7) his own personal contact with Appellant.

Martinez later administered standard field sobriety tests at a DPS office which Appellant failed. Appellant was uncooperative and argumentative during the tests and repeatedly asserted, "I'm not driving." After Appellant declined to provide a breath sample, Martinez obtained a

search warrant for a blood draw, and Appellant's blood was drawn by a nurse at a hospital.[2]

Outside the presence of the jury, Trooper Martinez testified that as Appellant's blood was being drawn, he voluntarily sought forgiveness and inquired whether the officers could "cut [him] a break" since he was a Border Patrol agent. It was at this point that defense counsel sought to suppress these statements and raised his pretrial motion to suppress challenging the validity of his detention and warrantless arrest.[3]

The trial court concluded that Appellant's detention was "a reasonable and justified detention." It found that Trooper Martinez was dispatched to an accident and met with the witnesses who had observed "a truck embedded out in a desert portion area[.]" After talking with the witnesses, Trooper Martinez personally possessed sufficient information regarding an accident scene, as well as specific information regarding the individual who had emerged from the truck. The witnesses told Martinez in what direction the individual had walked and the individual "was, in fact, located in the general vicinity as the witnesses had pointed out." Alvarez had accompanied Martinez in looking for the individual and "that individual was, in fact, located in the general vicinity as the witnesses had said." The court concluded that "Trooper Martinez made contact with [Appellant] detaining the subject in furtherance of investigating said accident scene[,]" and that "[t]hese specific facts and circumstances established reasonable suspicion for the trooper that some activity out of the ordinary was occurring or had occurred, and that [Appellant] possibly was connected to that scene of the accident."

The court also found that Trooper Martinez observed Appellant walking in a staggering

[2] The State presented evidence that Appellant had a blood alcohol content of 0.203.

[3] Defense counsel asserted that he delayed consideration of the motion until trial "as a matter of strategy." Although Appellant's motion sought to exclude the facts surrounding his arrest and the results of his field sobriety tests, Trooper Martinez and the other witnesses had already testified in those areas before counsel urged the motion.

manner with his clothing in disarray and covered in dirt. There was an odor of alcohol on Appellant's person, and dirt fell from Appellant's wallet as he attempted to retrieve his driver's license from his wallet. Upon questioning, Appellant was "very uncooperative and repeated over and over, I'm not driving, I'm not driving." The trial court concluded that "this warrantless arrest is deemed proper given the totality of the circumstances based on facts and circumstances made known to the officer by the witnesses, as well as those observations, and facts and circumstances, that ultimately came within the officer's personal knowledge as well."

MOTION TO SUPPRESS

In his first issue, Appellant contends the trial court abused its discretion in denying his motion to suppress because Trooper Martinez detained and later arrested him "without any reasonable, articulated reason or objective standard[.]" The gravamen of this complaint appears to be that because no one actually saw him driving the truck, Trooper Martinez could not reasonably infer that he was the driver and thus did not have reasonable suspicion to detain him or probable cause to arrest him.

Standard of Review

We review a trial court's ruling refusing to suppress evidence for an abuse of discretion. *Crain v. State,* 315 S.W.3d 43, 48 (Tex.Crim.App. 2010); *Ramos v. State,* 245 S.W.3d 410, 417-18 (Tex.Crim.App. 2008). When a trial court makes explicit fact findings, we determine whether the evidence, viewed in the light most favorable to the trial court's ruling, supports the findings. *Johnson v. State,* 414 S.W.3d 184, 192 (Tex.Crim.App. 2013); *State v. Kelly,* 204 S.W.3d 808, 818 (Tex.Crim.App. 2006). We apply a bifurcated standard of review under which the trial court's determinations of historical facts and mixed questions of law and fact that rely on credibility are

granted almost total deference when supported by the record, but mixed questions of law and fact that do not depend on the evaluation of credibility and demeanor are reviewed *de novo.* *Johnson*, 414 S.W.3d at 192; *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex.Crim.App. 2013). We will uphold the trial court's ruling so long as it is correct under any theory of law applicable to the case, even if the trial court did not rely on that theory. *Leming v. State*, 493 S.W.3d 552, 562 (Tex.Crim.App. 2016); *State v. Esparza*, 413 S.W.3d 81, 85 (Tex.Crim.App. 2013).

