TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00009-CR
NO. 03-14-00010-CR

Ismael Trevino, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 22ND JUDICIAL DISTRICT
NOS. CR-13-0393 & CR-13-0394,
THE HONORABLE WILLIAM R. HENRY, JUDGE PRESIDING

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

A jury convicted appellant Ismael Trevino of two drug offenses—possession of a controlled substance, methamphetamine, in an amount of less than one gram and possession of a controlled substance with intent to deliver, cocaine, in an amount of four grams or more but less than two hundred grams—both arising out of a traffic stop. *See* Tex. Health & Safety Code §§ 481.115(a) (person commits offense if he knowingly or intentionally possesses controlled substance), .112(a) (person commits offense if he knowingly possesses with intent to deliver controlled substance). The jury assessed appellant's punishment at confinement in a state jail facility for two years for the methamphetamine offense and 20 years in the Texas Department of Criminal Justice for the cocaine offense. *See id.* §§ 481.115(b), .112(d); Tex. Penal Code §§ 12.35 (punishment range for state jail felony), 12.32 (punishment range for first degree felony). On appeal, appellant challenges the

sufficiency of the evidence and complains about the denial of his motion to suppress. Finding no reversible error, we affirm the trial court's judgment of conviction for possession of a controlled substance. To correct non-reversible error in the judgment of conviction for possession of a controlled substance with intent to deliver, we modify that judgment and, as modified, affirm the trial court's judgment of conviction.

BACKGROUND[1]

This case involves a traffic stop during which drugs were found in the Chevy Tahoe appellant was driving. A patrol officer initiated a traffic stop of the SUV for the failure to come to a complete stop at a stop sign. When making contact with appellant, the officer smelled the odor of marijuana coming from the vehicle and called for a canine unit to assist. During the subsequent investigation, police discovered approximately ten grams of cocaine, one gram of methamphetamine, marijuana, and various prescription pills along with multiple small plastic baggies and two digital scales.

DISCUSSION

Sufficiency of the Evidence

In his first point of error, appellant argues that the evidence is legally insufficient to prove that he possessed the methamphetamine and cocaine recovered from the SUV he was driving.

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[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

Specifically, he disputes the element of knowledge. The State contends that the circumstantial evidence, combined with reasonable inferences therefrom, established that appellant knowingly possessed these illegal substances.

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We review all the evidence in the light most favorable to the verdict and assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318; *see Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We consider only whether the fact finder reached a rational decision. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) ("Our role on appeal is restricted to guarding against the rare occurrence when a factfinder does not act rationally.").

To prove unlawful possession of a controlled substance, the State must prove that the defendant exercised control, management, or care over the substance and that he knew the matter possessed was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005); *see also* Tex. Health & Safety Code § 481.002(38) (defining possession as "actual care, custody, control,

or management"). To do so, the State may use direct or circumstantial evidence. *Poindexter*, 153 S.W.3d at 405–06. The State is entitled to rely upon circumstantial evidence because circumstantial evidence "is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone may be sufficient to establish guilt." *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). Regardless of whether the evidence is direct or circumstantial, it must establish, to the requisite level of confidence, that a defendant's connection to the contraband was more than fortuitous. *Poindexter*, 153 S.W.3d at 406; *Allen v. State*, 249 S.W.3d 680, 691 (Tex. App.—Austin 2008, no pet.). Presence or proximity, when combined with other evidence, either direct or circumstantial, may be sufficient to establish the element of possession beyond a reasonable doubt. *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006).

Texas courts have identified relevant factors that may, alone or in combination, link an accused to contraband to establish knowing possession of the contraband, including: (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the

defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt. *See Evans*, 202 S.W.3d at 162 n.12 (citing *Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.)). These are simply some factors that may circumstantially establish the sufficiency of the evidence to prove a knowing possession; they are not a litmus test. *Evans*, 202 S.W.3d at 162 n.12; *see also Allen*, 249 S.W.3d at 692 n.13 (explaining that affirmative-link doctrine "is a judicially devised standard to aid appellate courts in determining the legal sufficiency of the evidence in knowing possession of contraband cases" and is not a "litmus test"). Each case must be examined on its own facts to determine whether sufficient facts and circumstances exist to link or connect a defendant to illegal contraband. *Roberson v. State*, 80 S.W.3d 730, 736 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

