COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00302-CR

STEPHANIE NICHOLE SANCHEZ — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 1371415

MEMORANDUM OPINION[1]

In two points, Appellant Stephanie Nichole Sanchez appeals her conviction for driving while intoxicated (DWI). *See* Tex. Penal Code Ann. § 49.04 (West Supp. 2016). We affirm.

[1]*See* Tex. R. App. P. 47.4.

Background

On the night of March 26, 2014, Haltom City Police Officer Stephen Gilley[2] was running radar while parked in his patrol car on the on-ramp to northbound Airport Freeway. Shortly before midnight, a silver Saturn driven by Appellant passed Officer Gilley's vehicle as it entered the freeway on the same on-ramp. As the Saturn passed the patrol car, a passenger in the Saturn leaned out of the window and said, "F*** you, m*****f*****!" Officer Gilley testified that the yelling and the fact that the car was coming from downtown Fort Worth, an area with a lot of bars, led him to suspect that the driver was intoxicated, so he turned on his dashboard camera and began to follow the car. In the video, Appellant's car can be seen weaving in the far right lane of the freeway more than once and touching or partially crossing over the line on the left side of the lane at least five times.

Officer Gilley described the traffic on the freeway that night as "medium," not heavy, and Appellant's driving as unsafe because her speed was too slow—"50ish" miles per hour in a 65-mile-per-hour zone. Officer Gilley testified that he observed the vehicle weaving within the far right lane and that he pulled over the vehicle when it "went into the middle lane, [and] nearly struck another vehicle that had to make an evasive . . . action to avoid a collision with the . . . Saturn."

[2]Officer Gilley testified that he was a DWI enforcement officer with the Haltom City Police Department and had been a Haltom City police officer for almost six years at the time of trial. He additionally testified that he had specialized training in detecting intoxication, including the Advanced Roadside Impairment Detection class and multiple Standard Field Sobriety Test (SFST) classes, and had assisted in teaching the SFST class.

The video confirms that immediately prior to being pulled over, Appellant's vehicle weaved toward the left lane, that Appellant's left tire went across the dividing stripe and part of the tire—but not the entire tire—entered into the other lane. The video neither confirms nor contradicts Officer Gilley's testimony that another vehicle took evasive action in response to Appellant's movement into the adjoining lane—what nearby vehicles did or did not do was simply not depicted on the video. When Appellant's counsel cross-examined Officer Gilley about whether the tires completely crossed over the lane dividing lines, the video was played again for Officer Gilley and the court:

> Q: When you watched [the video] just now, you believe you saw her complete tire go completely over the white line?
>
> A: Yes.
>
> . . . .
>
> (State's Exhibit 1 plays.)
>
> [THE COURT:] All right. Let—Let me just . . . ask a question. Are we—Are we talking about the entire left-rear tire is in the other lane, or are we talking about that the left-hand portion of the left tire is in the other lane? I'm not clear on what we're talking about is in the other lane from your testimony.
>
> [OFFICER GILLEY:] If—if the—If any part of the tire crosses into that white line.
>
> [THE COURT:] Okay. So we're talking about—your testimony is that it is not that the entire left-rear tire is in the other lane—
>
> [OFFICER GILLEY:] Correct.

[THE COURT:] --it's that a portion of the left-rear tire is in the other lane?

[OFFICER GILLEY:] Correct.

Officer Gilley also acknowledged that there are no bars in Haltom City and that Appellant was about five or six miles away from downtown Fort Worth when he observed her vehicle entering the freeway. And, while he agreed that weaving in and out of the lane is not a violation of the traffic law, he testified that it was enough to cause "reasonable suspicion of a DWI considering the time of night, the profanities that were being yelled out the window, [and] coming from . . . an area with bars late at night."[3]

Officer Gilley pulled over Appellant, and when he approached the car he observed vomit on the back seat and on the shirt and pants of the male passenger occupying the back seat. The pants of the male seated in the front passenger seat were pulled down around his ankles. Officer Gilley testified that "[e]veryone in the vehicle appeared intoxicated" and everyone's "speech was slurred," and a "[v]ery strong odor of alcohol [was] coming out of the vehicle as soon as [he] walked up to the window." He further noticed that Appellant's eyes were "real red and watery."