The Detention

Under the Fourth Amendment, a warrantless detention that amounts to less than a full-blown custodial arrest must be justified by reasonable suspicion. *Leming*, 493 S.W.3d at 562 (citing *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex.Crim.App. 2011)). Reasonable suspicion exists if the officer has "specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity." *Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex.Crim.App. 2015) (quoting *Abney v. State*, 394 S.W.3d 542, 548 (Tex.Crim.App. 2013)). This standard is an objective one that disregards the actual subjective intent of the arresting officer and looks instead to whether there was an objectively justifiable basis for the detention. *Leming*, 493 S.W.3d at 562 (citing *Derichsweiler*, 348 S.W.3d at 914). It also looks to the totality of the circumstances, and while those circumstances may all seem innocent in isolation, if they combine to reasonably suggest the imminence of criminal conduct, an investigative detention is justified. *Id*. The question is not whether Appellant was guilty of a traffic offense but whether the trooper had a reasonable suspicion that he was. *See Jaganathan*, 479 S.W.3d at 247. "A determination that reasonable suspicion exists . . . need not rule out the

possibility of innocent conduct." *Id*. at 248 (quoting *United States v. Arvizu*, 534 U.S. 266, 277, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002)). The reasonable suspicion standard "accepts the risk that officers may stop innocent people." *Id*. (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)). The mere possibility that an act is justified will not negate reasonable suspicion. *Id*.

Appellant argues that Trooper Martinez could not have had reasonable suspicion that he had engaged in criminal activity because neither he nor the witnesses saw him actually driving the vehicle. He contends the trooper's assumption is merely a subjective characterization lacking any objective facts to support a rational inference that he was the driver. We disagree. Trooper Martinez was in possession of specific articulable facts at the time he detained Appellant from which he could rationally infer that Appellant was the driver of the truck.[4] Martinez himself observed the truck nose down in the ditch, and the witnesses told him what they had observed. Martinez then found Appellant walking in the area and wearing the clothes identified by the witnesses.

The detaining officer need not be personally aware of every fact that objectively supports a reasonable suspicion to detain. *Leming*, 493 S.W.3d at 562 (citing *Derichsweiler*, 348 S.W.3d at 914). Information provided to police from a citizen-informant who identifies himself and may be held to account for the accuracy and veracity of his report may be regarded as reliable. *Id.* In such a scenario, the only question is whether the information that the known citizen-informant provides, viewed through the prism of the detaining officer's particular level of knowledge and experience, objectively supports a reasonable suspicion to believe that criminal activity is afoot.

[4] Appellant contends that he was detained the moment Trooper Martinez asked him to stand in front of his patrol car and he submitted to his authority. The State does not contest the characterization, and the trial court's findings and conclusions establish that the court determined that is when the detention began.

Id. at 562-63 (citing *Derichsweiler*, 348 S.W.3d at 914-15). We conclude the facts the witnesses provided to Trooper Martinez could be regarded as reliable because the witnesses not only identified themselves, but remained at the scene to assist in locating and identifying Appellant. We also conclude that at the time Trooper Martinez detained Appellant, he was in possession of specific articulable facts--including those within his personal knowledge and those obtained from the reliable witnesses -- from which he could make rational inferences that would lead him to reasonably suspect that Appellant had been driving the vehicle.

There was also an independent basis to support Appellant's initial detention. The trial court concluded that Martinez detained Appellant "in furtherance of investigating said accident scene."[5] Law enforcement officers have the authority to investigate car accidents. *Alonzo v. State*, 251 S.W.3d 203, 208 (Tex.App. – Austin 2008, pet. ref'd); *Rodriguez v. State*, 191 S.W.3d 428, 444 (Tex.App. – Corpus Christi 2006, pet. ref'd); *Maxcey v. State*, 990 S.W.2d 900, 903 (Tex.App. – Houston [14th Dist.] 1999, no pet.); *see* TEX. TRANSP. CODE ANN. § 550.041(a) (West 2011). Once a peace officer is dispatched to an accident scene, he has a duty to investigate and determine if the accident caused injury or property damage over $1,000. *See* TEX. TRANSP. CODE ANN. § 550.062 (West 2011). This duty provides an independent basis to deem the investigation of the accident reasonable and supports the legality of an investigative detention at its inception. *See, e.g., Alonzo*, 251 S.W.3d at 208; *Rodriguez*, 191 S.W.3d at 444; *Maxcey*, 990 S.W.2d at 903.

