Affirmed and Memorandum Opinion filed August 17, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00273-CR

ALEXANDRA LEIGH DENKOWSKI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Cause No. 2031735

M E M O R A N D U M O P I N I O N

Appellant Alexandra Leigh Denkowski challenges her conviction for driving while intoxicated ("DWI"). She contends the trial court erroneously denied her motion to suppress evidence because (1) she was subjected to an illegal citizen's

arrest, and (2) a police officer subsequently elicited incriminating custodial statements from her absent *Miranda*[1] warnings.

We conclude, given the present circumstances, probable cause existed to believe appellant committed the offense of DWI. Assuming without deciding that appellant was arrested by a citizen—in this case, a private neighborhood security guard—any arrest was reasonable and lawful. Further, to the extent the trial court erroneously admitted incriminating statements appellant made during a custodial interrogation, any error was harmless. Accordingly, we affirm the judgment.

Background

Shortly after 1:00 a.m. on June 17, 2015, Kenneth Landry, a private security officer for the River Oaks Patrol ("ROP"), drove past a car blocking the driveway of a home in Houston's River Oaks neighborhood. Landry was not a certified peace officer but, at the time of this encounter, had been employed by ROP for over twenty years and was familiar with the area and its residents.

Landry did not see anyone in the car as he drove past. Because he did not believe the car should be there at that time of night, he looped around and returned to the location, which took about three minutes. In the meantime, the car had moved from its original location and Landry followed its taillights. He watched as the car was driven off the street and over a curb for a distance of approximately forty yards. Then the car returned to the road and rolled to a stop. As he pulled behind the car, he saw a single tire track in the lawn by the street that ended near where the car was now stopped in the street. Landry stopped about twenty feet behind the car and noticed the brake lights were on. Landry radioed for back-up from other ROP

[1] *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *see also* Tex. Code Crim. Proc. art. 38.22.

security officers. As he waited, he activated his "rear front strobes to warn traffic" that might approach from behind. He also illuminated his front spotlight and his white "takedown" lights.

Another ROP security officer, Ramos,[2] arrived. Landry and Ramos carefully approached the vehicle. As Landry walked along the driver's side of the car, he noticed the driver's side window was rolled down. Landry could see a person, later identified as appellant, "laid over in the driver's seat." Appellant was the only person in the car. The car's engine was running and the vehicle was in "drive," but Landry could tell by the brake lights that the brakes were engaged. Landry reached "through the driver's window behind the steering wheel, grabbed the key, and turned [the car] off." Because the car was in drive, Landry had to "shove the stick into . . . park" to remove the keys from the ignition. At that point, appellant "woke up."

As appellant appeared confused, Landry asked her a series of questions, including whether she was okay and if she knew where she was or where she lived. Appellant "mumbled" in response and was unable to answer coherently. Landry described appellant as "sluggish," with "glassy looking" eyes and a "disheveled" appearance. Landry placed appellant's car keys on the roof of her car and returned to his patrol vehicle to turn off the spotlight and takedown lights. After deactivating the lights, he saw appellant emerge from her car. Landry said, "Ma'am would you, please, stay in the vehicle?" and appellant returned to her car. According to Landry, he did not want her "walking around in a public street" in the dark at 1:00 a.m. because he was concerned about her condition.

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[2] The record does not reflect whether Ramos or any other ROP security officers who later arrived at the scene were certified peace officers. Landry was the only ROP security officer to testify at appellant's trial, and the other ROP security officers played only a tangential role in the events surrounding the offense.

Meanwhile, Ramos called the Houston Police Department ("HPD") for assistance because "they're the ones that are trained in handling situations like this with the driver down. . . . They have the proper training to make the assessment to determine what help she needs." Landry "kept an eye on" appellant until an HPD officer arrived.

The preceding facts were related by Landry, who was the State's first witness. At this point in the trial, appellant requested a hearing (outside the jury's presence) on her previously filed motion to suppress evidence that Landry conducted an unlawful citizen's arrest. During the hearing, Landry testified that although he was initially unsure whether appellant was asleep or intoxicated when he saw her slumped over in her car, he ultimately concluded she was intoxicated. He formed this opinion because she was unable to answer questions coherently; she was very confused and exhibited physical signs of potential intoxication such as slurred speech and "glassy looking" eyes; she did not know where she was or where she was going; and she could not tell Landry where she lived.