The evidence at trial demonstrated that Officer Hollie Salinas, a patrol officer with the San Marcos Police Department, pulled over the Chevy Tahoe for failing to make a complete stop at a stop sign. Appellant was driving; his girlfriend, Misty Price, was in the front passenger seat.[2] The Tahoe was registered to Price's mother but appellant was listed on the insurance as a driver. He regularly drove the SUV as Price was not supposed to drive since she did not have a driver's license. When Officer Salinas made contact with appellant, she smelled the odor of marijuana coming from the vehicle and called for a canine unit to assist in the investigation. During the open air sniff of the exterior of the Tahoe, the drug dog alerted on the back passenger door. Once inside the SUV, the dog made several more alerts. First, the dog alerted on a camouflage backpack on the front

[2] Appellant and Price had been dating for three years and lived together on her mother's property.

passenger floorboard. Several plastic baggies, one with "a white powdery substance" in it, were in the small exterior front pocket of the backpack. Two digital scales and "many clear little plastic baggies" were found inside the backpack. No identifying information was found in the backpack, but Price claimed ownership of the backpack at the scene and during her testimony at trial. The drug dog next alerted on the area between the front passenger seat and the center console (where the seatbelt buckle comes out). In that location, police discovered a clear plastic baggie containing marijuana. Price also claimed ownership of this marijuana.[3] Finally, the drug dog alerted on the set of cup holders in the center console. Specifically, the dog "laid in the -- she downed in the driver's seat with her nose on the driver's side edge of the cup holders." The cup holders were empty. However, upon removal of the cup holders, in the space underneath, police discovered a large clear plastic baggie containing several smaller baggies of cocaine, a clear plastic baggie containing a rock of methamphetamine, a clear plastic baggie of marijuana (larger than the one already found in the crack by the passenger seat), and some prescription pill bottles. Subsequent lab testing revealed that the aggregate amount of cocaine was 9.54 grams and the amount of methamphetamine was .81 grams.[4] After the police conducted the search, appellant and Price were handcuffed and placed in the backseat of Officer Salinas's squad car, which was equipped with a camera and recording device. The recording from the car depicts appellant whispering to Price while looking at the camera

[3] The evidence at trial demonstrated that Price had marijuana flakes on her clothing when she emerged from the Tahoe.

[4] The record does not reflect the amount of marijuana recovered, though Officer Salinas testified that one of the baggies "was a small amount, less than two ounces."

and then urging her aloud to claim ownership of the drugs recovered from the SUV. Upon the arrest of appellant, $500 was confiscated from appellant's pocket.

Appellant argues that the "affirmative link" factors do not show knowing possession. He first asserts that the cocaine and methamphetamine were not in plain view and not readily accessible, so these factors fail to link him to the drugs or show that he had knowledge of them. While it is true that the record establishes that these substances were not in plain view, it does not necessarily demonstrate that they were not readily accessible. The record reflects that removing the cup holders by simply lifting that section from the console revealed the space underneath where the drugs were located. Moreover, one of the relevant factors to consider is whether the place where the drugs were found was enclosed. Such was the case here. The compartment beneath the cup holders, an enclosed place, could be construed as a place private to the driver of the SUV. In fact, the patrol officer agreed that "it looked like [the drugs] had been secreted by somebody." The record established that appellant regularly drove the SUV—to the extent that he was insured as a driver. The concealed nature of the location where the drugs were found does not, alone, show appellant lacked knowledge of the drugs.