[3]Officer Gilley later reiterated, "The time of night, coming from . . . the direction of known areas of—of bars, the profanities being yelled out the window, the swerving, the swerving into another person's lane causing them to swerve to the left, all those are signs of an intoxicated driver."

Appellant denied having had anything to drink. But after Officer Gilley conducted a DWI investigation, he arrested Appellant for DWI, and a breath test taken an hour after the initial detention reflected Appellant's blood alcohol level as 0.15, almost twice the legal limit.[4]

Appellant filed a motion to suppress, arguing that the initial stop was an illegal detention made without reasonable suspicion. After a hearing at which Officer Gilley testified to the above-recited facts, the trial court denied the motion to suppress.

During voir dire, Appellant's counsel told the veniremembers that the breath-testing process is "secret" and asked the panel questions about whether they felt the State should have to prove that the intoxilyzer used to conduct the breath test was working properly. The record does not provide a specific response attributable to Juror 17, but following the questioning of the panel, Appellant's counsel challenged Juror 17 for cause, arguing that he could not "follow the law and the—being the sole judge of the credibility of the witnesses in evidence" and that he was "predisposed to evidence." The court interviewed Juror 17 individually:

> THE COURT: I think we had a question about assuming that we have evidence about intoxilyzer machine and what the breath results were. If you would just believe that the machine was

[4]The legal limit is 0.08. *See* Tex. Penal Code Ann. § 49.01(2)(B) (West 2011).

operating properly and there was nothing else that you were going to hear about, just it said 08 and so, by golly, it's 08 or whatever it is.

JUROR 17: Yeah.

THE COURT: Is that—or did you—

JUROR 17: That's—

THE COURT: —think that—

JUROR 17: That's true.

THE COURT: Okay. All right. In other words, if it was a machine—

JUROR 17: It goes on every day. You know what I'm saying?

THE COURT: All right. Okay. Does anybody have any further questions of this witness?

[APPELLANT'S COUNSEL]: Not from the Defense.

[THE STATE]: Not from the State.

Juror 17 was then dismissed from the courtroom and Appellant's counsel reiterated his challenge for cause, arguing:

> If he can't wait to hear about the machine . . . before he is just predisposed to the fact that this is the machine the State uses, therefore it works, then he is not being . . . the sole judge of the credibility of the evidence. He has merely already found some evidence to be true. It's the same thing as finding a police officer's credibility more than—more than any other witnesses. They have to wait until they've heard the evidence before they can decide whether it's true or not.

The trial court overruled the objection. Appellant's counsel requested an additional peremptory strike in order to use that strike on number 17 and his request was denied. The parties then took a break to make their peremptory strikes, and when they returned, Appellant's counsel renewed his challenges for

cause to three jurors, including Juror 17. His objection was again overruled, along with his request for three additional peremptory strikes. Appellant's counsel once again complained of the trial court's denial of his challenges for cause and request for additional peremptory strikes, arguing that this caused Appellant harm because he would have used the additional strikes to strike jurors number three, five, and ten.

The jury found Appellant guilty of DWI, and Appellant was sentenced to 90 days' confinement to be suspended for 18 months of community supervision and was ordered to pay a $500 fine.

Discussion

I. Reasonable Suspicion

In her first point, Appellant argues that the trial court erred in denying her motion to suppress because Officer Gilley's testimony did not establish reasonable suspicion for DWI.

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). In reviewing the trial court's decision, we do not engage in our own factual review. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Best v. State*, 118 S.W.3d 857, 861 (Tex. App.—Fort Worth 2003, no pet.). The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex.

Crim. App. 2007); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000), *modified on other grounds by State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006). Therefore, we give almost total deference to the trial court's rulings on (1) questions of historical fact, even if the trial court's determination of those facts was not based on an evaluation of credibility and demeanor, and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Amador*, 221 S.W.3d at 673; *Montanez v. State*, 195 S.W.3d 101, 108–09 (Tex. Crim. App. 2006); *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002). But when application-of-law-to-fact questions do not turn on the credibility and demeanor of the witnesses, we review the trial court's rulings on those questions de novo. *Amador*, 221 S.W.3d at 673; *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005); *Johnson*, 68 S.W.3d at 652–53.