Landry also testified regarding whether appellant's freedom of movement was limited. Though Landry removed the keys from appellant's vehicle, he did not "physically detain her in any way, shape, or form" and appellant "could have reached on the roof of her car, removed the keys, put them back in the ignition, and drove [sic] away at any time," which Landry "would not have been able to stop." According to Landry, his encounter with appellant was not violent and she made no violent threats, but the situation could have become dangerous if appellant had driven away after Landry determined she was likely intoxicated. When asked whether he thought appellant knew that she could have left, Landry responded, "I don't think she was aware of much." At this point, the trial court denied the motion to suppress without making findings.

HPD Officer Cody Jarboe testified next. Officer Jarboe is a certified DWI officer who has conducted many DWI investigations. He arrived at the scene just before 2:00 a.m. Officer Jarboe spoke with appellant, whom he described as exhibiting bloodshot eyes, slurred speech, an inability to stand without swaying, and emanating a strong odor of alcohol.[3] Appellant told Officer Jarboe that she consumed a bottle of whiskey and a beer in the preceding hours, taking her first drink at around 11:30 p.m. the evening before and her last drink at around 12:10 a.m. that morning. She also told Officer Jarboe that she had last eaten at around 11:00 a.m. the morning before. Officer Jarboe administered the horizontal gaze nystagmus test, during which he noted six out of six clues of intoxication. He was unable to perform other standardized field sobriety tests at the scene, so he transported appellant to "central intox" to complete his DWI investigation.

At central intox, Officer Jarboe instructed appellant on the "walk-and-turn" and the "one-leg-stand" tests. Appellant performed both of these tests. Officer Jarboe observed four out of eight clues of intoxication on the walk-and-turn test and one out of four clues of intoxication on the one-leg-stand test. According to Officer Jarboe, displaying more than two clues on the walk-and-turn test indicates intoxication. However, Officer Jarboe acknowledged that appellant "passed" the one-leg-stand test. After completing the field sobriety testing, Officer Jarboe arrested appellant for DWI and advised appellant of her rights under *Miranda*. Appellant provided a breath specimen at approximately 3:00 a.m. and testing revealed her alcohol concentration to be 0.126, well above the legal limit of 0.08.[4]

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[3] Landry did not detect an odor of alcohol. However, he testified that his sense of smell is "messed up," and he cannot smell alcohol.

[4] *See* Tex. Penal Code § 49.01 (defining "intoxicated" as, relevantly, having an alcohol concentration of 0.08 or more).

Based on a retrograde extrapolation analysis, appellant's alcohol concentration was at least 0.141 at the time she was driving.

A jury convicted appellant of Class B misdemeanor DWI. The trial court assessed punishment at confinement in Harris County jail for six days and a $750 fine, as well as a one-year suspension of appellant's driver's license. Appellant filed a motion and an amended motion for new trial, by which she sought to set aside her conviction because Landry (1) unlawfully arrested her and (2) she was not given statutory warnings before making incriminating statements to Officer Jarboe. The trial court denied the motions and stated findings on the record. This appeal timely followed.

Motion to Suppress

In her first two issues, appellant claims that Landry, a private citizen, illegally arrested her and thus the fruits of that arrest, including her statements to Officer Jarboe, should have been suppressed. These issues raise two fundamental questions: whether Landry's conduct constituted an "arrest" and, if so, whether such a citizen's arrest was lawful under the present facts. The parties commit substantial portions of their respective briefing to whether Landry's conduct constituted a citizen's arrest. However, based on the present record, we need not decide that question. Assuming Landry arrested appellant, we conclude his conduct was lawful because appellant committed in Landry's presence or view an offense against the public peace. *See* Tex. Code Crim. Proc. art. 14.01(a). Thus, we begin our analysis on appellant's second issue.

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App.

2013). We review the trial court's factual findings for an abuse of discretion, but review the trial court's application of the law to the facts de novo. *Id.* Our deferential review of the trial court's factual determinations, *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010), also applies to the trial court's conclusions regarding mixed questions of law and fact that turn on credibility or demeanor. *State v. Ortiz*, 382 S.W.3d 367, 372 (Tex. Crim. App. 2012). We review mixed questions of law and fact that do not turn on credibility and demeanor, as well as purely legal questions, de novo. *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011).