Appellant also maintains that the drug paraphernalia found in the backpack was not linked to him because "police found no identification, fingerprints, or other items linking appellant to the pack." However, no such evidence linked Price to the backpack either. The only link between Price and the backpack was her claim of ownership and, to a lesser extent, its location in the front passenger floorboard. At trial, Price testified about her lifelong drug addiction and claimed that the drugs and contraband found in the SUV, including the scales, were hers. However, the jury was not

required to believe Price's testimony or her claim of ownership. Testimony from police officers reflected that digital scales are commonly used in the distribution of narcotics, not personal drug use by addicts. Here, police recovered two scales. In a similar argument, appellant asserts that the other contraband found—the marijuana in particular—was linked to Price, not him. While it is true that the evidence demonstrated that Price was the one with marijuana flakes on her clothing and seated immediately next to the first baggie of marijuana found, appellant admitted to the patrol officer that he smelled the marijuana. Thus, he was aware of the presence of other contraband. Furthermore, the other larger baggie of marijuana was found in the console with the cocaine and methamphetamine next to where appellant was sitting.

In addition, appellant notes the absence of evidence showing that he was intoxicated or under the influence of drugs at the time he was arrested, in contrast to Price, who was nervous and "shaky" and admitted to smoking marijuana. He maintains that "[t]here is no intoxication link between appellant and the drugs." However, the absence of some of the factors is not evidence of innocence that must be weighed against the factors that are present. *Satchell v. State*, 321 S.W.3d 127, 134 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd); *see Hernandez v. State*, 538 S.W.2d 127, 131 (Tex. Crim. App. 1976).

Appellant also insists that his failure to make incriminating statements demonstrates that he did not knowingly possess the drugs, particularly in light of the incriminating statements Price did make. While it is true that appellant made no directly incriminating statements, his conduct at the scene of the traffic stop can reasonably be interpreted as somewhat incriminating. First, the video demonstrates appellant's complete lack of surprise when police discovered the drugs in the

SUV he was driving, suggesting that he was aware of the presence of narcotics notwithstanding his denial. Second, in the backseat of the patrol car, appellant whispered in a conspiratorial manner to Price while looking directly at the camera before repeatedly urging her to "tell them it's yours." His statements—including telling her to "stay strong minded" and that "[y]ou sign your life right here. This is it baby."—could be reasonably construed as attempts to coerce, or at least influence, Price to take responsibility for the drugs in order to shift blame from himself.

Appellant also contends that there was no evidence of flight or furtive gestures. He asserts that the only evidence suggesting an attempt to flee was his delay in pulling over when Officer Salinas initiated the traffic stop. The patrol officer indicated in her testimony that she became suspicious when appellant did not immediately pull over when she activated her overhead lights but instead continued driving for over a mile before turning onto another road. The canine officer testified that "the initial concern was actually because the driver didn't immediately pull over, that he extended the traffic stop distance, which is very indicative of someone who's trying to hide something or trying to escape." Appellant, however, points to evidence suggesting that appellant delayed pulling over in order to do so in a safer location as well as evidence showing that he signaled his intent to turn. He argues that "[t]his simply is not evidence of proving attempted flight." However, the jury, as fact finder, was entitled to construe all of this evidence and determine whether it constituted evidence of attempted flight or, in the alternative, suspicious behavior.

Finally, appellant asserts that the $500 cash found in his pocket did not establish that he was found with a large amount of cash in light of the statements he made on the scene about

getting paid every two weeks for working on a "call-in" basis. The jury, however, was not obligated to believe appellant's statements about the source of the money.

Appellant mistakenly treats the relevant factors as a required checklist, analyzing them independently to argue that they do not establish knowing possession. However, as noted previously, these relevant factors are simply some factors that may circumstantially show knowing possession; they are not a litmus test. *Evans*, 202 S.W.3d at 162. Not all, or even a certain number, of these factors must be proved. *Sheppard v. State*, No. 03-10-00868-CR, 2012 WL 6698963, at *3 (Tex. App.—Austin Dec. 21, 2012, no pet.) (mem. op., not designated for publication). It is "not the number of links that is dispositive, but rather the logical force of all the evidence, direct and circumstantial." *Evans*, 202 S.W.3d at 162. There is no set formula of facts necessary to support an inference of knowing possession. The issue is whether there was evidence of circumstances, in conjunction with the defendant's presence, that justifies the conclusion that the defendant knowingly possessed the substance. *Id.* at 166–67 (Womack, J., concurring).