When the trial court makes explicit fact findings, we determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports those fact findings. *State v. Kelly,* 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006). We then review the trial court's legal ruling de novo unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id.* at 818. We must uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case even if the trial court gave the wrong reason for its ruling. *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003), *cert. denied*, 541 U.S. 974 (2004).

The trial court in this case issued the following pertinent findings of fact and conclusions of law:

> 1. On May 26, 2014, around 11:48 p.m. Officer Stephen Gilley of the Haltom City Police Department, a DWI enforcement officer with nearly 300 DWI arrests, was sitting on the onramp around the 6000 block of Airport Freeway northbound running radar when he observed a silver Saturn pass him.
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> 2. As the Saturn passed him, the passenger leaned out of the window and said, "F[***] you, m[*****]f[*****]," which initially got the officer's attention.
>
> 3. After hearing that, and considering the time of night and that the Saturn was coming from the direction of downtown with its numerous bars, Officer Gilley thought it might be an intoxicated driver, so he began to follow the Saturn, which was traveling around 50 miles per hour in a 65 miles per hour zone.
>
> 4. Officer Gilley testified that he observed the Saturn weaving within its lane, and at one point the vehicle's left tires crossed over into the middle lane, causing another vehicle to take evasive action.
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> 5. The video from the officer's car shows that:
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> a. Sanchez's car weaves inside its lane of traffic.
>
> b. The car touches the inside white dashed line of traffic.
>
> c. The car's left tires partially or totally cross the white-dashed line and into the adjacent line.
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> d. The video does not show, at the time the Sanchez car partially or totally crossed into the adjacent line of traffic, whether the car that was beside Sanchez's car had made an evasive maneuver away from Defendant's vehicle.
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> 6. The officer testified that the aforementioned evasive action occurred, but the video does not show what maneuver the adjacent car made prior to coming into the view of the video.

> 7. Once Officer Gilley observed what he referred to as a near collision, he activated his emergency lights and stopped the Saturn.
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> . . . .
>
> CONCLUSIONS OF LAW
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> . . . .
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> Considering the factual observations set forth in paragraphs two, three, four, five, and the rational inferences drawn therefrom, the totality of circumstances amounts to reasonable suspicion justifying the stop.

The Fourth Amendment protects against unreasonable searches and seizures by government officials. U.S. Const. amend. IV; *Wiede*, 214 S.W.3d at 24. To suppress evidence because of an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct. *Amador*, 221 S.W.3d at 672; *see Young v. State*, 283 S.W.3d 854, 872 (Tex. Crim. App.), *cert. denied*, 558 U.S. 1093 (2009). A defendant satisfies this burden by establishing that a search or seizure occurred without a warrant. *Amador*, 221 S.W.3d at 672. Once the defendant has made this showing, the burden of proof shifts to the State, which is then required to establish that the search or seizure was conducted pursuant to a warrant or was reasonable. *Id.* at 672–73; *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005).

A detention, as opposed to an arrest, may be justified on less than probable cause if a person is reasonably suspected of criminal activity based on specific, articulable facts. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000). An officer conducts a lawful temporary detention when he or she has reasonable suspicion to believe that an individual is violating the law. *Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010); *Ford*, 158 S.W.3d at 492. Reasonable suspicion exists when, based on the totality of the circumstances, the officer has specific, articulable facts that when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person is, has been, or soon will be engaged in criminal activity. *Ford*, 158 S.W.3d at 492. This is an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists. *Id.*

Appellant argues that the trial court's findings are unsupported by the record. First, Appellant argues that the trial court's finding that Appellant was "coming from the direction of downtown [Fort Worth] with its numerous bars" is unsupported because Officer Gilley first came into contact with Appellant five or six miles away from downtown, in an area that has no bars. According to Appellant, this finding is no more relevant than a determination that Appellant "was coming from the direction of Abilene." We disagree. While the strength of the evidence may be debated, this evidence does have some probative force.