The trial court is the sole trier of fact and judge of witness credibility and the weight to be given their testimony. *Valtierra*, 310 S.W.3d at 447. When the trial court makes explicit findings of fact, we determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports the fact findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). If the trial court fails to make a particular finding, we imply a fact finding to support the trial court's ruling when the evidence supports the implied finding. *See Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007). We afford the prevailing party the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013). We will uphold the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014).

B. Probable Cause to Arrest for DWI

The right to arrest a person is not unfettered. *See Miles v. State*, 241 S.W.3d 28, 39 (Tex. Crim. App. 2007). In Texas, the right to arrest someone extends to both law enforcement officers and private citizens, but the right exists only in limited, statutorily authorized, circumstances. *Id.* In particular, Texas Code of Criminal

Procedure Chapter 14 speaks to warrantless arrests by private citizens: "[a] peace officer *or any other person*, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace." Tex. Code Crim. Proc. art. 14.01(a) (emphasis added)de; *see also Miles*, 241 S.W.3d at 39-40. Thus, citizens may arrest a person only for a felony or, as relevant here, an "offense against the public peace." *Miles*, 241 S.W.3d at 40. Whether an act constitutes an offense against the public peace depends on the particular circumstances of each case but requires evidence that "the person's conduct poses a threat of continuing violence or harm to himself or the public." *See id*. at 40-42.

Texas courts have long accepted DWI as an offense that is by its nature one against the public peace. *See id*. at 41-42 (holding that citizen arrests for misdemeanor DWI is permitted) (citing *Romo v. State*, 577 S.W.2d 251, 252-53 (Tex. Crim. App. 1979)). DWI poses a threat of continuing violence or harm to the suspect, the public, and any arresting or investigating person. *See id.*; *cf. also Acevedo v. State*, No. 08-07-00006-CR, 2008 WL 1976661, at *3 (Tex. App.—El Paso May 8, 2008, no pet.) (not designated for publication) (concluding that arrest by citizen was not illegal because citizen pulled Acevedo over and detained Acevedo when citizen believed, based on citizen's observations and experience, that Acevedo was intoxicated and constituted a danger to himself and others).

The State may show that a citizen's arrest is reasonable if the citizen had probable cause to believe a person committed the offense of DWI in the citizen's presence or view. *See Miles*, 241 S.W.3d at 42. Probable cause for a warrantless arrest requires the officer or citizen to have a reasonable belief that, based on the facts and circumstances within that person's personal knowledge or of which the person has reasonably trustworthy information, an offense has been or is being

committed. *See Torres v. State*, 182 S.W.3d 899, 901-02 (Tex. Crim. App. 2005); *Smith v. State*, 491 S.W.3d 864, 870 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). The test for probable cause is objective, *see Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009), and must be based on specific, articulable facts rather than the officer's or citizen's mere opinion. *Torres*, 182 S.W.3d at 902. We use the "totality of the circumstances" test to determine whether probable cause existed for a warrantless arrest. *Id*.

Again, as we are reviewing the trial court's denial of appellant's motion to suppress, we view the historical facts bearing upon whether an offense against the public peace occurred in Landry's presence in the light most favorable to the ruling. *Cf. Duran*, 396 S.W.3d at 571-72.

C. The Texas Exclusionary Rule

The Texas exclusionary rule applies to citizen arrests. *See Miles*, 241 S.W.3d at 33-36; *Melendez v. State*, 467 S.W.3d 586, 592 (Tex. App.—San Antonio 2015, no pet.). As stated in the Code of Criminal Procedure, "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Tex. Code Crim. Proc. art. 38.23(a). In applying this rule, the Texas Court of Criminal Appeals has explained, "a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do." *Miles*, 241 S.W.3d at 39.

D. Application

We turn to the present facts with the above framework in mind. During the hearings on appellant's motion for new trial and amended motion for new trial, the

trial court found that Landry had probable cause to believe appellant committed the offense of driving while intoxicated, which constituted a breach of the peace. The evidence supports the trial court's findings. Landry initially spotted appellant's vehicle stopped in front of a driveway where it did not belong. Upon circling back to the location, he followed appellant's taillights and watched as appellant's car drove over a curb for about forty yards, leaving a tire track across a lawn, then came to a stop again on the street.[5] When he approached the vehicle, he saw the driver's window rolled down and appellant unresponsive behind the steering wheel. Appellant was leaning against the door, with her foot on the brake while the engine was running and the vehicle was in drive. To protect the well-being of appellant and others, including himself, Landry reached through the open window, turned off the ignition, placed the car in park, and removed the keys to place them on the roof of the vehicle. When appellant stirred, she was confused, disheveled, displayed "glassy looking" eyes, and was unable to respond coherently to any of Landry's questions. Based on his observations, Landry formed the reasonable belief that appellant was likely intoxicated.