Additional information obtained while conducting the accident investigation, can justify further detention. *Alonzo*, 251 S.W.3d at 208-09. While investigating whether Appellant had a

[5] We note that the trial court did not conclude that the facts established a reasonable suspicion that Appellant was driving while intoxicated, but rather concluded more broadly that the facts established a reasonable suspicion "that some activity out of the ordinary was occurring or had occurred, and that [Appellant] possibly was connected to that scene of the accident."

connection to the truck crashed in the ditch, Trooper Martinez observed that Appellant was "walking in a staggering manner," he was wearing clothes described by the witnesses, his clothes were in disarray, he was covered in dirt, an odor of alcohol was emanating from his person and breath, his skin exhibited contusions and marks consistent with driving and wearing a seat belt, and the registered address for the truck matched the address on Appellant's driver's license. These additional facts supported a reasonable suspicion that Appellant had been engaged in criminal activity and justified his continued detention.

The Arrest

In Texas, a lawful warrantless arrest requires both probable cause for the arrest and statutory authorization under Chapter 14 of the Texas Code of Criminal Procedure. *Torres v. State*, 182 S.W.3d 899, 901 (Tex.Crim.App. 2005). Probable cause for a warrantless arrest exists if, at the time the arrest is made, the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man to believe that the arrested person had committed or was committing an offense. *Amador v. State*, 275 S.W.3d 872, 878 (Tex.Crim.App. 2009); *see also State v. Woodard*, 341 S.W.3d 404, 412 (Tex.Crim.App. 2011). "The test for probable cause is an objective one, unrelated to the subjective beliefs of the arresting officer, and it requires a consideration of the totality of the circumstances facing the arresting officer." *Amador*, 275 S.W.3d at 878.

Appellant contends Trooper Martinez lacked probable cause when he arrested him for DWI. We will not repeat the facts we have carefully outlined which refute his argument. Appellant focuses on the fact that Trooper Martinez and the witnesses did not personally see him driving his truck. While he addresses this perceived deficiency as a lack of probable cause, his

argument goes more directly to the statutory arrest requirements contained in Chapter 14 of the Code of Criminal Procedure, and specifically to Article 14.01, which authorizes a peace officer to arrest an offender without a warrant for an offense committed in his presence or within his view. TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (West 2015). Chapter 14, however, contains exceptions to this "presence or view" requirement. Article 14.03(a)(1) provides that a peace officer may arrest, without a warrant, a person found in a suspicious place and under circumstances reasonably showing that he committed a "breach of the peace[.]" TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (West Supp. 2016). Driving while intoxicated is a breach of the peace under Article 14.03(a)(1). *Gallups v. State,* 151 S.W.3d 196, 201 (Tex.Crim.App. 2004) (citing *Romo v. State,* 577 S.W.2d 251, 253 (Tex.Crim.App. 1979)); s*ee also Patel v. State,* No. 08-13-00311-CR, 2015 WL 6437413, at *4 (Tex.App. – El Paso Oct. 23, 2015, no pet.) (not designated for publication) ("Driving while intoxicated is a breach of the peace under Article 14.03(a)(1)."); *Perez v. State,* No. 10-09-00022, 23, 24-CR, 2010 WL 3342009, at *3 (Tex.App. – Waco Aug. 25, 2010, no pet.) (mem. op., not designated for publication) ("DWI is a breach of the peace."). Consequently, probable cause to arrest a person for DWI may exist if the officer finds the arrestee in circumstances indicating that the arrestee committed the offense, even though the officer did not witness the arrestee driving a vehicle. *State v. Rudd,* 255 S.W.3d 293, 300 (Tex.App. – Waco 2008, pet. ref'd).

Under Article 14.03(a)(1), we look to the totality of the circumstances. In addition to probable cause, the defendant must be found in a "suspicious place." *Dyar v. State*, 125 S.W.3d 460, 468 (Tex.Crim.App. 2003). Whether a place is suspicious is a highly fact-specific inquiry. *Id.* Any place may become suspicious when an individual at the location and the accompanying

circumstances raise a reasonable belief that the individual committed a crime. *Id.* at 464–68; *Perez*, 2010 WL 3342009, at *3; *Gallups*, 151 S.W.3d at 201.