Time and location, such as location near a known bar district, are relevant and appropriate considerations when reviewing the totality of the circumstances to determine if reasonable suspicion existed. *Foster v. State*, 326 S.W.3d 609, 613 n.10 (Tex. Crim. App. 2010). Appellant's argument also significantly overstates the facts—Appellant could have traveled the five to six mile distance from the downtown bar area to the freeway onramp where Officer Gilley was located in less than ten minutes.

Appellant also argues that the fact that her passenger yelled "F*** you, m*****f*****!" is irrelevant because it is not evidence that Appellant, the driver, was intoxicated. While a passenger's behavior does not necessarily indicate that the driver is intoxicated, this factor cannot be viewed in isolation; rather, our role is to view the *totality* of the circumstances in determining if reasonable suspicion existed. *Ford*, 158 S.W.3d at 492. At a minimum, the passenger's profanity-laden exclamation directed at a police officer was at least sufficient to pique Officer Gilley's interest and lead him to follow Appellant as her car entered the freeway. At that point, he began to observe Appellant's operation of her vehicle, as depicted in the dashboard camera video also admitted into evidence, including weaving both inside her lane and into the adjacent lane at a speed noticeably slower than other vehicles on the road at the time.[5]

[5]Officer Gilley estimated that she was traveling approximately fifteen miles below the speed limit.

Appellant takes issue with the testimony regarding Appellant's weaving because Officer Gilley testified that her car crossed into the adjacent left lane and almost hit another car, forcing that car to take an evasive action by moving to another lane in response to her weaving. Appellant is correct that the video does not clearly depict another vehicle changing lanes in order to avoid colliding with Appellant, and the trial court noted this in its findings of fact. Appellant compares this situation to the one in *Carmouche*, 10 S.W.3d at 327, in which the arresting officer testified that he approached the appellant and asked, "Do you mind if I search you again?"[6] to which, according to the officer's testimony, the appellant "threw his hands up, said, 'All right,' and turned around and placed his hands on the car." The officer discovered a package of powder cocaine in the appellant's pants. *Id.* On review, the court of criminal appeals abandoned the standard of giving "almost total deference" to the trial court's implicit finding of consent because in that case the video proved that the officer's testimony was erroneous.

The court of criminal appeals pointed out that the video recording taken by the patrol car's camera depicted the officer as he approached the appellant with three other officers, who the court described as "closely surround[ing]" the appellant as he stood with his back to his car. *Id.* at 332. The appellant turned around and placed his hands on the car as directed by one of the officers, and as the court described,

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[6]Another officer had initially conducted a pat down of the appellant. *Id.* at 326.

> Appellant can then be seen standing up and complying with the order. Only after appellant has raised his hands, turned around and faced the car, can [the arresting officer] be heard asking, "Mind if I pat you down again?" Williams' "request" to search is made *as* he is reaching for the crotch area of appellant's pants. Moreover, no oral response from appellant is audible on the tape. In fact, the next voice heard is [the arresting officer], presumably as he finds the drugs, saying, "What you got here?"

Id. As the court then explained,

> This section of the video *belies* [the officer]'s testimony that appellant raised his hands and turned around in response to [the officer]'s request to search. The tape does not support a conclusion that appellant made these gestures as an indication of consent. Indeed, appellant turned around and assumed a position to facilitate the search after he was ordered to do so by one of the officers. [The officer]'s "request" came after officers had appellant spread-eagled beside his car.

Id. (emphasis added). In light of this conflict, the court of criminal appeals held, "In the unique circumstances of this case, . . . we decline to give 'almost total deference' to the trial court's implicit findings under which the Court of Appeals found consent." *Id*. Thus, the court of criminal appeals held that the record did not support the court of appeals' finding of clear and convincing evidence that the appellant's consent was given freely and voluntarily. *Id.* at 333.