Assuming without deciding that Landry's conduct rose to the level of a citizen's arrest, the objective facts he observed, viewed most favorably to the ruling, support a finding that Landry had probable cause to believe appellant committed the offense of DWI, which is an offense "against the public peace." Based on the totality of the circumstances, the trial court could have determined that Landry's conduct was reasonable under the circumstances. Accordingly, the trial court did not err in denying appellant's motion to suppress.

[5] Landry did not cause appellant's vehicle to stop.

Comparable cases from this court and other courts support our holding. *See LeCourias v. State*, 341 S.W.3d 483, 489 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (holding probable cause that defendant drove while intoxicated existed when witness informed 911 dispatcher of defendant's erratic driving and defendant's performance on the field-sobriety tests was "dismal"); *Banda v. State*, 317 S.W.3d 903, 907, 910-11 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding officer possessed probable cause based on information provided by a witness who observed defendant's erratic driving, the officer's observation of defendant's slurred speech and strong odor of alcohol, and defendant's performance on field-sobriety tests); *Ruiz v. State*, 907 S.W.2d 600, 603-04 (Tex. App.—Corpus Christi 1995, no pet.) (citing *Woods v. State*, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948), and concluding that DWI defendant committed breach of peace when he drove the wrong way down the highway, placing "his own life and the lives of other motorists in danger"); *Dowell v. State*, No. 02-10-00034-CR, 2011 WL 2306818, at *3 (Tex. App.—Fort Worth June 9, 2011, no pet.) (mem. op., not designated for publication) (assuming citizen restrained appellant, citizen's arrest was appropriate because citizen observed appellant was likely driving while intoxicated); *see also Turner v. State*, 901 S.W.2d 767, 770-71 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd) (relying on *Woods* and upholding a citizen's arrest by a private security officer for an offense involving a breach of the peace when circumstances showed it was night, the apartment complex had previous incidents of criminal activity, defendant acted suspiciously, gave citizen a false name, and held up a handgun); *Crowley v. State*, 842 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (relying on *Woods* and concluding that, under particular circumstances, failure to stop and give information after traffic accident was an offense involving a breach of the peace). Appellant's behavior posed an ongoing threat of harm to herself and others. *See Miles,* 241 S.W.3d at 41 nn.66-67 (citing *Heck v. State*, 577 S.W.2d 737, 740 (Tex. Crim. App.

1974) ("Being drunk in a public place is a breach of the peace."); *Romo*, 577 S.W.2d at 252-53 (driving while intoxicated is a breach of the peace); *McEathron v. State*, 294 S.W.2d 822, 823 (Tex. Crim. App. 1956) (same)).

Advocating against this result, appellant contends that evidence of "traffic violations" is not a breach of the public peace and, thus, any arrest here was unlawful. As support, appellant cites *Kunkel v. State*, 46 S.W.3d 328, 331 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) ("simple moving violations or erratic driving" insufficient to support a citizen's arrest); *Pierce v. State*, 32 S.W.3d 247, 248 (Tex. Crim. App. 2000) (no breach of peace when defendant swerved in front of another vehicle, forcing other driver to apply brakes), and *Reichaert v. State*, 830 S.W.2d 348, 352 (Tex. App.—San Antonio 1992, pet. ref'd) (arrest for breach of peace not justified when vehicle was speeding). These cases do not support reversal of appellant's conviction. To be sure, Landry saw appellant's "moving violations" and "erratic driving," but that was not all he saw. He also observed appellant while she appeared to be passed out at the wheel of a stopped but running automobile, in drive gear; who was unable to respond coherently to basic questions; who had "glassy looking" eyes and slurred speech; who presented a confused affect and was disheveled; and who could not state where she was or where she was going. The totality of the present circumstances distinguish this case from the authority appellant cites.

For these reasons, we overrule appellant's first two issues.