Based on his piecemeal interpretation of the relevant factors, as discussed above, appellant argues that the evidence "conclusively linked" the concealed controlled substances "only" to his girlfriend. However, the jury was not required to believe Price's claim of ownership of the drugs and contraband or her assertion that appellant had no knowledge of the drugs. Furthermore, even if the jury believed her claim of ownership, appellant could still be guilty of possessing Price's drugs if he had care, custody, control, or management of them. Moreover, the possibility of joint possession remains; possession need not be exclusive. *See McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985) ("It is well settled though that an accused may with another or others

jointly possess dangerous drugs or narcotics and that such possession need not be exclusive."); *Hutchison v. State*, 424 S.W.3d 164, 173 (Tex. App.—Texarkana 2014, no pet.) ("It is well established that possession need not be exclusive to be criminal."). Viewing all the evidence in the light most favorable to the verdict, the logical force of the combined pieces of circumstantial evidence in this case, together with reasonable inferences from them, could lead a rational jury to determine that appellant possessed these controlled substances, regardless of whether Price owned them or possessed them as well.

We conclude that the circumstantial evidence, when viewed in combination and its sum total, constituted amply sufficient evidence connecting appellant to the actual care, custody, control, or management of the cocaine and methamphetamine found in the console of the SUV he was driving. Accordingly, the evidence was sufficient to support appellant's convictions for possession of a controlled substance and possession of a controlled substance with intent to deliver.[5] We overrule his first point of error.

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[5] Appellant does not assert that the evidence is insufficient to demonstrate the intent to deliver. Nevertheless, we note that intent to deliver may be proven by circumstantial evidence. Courts have considered several factors in determining intent, including the quantity of drugs the defendant possessed, the manner of packaging of the drugs, and the presence or absence of drug paraphernalia for use or sale. *See Brown v. State*, 243 S.W.3d 141, 149–50 (Tex. App.—Eastland 2007, pet. ref'd); *Jordan v. State*, 139 S.W.3d 723, 726 (Tex. App.—Fort Worth 2004, no pet.). Here, the evidence reflected that appellant was present when the drugs were found in the console of the SUV he was driving, the amount of drugs was more than amounts commonly found possessed by mere users, several types of drugs were present, and there were multiple small baggies and scales in the SUV (which are indicative of intent to deliver). From this evidence, the jury could have determined beyond a reasonable doubt that appellant possessed the cocaine with the intent to deliver.

Denial of Motion to Suppress

The trial court conducted a hearing on appellant's motion to suppress during trial, outside the presence of the jury. At the hearing, Officer Salinas testified that she initiated a traffic stop of the Tahoe appellant was driving because he failed to come to a complete stop at a stop sign at an intersection with a four-way stop. A video from the dash-cam of her patrol car was admitted and played for the court.[6] The prosecutor replayed the beginning portion of the video—showing appellant's approach to the four-way stop—and reviewed it with the officer. At that point, the trial judge asked the prosecutor to "back up the videotape" to replay that portion of the recording. The prosecutor complied and then further questioned the officer. Officer Salinas indicated that "it's kind of hard to see in the video" but testified that appellant did not come to a complete stop at the stop sign as provided by the Traffic Code. On cross examination, in an attempt to show that appellant had in fact completely stopped at the stop sign, appellant's counsel played the beginning portion of the video four more times and then questioned the officer extensively about the positioning of the vehicles as they approached the intersection and proceeded through the four-way stop. Officer Salinas repeatedly maintained that appellant did not make a complete stop: "He didn't make a complete stop, no."; "No, he, kind of, rolled through. He didn't make a complete stop, it was more

[6] The beginning portion of the video—the first 20 seconds—depicted appellant's SUV and two other vehicles approaching the four-way stop, one in front of Officer Salinas in the direction she was traveling and the other two, one of which was appellant, approaching on the cross street from her right. The remainder of the video depicted the subsequent traffic stop, including the interaction between the police and the occupants of the SUV, the search by the drug dog, and the recovery of the contraband.

like a yield."; "He doesn't [sic] stop completely." She reiterated that it was "hard to tell on the video." The officer also testified that appellant "did not have the right of way to go."