Numerous courts have found a warrantless arrest made under similar circumstances to be valid under Article 14.03(a)(1).[6] For example, in *Layland v. State*, 144 S.W.3d 647 (Tex.App. – Beaumont 2004, no pet.) (per curiam), the arresting officer arrived at the scene of a single-vehicle automobile accident where the vehicle had left the road and landed in a ditch. *Id.* at 649-50. The driver was not at the scene but returned later, and the officer noticed she was unsteady on her feet and showed other signs of intoxication. *Id.* The officer performed field sobriety tests which the driver performed poorly. *Id.* The officer determined the driver was intoxicated and took her into custody. *Id.* at 649. The driver claimed her warrantless arrest was improper. *Id.* at 650. The court of appeals concluded that under the totality of the circumstances, the facts made the location a "suspicious place," and also provided probable cause for the officer to believe that the defendant had been drinking and driving, thereby making the warrantless arrest valid and the subsequent statements admissible. *Id.* at 650.

Likewise, Trooper Martinez arrived at the scene of the single-car accident and found a truck registered to Appellant that had left the road and landed tail-up in a ditch. Appellant was not at the scene but was discovered nearby, where Trooper Martinez observed signs of intoxication. Under the totality of the circumstances, Appellant was found in a "suspicious place" and the facts provided probable cause for Trooper Martinez to believe Appellant had been drinking and driving. Appellant's warrantless arrest for driving while intoxicated -- a breach of the peace -- was

[6] *See, e.g.*, *Gallups*, 151 S.W.3d at 201; *Dyar*, 125 S.W.3d at 468; *Perez*, 2010 WL 3342009, at * *2–3; *State v. Wrenn*, No. 05-08-01114-CR, 2009 WL 1942183, at *3 (Tex.App. – Dallas July 8, 2009, no pet.) (mem. op., not designated for publication); *see also Peters v. Tex. Dep't of Public Safety*, No. 05-05-00103-CV, 2005 WL 3007783, at *2 (Tex.App. – Dallas Nov. 10, 2005, no pet.) (mem. op.).

permitted under Article 14.03(a)(1), although neither Martinez nor the witnesses had personally observed Appellant driving the vehicle. We overrule Issue One.

CHARGE ERROR

In his second issue, Appellant complains the trial court included language in its Article 38.23 instruction that improperly commented on the weight of the evidence. Article 38.23 prohibits the admission of illegally-obtained evidence and requires that where a fact issue is raised as to whether evidence was obtained in violation of the Constitution or laws of the United States or the State of Texas, "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005).

Standard of Review

Appellate review of charge error involves a two-step process. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex.Crim.App. 2012). First, we determine whether error occurred; if error did not occur, our analysis ends. *Phillips v. State*, 463 S.W.3d 59, 64 (Tex.Crim.App. 2015); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005). Second, if error occurred, we then evaluate whether sufficient harm resulted from the error to require reversal. *Phillips*, 463 S.W.3d at 64-65; *Ngo*, 175 S.W.3d at 743.

Analysis

Appellant requested that an Article 38.23 instruction be included in the charge "with respect to the detention, search, stop issues that arose during testimony." The trial court ultimately submitted an instruction informing the jury that if it did not find beyond a reasonable

doubt that Trooper Martinez reasonably believed that Appellant was driving a vehicle possibly involved in a motor accident, it was not to consider any evidence obtained by Trooper Martinez after making "an unlawful stop," which in this case would require a finding of not guilty:

> You are instructed that no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or the Constitution or laws of the United States of America, shall be admitted in evidence against the accused in the trial of any criminal case.
>
> You are further instructed that no evidence obtained by an officer as the result of an unlawful stop and detention is admissible against the defendant. An officer is permitted to make a temporary investigative detention of a motorist if that officer has reasonable suspicion to believe that the motorist has been involved in some activity out of the ordinary in violation of the law. *One such activity would be possible involvement in a motor vehicle accident.*
>
> Before you may consider whether the evidence supports the defendant's guilt of the offense of driving while intoxicated, you must first determine whether the State has proven, beyond a reasonable doubt, that (1) Trooper Daniel Martinez reasonably believed that (2*) the defendant, Luis Gonzalez, was driving a vehicle possibly involved in a motor vehicle accident.*
>
> If you find both (1) and (2) beyond a reasonable doubt, then you will next consider whether the State's evidence has proven the elements of the offense of driving while intoxicated.
>
> If you do not find both (1) and (2) beyond a reasonable doubt, then you will not consider any evidence that was obtained by Trooper Daniel Martinez after making an unlawful stop. In this case, you must find the defendant "not guilty" if you find that Trooper Daniel Martinez made an unlawful stop of the Defendant. [Emphasis added].

