Affirmed and Memorandum Opinion filed April 15, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00823-CR

DURON WAYNE BOOTHE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 1500181

MEMORANDUM OPINION

Appellant, Duron Wayne Boothe, pleaded guilty to the misdemeanor offense of driving while intoxicated ("DWI"). In a single issue, appellant argues the trial court erred in denying his motion to suppress. Because the dispositive issues are settled in Texas law, we issue this memorandum opinion and affirm the trial court's judgment. Tex. R. App. P. 47.4.

I. BACKGROUND[1]

On the morning of January 1, 2008, Officer Belwin Bolden of the Houston Police Department was driving a police van when the driver of a vehicle carrying passengers behind him (the "complaining individuals") began flashing headlights and sounding the horn. The complaining individuals pulled beside Officer Bolden and motioned for him to stop.

The complaining individuals informed Officer Bolden that the driver of another vehicle which had struck their vehicle was chasing them. Officer Bolden described the demeanor of the complaining individuals as "pretty startled and shaken." While he was speaking with the complaining individuals, appellant arrived, driving his vehicle on the wrong side of the road. The complaining individuals recognized appellant's vehicle as the one involved in the chase.

According to Officer Bolden, appellant parked in the middle of the street, exited his vehicle, and hastily walked toward Officer Bolden. Because of the manner of appellant's approach and the uncertainties of the situation, Officer Bolden pointed his gun at appellant, told him to turn around, and placed him in handcuffs. Officer Bolden testified that appellant was agitated, had glossy eyes, and slurred his speech. Officer Bolden told appellant he was being detained for investigative purposes. When Officer Bolden asked appellant to explain the situation, he stated several times, "[You] wouldn't understand." Officer Bolden smelled "a strong odor of alcohol emitting from" appellant and asked if he had been drinking. Appellant responded that he had consumed seven mixed drinks and was "just coming" from a club. Officer Bolden summoned a DWI Task Force unit and

[1] Ordinarily, review of a motion to suppress is confined to the facts and evidence presented at the suppression hearing. *See Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996). Here, the trial court allowed appellant a running objection regarding admission of the evidence he sought to suppress. Therefore, we will consider testimony given at both the suppression hearing and trial. *See Weaver v. State*, 265 S.W.3d 523, 533, 535 n. 4 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (considering trial testimony during review of pre-trial motion to suppress because appellant reurged suppression following the trial testimony). Nevertheless, our disposition would remain the same even if we refused to consider the trial testimony, and we consider the findings of fact and conclusions of law dictated by the trial court at the end of the pre-trial suppression hearing.

instructed appellant to sit on the curb. According to Officer Bolden, appellant was not under arrest at this point.

Between five and ten minutes later, Officers Michael Schwartzengraber and Danny Flores arrived.[2] Officers Schwartzengraber and Flores were in the process of investigating a "shots fired" call when they were informed that the person who made the "shots fired" call might be at Officer Bolden's location. Officer Schwartzengraber saw appellant sitting on the sidewalk with his hands handcuffed behind his back. Appellant was "very, very angry" and was yelling and swearing at the officers who were speaking with him. Appellant stated, "Why have you guys got me handcuffed? You know, [t]hey're the ones . . . shooting at me," apparently referring to the complaining individuals. Officer Schwartzengraber believed appellant needed to be detained because he was uncooperative and belligerent; he explained that belligerent people are detained for their own safety and the safety of the officers.

Officer Schwartzengraber stated that appellant required assistance to stand up and walk to the patrol car. Officer Schwartzengraber testified that he placed appellant in the backseat of the patrol car and interviewed him; the patrol car door was left open during the interview. Officer Schwartzengraber did not give appellant *Miranda*[3]warnings prior to the interview. Officer Schwartzengraber asked appellant for his version of the events. Appellant responded that the complaining individuals had "cut him off," he exchanged words and gestures with them at an intersection, and he began following them after hearing gunshots. While Officer Schwartzengraber was still standing next to the patrol car, appellant began repeatedly stating that Arab-Americans did not "belong in this country" and that he was trying to "get rid of them out of our country." According to Officer Schwartzengraber, the complaining individuals were of Arab ethnicity. While he was questioning appellant in the patrol car, Officer Schwartzengraber noticed the odor of

[2] Officer Schwartzengraber was not a member of the DWI Task Force.