Appellant's Statements to Officer Jarboe

In her third issue, appellant asserts that the trial court should have suppressed incriminating statements she made to Officer Jarboe regarding the alcohol she consumed that evening. According to appellant, she was in "custody" the moment Landry arrested her, and she remained so during Officer Jarboe's questioning at the

scene.[6] Thus, appellant continues, her statements to Officer Jarboe regarding the amount of alcohol she consumed, and when she consumed it, were inadmissible because she did not receive her statutory warnings before making those incriminating statements.

Assuming without deciding that Officer Jarboe subjected appellant to an un-*Mirandized* custodial interrogation, we believe any error in admitting appellant's statements to Officer Jarboe was harmless. Because the alleged error is constitutional in nature, we assess harm using the standard set forth in Texas Rule of Appellate Procedure 44.2(a). Under this standard, we must reverse a judgment of conviction unless we determine beyond a reasonable doubt that the trial court's constitutional error did not contribute to the conviction. Tex. R. App. P. 44.2(a). Constitutional error does not contribute to the conviction if the verdict "would have been the same absent the error." *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007) (quoting *Neder v. United States*, 527 U.S. 1, 17 (1999)). As a reviewing court, we must "calculate, as nearly as possible, the probable impact of the error on the jury in light of the record as a whole." *Wall v. State*, 184 S.W.3d 730, 746 (Tex. Crim. App. 2006). In making this calculation, we consider such factors as the nature of the error, whether the error was emphasized by the State, the probable implications of the error, and the weight the jury likely would have assigned to the error in the course of its deliberations. *See Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011). Because the error in this case relates to the admission of evidence, we consider whether the record contains other properly admitted evidence

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[6] Appellant relies on *Knot v. State*, 853 S.W.2d 802 (Tex. App.—Amarillo 1993, no pet.), to support her assertion that her statements to Officer Jarboe resulted from a custodial interrogation. Though *Knot* is distinguishable from the present facts, we nonetheless assume without deciding that appellant was subjected to a custodial interrogation by Officer Jarboe for purposes of this issue.

that supports the material fact to which the inadmissible evidence was directed. *See Wall*, 184 S.W.3d at 746.

Here, the record contains significant admissible evidence of appellant's intoxication—much of it admitted without objection—including the circumstances surrounding her encounters with Landry and Officer Jarboe, her physical condition, her performance on the field sobriety testing, and her blood-alcohol content. The evidence surrounding appellant's encounter with Landry is described above. In short, Landry saw appellant's car drive off the road for about forty yards, "bump" back onto the road, and roll to a stop. He discovered appellant slumped over on the driver's side of her car, with the car in "drive" and her foot on the brake. She was unresponsive and incoherent when questioned by Landry, and Landry believed that appellant appeared intoxicated. When Officer Jarboe arrived at the scene and began his investigation, he observed appellant swaying, slurring her speech, and emanating a strong odor of alcohol from her person. He conducted field sobriety testing on appellant; appellant displayed multiple clues of intoxication on two out of the three tests.

When appellant provided a breath specimen about two hours after Landry's first encounter, her blood alcohol content was 0.126. This evidence alone provides objective proof that appellant was intoxicated. Officer Jarboe's testimony concerning appellant's statements about what and how much she had been drinking was cumulative of this evidence; it was unlikely that this testimony swayed the jury in assessing appellant's guilt.

During closing argument, the State never referred to Officer Jarboe's testimony about appellant's statements. Instead, the State focused on the overwhelming evidence that appellant was intoxicated, as demonstrated by the circumstances surrounding Landry's encounter with her and appellant's physical

condition, including her performance on the field sobriety testing and her blood-alcohol content. All of this evidence, which is unrelated to appellant's statements concerning her consumption of alcohol, support the jury's verdict. We are confident beyond a reasonable doubt that appellant would have been convicted even disregarding the portion of Officer Jarboe's testimony about which appellant complains. *Cf. Campbell v. State*, 325 S.W.3d 223, 238-39 (Tex. App.—Fort Worth 2010, no pet.) (failure to suppress un-*Mirandized* statement of defendant that he had been drinking with friends was harmless where evidence showed that defendant had been driving recklessly, smelled of alcohol, and failed a field sobriety test).

For the foregoing reasons, assuming that the trial court erred in admitting appellant's statements concerning her consumption of alcohol, we conclude that any error was harmless. Accordingly, we overrule appellant's third and final issue.

Conclusion

We have overruled appellant's issues. We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Busby, and Jewell.
Do Not Publish — Tex. R. App. P. 47.2(b).