The situation at hand is not analogous to that in *Carmouche*. Here, while the video does not support Officer Gilley's testimony on the point regarding another vehicle's evasive action, it does not contradict it. As the trial court noted, the video does not show whether or not the car beside Appellant's car "made an

evasive maneuver away from [her] vehicle."[7] As the trial court noted in its findings, the car observed by Officer Gilley may have made the maneuver to another lane prior to it coming into the view of the video. Here, the video evidence does not belie Officer Gilley's testimony. It is simply neutral on that point. The "unique circumstances" present in *Carmouche* not being present here, we are not persuaded that we should follow the narrow holding of the case.

As the State points out in its brief, the facts in this case are similar to those in the recent decision of *Leming v. State*, No. PD-0072-15, 2016 WL 1458242 (Tex. Crim. App. Apr. 13, 2016). In *Leming*, the officer was notified of a 9-1-1 tip advising that defendant's vehicle was "swerving from side to side." *Id.* at *1. After the officer located and followed the car, he observed that it was traveling thirteen miles below the posted speed limit, that it was "slow[ing] down more and more" and that it "was drifting in its lane to the left, to the center stripe . . . [and its] tires were on the stripes." *Id.* This account by the officer was reflected in the dashboard-camera video. *Id.* In a fractured opinion, the court of criminal appeals held that the officer was justified in stopping the vehicle. *Id.* at *9. While a majority of the court held that the officer had reasonable suspicion to detain the

[7]With the exception of this point, however, the video confirms much of Officer Gilley's testimony. It depicts Appellant's car weaving within and, at times, out of her lane, allowing her tires to partially cross into the adjacent lane. In the video Appellant can be seen touching or at least partially crossing over the dotted white line separating the right and center lanes at least five times, and it depicts recurrent weaving within Appellant's lane of travel.

defendant for DWI, only a plurality held that the officer had reasonable suspicion to detain the defendant for failing to maintain a single lane.[8]

In holding that reasonable suspicion existed to detain the driver for investigation of DWI, the court noted that the United States Supreme Court recently acknowledged that "observation of 'dangerous behaviors' such as weaving back and forth across the roadway and crossing the center line 'would justify a traffic stop on suspicion of drunk driving.'" *Id*. at *8 (quoting *Navarette v. California*, 134 S. Ct. 1683, 1690–91 (2014)). Later in the decision, the court went on to note:

> Reasonable suspicion depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Under that commonsense approach, we can appropriately recognize certain driving behaviors as sound indicia of drunk driving." *Navarette*, 134 S.Ct. at 1690 (internal citation and quotation marks omitted). We hold that, on the facts of this case, [Officer] Gilow had an objectively reasonable basis to justify at least a temporary detention to investigate the cause of Appellant's unusual driving, even if Appellant's "erratic driving" (as the trial court aptly characterized it) might ultimately have proven to derive from some other, innocent cause.

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[8]*See* Tex. Transp. Code Ann. § 545.060 (West 2011). In Section II of the *Leming* opinion, Justice Yeary was joined by Presiding Justice Keller, Justice Meyers, and Justice Richardson in holding that it is a violation of section 545.060 to either (a) change lanes when it is unsafe to do so *or* (b) "to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so, regardless of whether the deviation from the marked lane is, under the particular circumstances, unsafe." *Leming*, 2016 WL 1458242 at *5. The plurality declined to decide whether driving on the dividing stripes constitutes a failure to stay "entirely within" a lane because "proof of the actual commission of the offense is not a requisite" for an officer to stop a motorist to investigate a traffic offense. *Id.* at *6.

Id. at *9.

Appellant attempts to distinguish *Leming* on the basis that Officer Gilow initially acted upon a 9-1-1 tip, but the court of criminal appeals provided no indication that this fact weighed particularly heavy in arriving at its holding.[9] Moreover, here we are presented with additional facts that contributed to Officer Gilley's reasonable suspicion of DWI. As discussed above, in addition to the weaving within her lane and either touching or partially crossing over the dividing line, Appellant was driving markedly below the freeway speed limit late at night within ten miles of an urban area containing numerous bars and accompanied by a passenger lacking the inhibitions that would dissuade a person of ordinary sensibilities from yelling obscenities at a police officer from the open window of a moving vehicle. And while the video is inconclusive on whether another vehicle changed lanes to avoid being hit, as Officer Gilley testified, the video does not contradict Officer Gilley's testimony, but, rather, substantiates Officer Gilley's additional testimony that the traffic volume was "medium" and that other vehicles were passing Appellant's vehicle in the adjacent lane. When viewed in totality, these facts are sufficient to provide reasonable suspicion of DWI. *See, e.g.*, *Curtis v. State*, 238 S.W.3d 376, 380 (Tex. Crim. App. 2007) (holding that