[3] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966).

alcohol. He also observed that appellant slurred his speech and had glossy eyes. Officer Schwartzengraber concluded appellant was intoxicated, but explained that field sobriety tests were not performed because of appellant's uncooperative attitude. Appellant was then taken to the police station "Intox room."

After appellant was charged with DWI, he filed a pre-trial motion to suppress the statements he made to the officers. Following a hearing, the trial court denied appellant's motion and orally pronounced its findings of fact and conclusions of law.[4] Trial began, but after several of the State's witnesses testified, appellant changed his plea from "not guilty" to "guilty" pursuant to a plea agreement. In consideration for appellant's guilty plea, the prosecutor agreed to drop charges against him if the appellate court reversed the trial court's ruling on the motion to suppress. The trial court accepted appellant's plea, and he was sentenced to 180-days confinement in the Harris County Jail, suspended for one year.

II. ANALYSIS

In his sole issue, appellant contends the trial court erred in denying his motion to suppress the statements made to officers because they were uttered during custodial interrogation and before he was given warnings required under the United States Constitution and article 38.22 of the Texas Code of Criminal Procedure.[5]

A. Standard of Review and Applicable Law

We review a trial court's ruling on a motion to suppress evidence under a bifurcated

[4] In reviewing a motion to suppress, oral findings of fact and conclusions of law may be considered with appropriate deference to the trial court. *See State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006). It is clear from the record that the trial court intended its oral statements to serve as its findings and conclusions, but the court also asked the State to file supplemental findings of fact and conclusions of law. However, no supplemental findings and conclusions appear in the record, and nothing indicates that appellant requested the trial court to supplement its findings. Hence, we consider and give deference to the trial court's oral findings of fact and conclusions of law.

[5] Although appellant asserts error under both the United States and Texas constitutions, he does not indicate how his rights under the Texas Constitution are different from those under the federal constitution. As a result, we decline to address appellant's state constitutional argument. *See Arnold v. State*, 873 S.W.2d 27, 33 & n. 4 (Tex. Crim. App. 1993).

standard of review. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Champion v. State*, 919 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). The trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented. *Id.* We give almost total deference to the trial court's determination of historical facts that depend on credibility and demeanor, but review *de novo* the trial court's application of the law to the facts if resolution of those ultimate questions does not turn on the evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

An accused must generally be in custody before he is entitled to *Miranda* warnings. *See Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. "'[A] person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest.'" *Herrera v. State*, 241 S.W.3d 520, 525 (Tex. Crim. App. 2007) (quoting *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)). This inquiry includes an examination of all the objective circumstances surrounding the questioning. *Id.* The "reasonable person" standard presupposes an innocent person, and the subjective intent of a police officer is irrelevant unless communicated or manifested to the suspect. *Dowthitt*, 931 S.W.2d at 254. The Court of Criminal Appeals has stated four general situations that may constitute custody:

> (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.

Id. at 255. In the first three situations, the restriction on freedom must be to the degree associated with an arrest, rather than that involved in an investigative detention. *Id.* As to the fourth situation, the officer's knowledge of probable cause must be manifested to the suspect. *Id.* "Such manifestation could occur if information substantiating probable

cause is related by the officers to the suspect or by the suspect to the officers." *Id.* "[S]ituation four does not automatically establish custody; rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest." *Id.*

B. Analysis

1. Appellant's Statement to Officer Bolden

Appellant first contends his statement that he had consumed "seven mixed drinks" and "just left the club" occurred during a custodial interrogation before he was given the constitutionally and statutorily-required warnings. According to appellant, he was in custody because Officer Bolden (1) witnessed appellant commit traffic violations, (2) observed he was agitated, had slurred speech and glossy eyes, and smelled of alcohol, and (3) placed him in handcuffs.[6] Appellant argues any reasonable person in the same situation would believe his "freedom of movement was restrained to the degree associated with formal arrest."

Indeed, the use of handcuffs limited appellant's freedom of movement. However, under *Dowthitt*, the restriction of freedom must be to the degree associated with an arrest, rather than that involved in an investigative detention. *Id.* Officer Bolden was flagged down by frantic individuals who exclaimed that someone who struck their vehicle with his vehicle was chasing them. Appellant then arrived, driving on the wrong side of the road, parked in the middle of the street, and hastily walked toward Officer Bolden. Officer Bolden pointed his gun at appellant and placed him in handcuffs. Importantly, Officer Bolden told appellant "he was just being detained until I sort things out and investigate what was going on that night." Officer Bolden said nothing about the traffic violations.