The trial court overruled Appellant's objections to the italicized sentences above. Appellant objected that the first italicized sentence constituted a comment on the weight of the evidence and that the second would confuse the jury and constituted a comment on the weight of the evidence.

The Code of Criminal Procedure provides that, with certain exceptions, the jury is the exclusive judge of the facts proved and of the weight to be given to the testimony, and that the judge must not comment on the weight of the evidence or convey his opinion of the case to the jury. TEX. CODE CRIM. PROC. ANN. arts. 38.04-.05 (West 1979). Article 36.14 provides that in submitting the charge to the jury, the judge must not express any opinion as to the weight of the evidence. *Id.* at art. 36.14 (West 2007). A charge that assumes the truth of a controverted issue is a comment on the weight of the evidence and is erroneous. *Whaley v. State*, 717 S.W.2d 26, 32 (Tex.Crim.App. 1986); *Molinar v. State*, 910 S.W.2d 572, 584 (Tex.App. – El Paso 1995, no pet.). Also a charge that improperly singles out certain testimony constitutes an improper comment on the weight of the evidence. *See Bartlett v. State*, 270 S.W.3d 147, 152 (Tex.Crim.App. 2008); *Hawkins v. State*, 656 S.W.2d 70, 73 (Tex.Crim.App. 1983).

In three specific instances, however, "a trial court may single out a particular item of evidence in the jury instruction without signaling to the jury an impermissible view of the weight (or lack thereof) of that evidence." *Bartlett*, 270 S.W.3d at 151; *see also Lucio v. State*, 353 S.W.3d 873, 876 (Tex.Crim.App. 2011). One instance occurs when a jury is permitted to determine the admissibility of evidence under Article 38.23. When an Article 38.23 instruction is given, it is essential that the jury be instructed about the exact evidence in question, because, in the absence of such instruction, the jury cannot make the necessary admissibility determination regarding the evidence. *Bartlett*, 270 S.W.3d at 151 (citing *Atkinson v. State*, 923 S.W.2d 21, 25 (Tex.Crim.App. 1996)). "While this procedure may have the incidental effect of emphasizing certain evidence to the jury, that consequence simply cannot be avoided in a system which vests the jury with authority to decide some questions of admissibility." *Id.* (quoting *Atkinson*, 923

S.W.2d at 25). The law authorizes the singling out of particular evidence in this instance, and the trial court does not violate Article 38.23 in doing so. *Id.*

In fact, the first requirement for obtaining a jury instruction under Article 38.23, is for the defendant to request an instruction "on a specific historical fact or facts."[7] *Madden v. State*, 242 S.W.3d 504, 511 (Tex.Crim.App. 2007). Here, the instruction properly identified and limited its application to a specific historical fact -- whether Appellant was driving a vehicle possibly involved in a motor accident -- and properly instructed the jury that it was required to first determine whether the State had met its burden of proving that Trooper Martinez had a reasonable belief that Appellant was driving a vehicle possibly involved in a motor vehicle accident before it could consider whether Appellant was guilty of DWI. The instruction was not a comment on the weight of the evidence and properly informed the jury of the specific historical fact in question, as it was required to do, and appropriately permitted the jury to make an admissibility determination under Article 38.23. We overrule Issue Two and affirm the judgment of the trial court below.

ANN CRAWFORD McCLURE, Chief Justice

June 7, 2017

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

(Do Not Publish)

[7] The Court of Criminal Appeals has provided an example of a specific, fact-based Article 38.23 instruction in *Oursbourn v. State*, 259 S.W.3d 159, 173-74 (Tex.Crim.App. 2008) ("Do you believe that Officer Obie held a gun to the defendant's head to extract his statement? If so, do not consider the defendant's confession.").