[9]In fact, the majority points out that "whatever doubt may have originally existed as to [the informant's] reliability . . . was dispelled by [Officer] Gilow's own verification of his report." *Id*. at *8. Likewise, the dissenting opinion emphasizes that the tip "[did] not add anything to the calculus of reasonable suspicion under the totality of the circumstances because the officer personally observed Leming weave within his lane." *Id.* at *14 (Keasler, J., dissenting).

reasonable suspicion was established by officer's testimony that he had specialized training in detecting DWIs and based on that training a driver's weaving in and out of a lane was a possible sign of intoxication, and the driver was seen weaving out of his lane at approximately 1:00 a.m.); *Kessler v. State*, No. 02-08-00270-CR, 2010 WL 1137047, at *5–6 (Tex. App.—Fort Worth Mar. 25, 2010, pet ref'd) (mem. op, not designated for publication) (holding that reasonable suspicion existed where officer testified that appellant swerved abruptly to avoid a curb shortly after 2:00 a.m., when the local bars closed, and failed to drive within a single lane of traffic, moving the "majority of the vehicle" into a designated left-turn lane while continuing to drive straight). We therefore overrule Appellant's first point.

II. Challenge for cause

In her second point, Appellant argues that the trial court erred in denying her challenge for cause to Juror 17. Specifically, Appellant argues that Juror 17 should have been stricken because his bias was demonstrated in the following exchange that took place after Appellant's counsel challenged the juror for cause:

> THE COURT: I think we had a question about assuming that we have evidence about intoxilyzer machine and what the breath results were. If you would just believe that the machine was operating properly and there was nothing else that you were going to hear about, just it said 08 and so, by golly, it's 08 or whatever it is.
>
> JUROR 17: Yeah.
>
> THE COURT: Is that—or did you—

JUROR 17: That's—

THE COURT: —think that—

JUROR 17: That's true.

THE COURT: Okay. All right. In other words, if it was a machine—

JUROR 17: It goes on every day. You know what I'm saying?

THE COURT: All right. Okay. Does anybody have any further questions of this witness?

[APPELLANT'S COUNSEL]: Not from the Defense.

[THE STATE]: Not from the State.

The State does not argue in its brief that Appellant has failed to preserve error, but preservation of error is a systemic requirement that this court should review on its own motion. *Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014); *Gipson v. State*, 383 S.W.3d 152, 159 (Tex. Crim. App. 2012). In order to preserve error for a trial court's denial of a challenge for cause, Appellant must show that: (1) she asserted a clear and specific challenge for cause; (2) she used a peremptory challenge on the complained-of veniremember; (3) her peremptory challenges were exhausted; (4) her request for additional strikes was denied; and (5) an objectionable juror sat on the jury. *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010) (citing *Green v. State*, 934 S.W.2d 92, 105 (Tex. Crim. App. 1996)*, cert. denied*, 132 S.Ct. 128 (2011). Appellant asserted a challenge for cause, arguing that Juror 17's answers indicated that he had already found some evidence—that the intoxilyzer machine was working

properly—to be true. Although she asserts in her brief to this Court that she utilized a peremptory challenge on Juror 17, her assertion is not supported by the record. Neither party's peremptory challenges are identified in the reporter's record or clerk's record. Without any support in the record to indicate that Appellant utilized a peremptory challenge on Juror 17, she has failed to preserve error on this point. We therefore overrule Appellant's second point.

Conclusion

Having overruled both of Appellant's points, we affirm the judgment of the trial court.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: GARDNER, WALKER, and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 20, 2016