[6] In his brief, appellant also asserts that Officer Bolden testified that he told appellant "he was not free to leave." However, while Officer Bolden admitted that appellant was not free to leave, the record does not reflect that he manifested this intent; instead, Officer Bolden told appellant he was being detained for investigative purposes. *See Dowthitt*, 931 S.W.2d at 254 (explaining that an officer's intentions are relevant only to the extent they are manifested to the suspect).

After the detention, Officer Bolden observed that appellant had slurred speech and glossy eyes. He asked appellant what had occurred, but appellant stated several times, "[You] wouldn't understand." Officer Bolden smelled the odor of alcohol emitting from appellant which, coupled with his behavior, caused him to suspect appellant was intoxicated. He asked appellant if he had been drinking, and appellant replied that he had consumed seven mixed drinks and "just left" a club.

Considering all the circumstances preceding appellant's statement regarding the number of drinks he had consumed, a reasonable person would not feel under restraint to the degree associated with a formal arrest, even though he was in handcuffs, because Officer Bolden explicitly informed appellant he was being temporarily detained for investigative purposes. *See Turner v. State*, 252 S.W.3d 571, 580 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd), *cert. denied*, 129 S. Ct. 1325 (2009); *Bartlett v. State*, 249 S.W.3d 658, 670 (Tex. App.—Austin 2008, pet. ref'd) ("An officer's subjective views may be relevant to the custody determination to the extent they are communicated and would affect a reasonable person's understanding of his freedom of action."). Furthermore, Officer Bolden's question regarding whether appellant had been drinking was a reasonable investigative inquiry considering appellant's behavior. Accordingly, the trial court did not err in denying appellant's motion to suppress this statement.

2. Appellant's Statement to Officer Schwartzengraber

We next review whether appellant's derogatory statements regarding Arab-Americans occurred during custodial interrogation. In it oral findings of fact and conclusions of law, the trial court expressed that these statements were not made in response to any interrogation, but were volunteered: "While the second officer asked defendant what happened, the defendant was in a - - continued to discuss and volunteered information about [the complaining individuals], their possible nationality and background, his anger about what happened on the street and so forth." On appeal, neither party addresses whether these statements were volunteered. However, we sustain the trial court's admission of evidence if the ruling is reasonably supported by the record and

correct on any theory of law applicable to the case. *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003).

Under both the Fifth Amendment and article 38.22, voluntary statements not made in response to police interrogation are admissible. *Ruth v. State*, 167 S.W.3d 560, 570 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

Here, Officer Schwartzengraber asked appellant to give his version of what occurred that morning. Appellant responded that the complaining individuals "cut him off," he exchanged words and gestures with them at an intersection, and then followed them after hearing gunshots. According to Officer Schwartzengraber, while he was "still standing" next to the patrol car, appellant "just started into talking" and he repeatedly stated that Arab-Americans did not "belong in this country" and that he was trying to "get rid of them out of our country." Officer Schwartzengraber testified that, prior to these utterances, he did not ask appellant why he was engaged in an altercation, but only asked what happened between appellant and the complaining individuals.

Viewing the evidence in the light most favorable to the trial court's ruling, this testimony supports the court's ruling that appellant's statements were volunteered, *i.e.*, the statements were not given in response to Officer Schwartzengraber's question concerning what had occurred. We acknowledge that appellant made the derogatory statements within a relatively brief, but unspecified, amount of time after he answered Officer Schwartzengraber's question, and while Officer Schwartzengraber was still nearby. We also acknowledge that explaining his rationale for chasing the complaining individuals is arguably responsive to Officer Schwartznegraber's question. Nevertheless, because appellant had completed his response to the question, had been behaving belligerently, and demonstrated a propensity for yelling, it is not unreasonable to conclude that he volunteered the derogatory statements. *See Manzi v. State*, 88 S.W.3d 240, 243 (Tex. Crim. App. 2002) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Accordingly, the trial

court did not err by denying appellant's motion to suppress the derogatory statements.[7]

We overrule appellant's sole appellate issue and affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.

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[7] Because we hold that these statements were volunteered, we need not reach the issue of whether appellant was under arrest at that time. *See Kelly v. State*, No. 14-04-00619-CR, 2005 WL 3071946, at *2 (Tex. App.—Houston [14th Dist.] Nov. 17, 2005, no pet.) (mem. op., not designated for publication) ("When an accused in custody spontaneously volunteers information not in response to earlier interrogation by authorities, the statement is admissible . . . .").