After both sides rested, the trial judge reviewed the video one more time off the record before hearing argument from the parties. Contending that there was no traffic violation, appellant asked the court to "suppress everything from [the] stop." He asserted that the issue was "whether or not [appellant] stopped at [the] stop sign" and argued that while the officer testified that he did not, the video of the traffic stop showed that he did. When the trial court raised the issue about whether appellant failed to yield the right-of-way, appellant maintained that he had the right-of-way. The State argued that the issue was not whether appellant stopped completely but only whether Officer Salinas had reasonable suspicion to believe that he had not. At the conclusion of the suppression hearing, the trial court summarily denied the motion to suppress. Later in the trial, after appellant was found guilty and before the start of the punishment phase, the trial court made oral findings of fact and conclusions of law. In relevant part, the court found that appellant did stop at the stop sign "or in the alternative, that his failure to stop was not proved beyond a reasonable doubt." The court further found that appellant had failed to properly yield the right-of-way. The court concluded that appellant's failure to yield was a traffic violation that was "a legal reason that was adequate to stop the defendant's vehicle."

In his second point of error, appellant contends the trial court erred in denying his motion to suppress because the traffic stop was not supported by reasonable suspicion. Specifically, he argues that the "all evidence gathered after the traffic stop should been have suppressed" because the video of the traffic stop "does not show any traffic violation."

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion, *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013); *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006), and overturn the ruling only if it is outside the zone of reasonable disagreement, *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014); *Dixon*, 206 S.W.3d at 590. We apply a bifurcated standard of review, giving almost total deference to a trial court's findings of historical fact and credibility determinations that are supported by the record, but review questions of law de novo. *Delafuente v. State*, 414 S.W.3d 173, 177 (Tex. Crim. App. 2013); *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). We view the evidence in the light most favorable to the ruling, *State v. Robinson*, 334 S.W.3d 776, 778 (Tex. Crim. App. 2011), and uphold the ruling if it is correct on any theory of law applicable to the case, *Absalon v. State*, 460 S.W.3d 158, 162 (Tex. Crim. App. 2015); *Young v. State*, 283 S.W.3d 854, 873 (Tex. Crim. App. 2009), even if the trial judge made the ruling for a wrong reason, *Story*, 445 S.W.3d at 732.

An officer may make a warrantless traffic stop if the "reasonable suspicion" standard is satisfied. *Jaganathan v. State*, — S.W.3d —, No. PD-1189-14, 2015 WL 5449576, at *2 (Tex. Crim. App. Sept. 16, 2015); *see Guerra v. State*, 432 S.W.3d 905, 911 (Tex. Crim. App. 2014) ("[A] traffic stop based upon a reasonable suspicion that some crime was, or is about to be, committed does not violate Texas law."). Reasonable suspicion exists when 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*, 2015 WL 5449576, at *2 (quoting *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013)). "[T]he likelihood of criminal activity need not rise to the level required for probable

cause." *State v. Kerwick*, 393 S.W.3d 270, 273–74 (Tex. Crim. App. 2013). The reasonable-suspicion standard requires only "some minimal level of objective justification" for the stop. *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012) (quoting *Foster v. State*, 326 S.W.3d 609, 614 (Tex. Crim. App. 2010)).

The test for reasonable suspicion is an objective one that focuses solely on whether an objective basis exists for the detention and disregards the officer's subjective intent. *Kerwick*, 393 S.W.3d at 274; *Hamal*, 390 S.W.3d at 306. A reasonable-suspicion determination requires consideration of the totality of the circumstances. *Delafuente*, 414 S.W.3d at 177; *Kerwick*, 393 S.W.3d at 274. Further, whether an officer has reasonable suspicion is determined from the facts and circumstances actually known to the officer at the time of the detention, not what that officer could have or should have known. *State v. Duran*, 396 S.W.3d 563, 572 (Tex. Crim. App. 2013); *see State v. Griffey*, 241 S.W.3d 700, 704 (Tex. App.—Austin 2007, pet. ref'd) ("We look at only those facts known to the officer at the inception of the detention[.]"). "The standard is not what an omniscient officer would have seen, but rather what a reasonable officer would have done with what he actually did see." *Duran*, 396 S.W.3d at 572. Whether the facts known to the officer amount to reasonable suspicion is a mixed question of law and fact subject to de novo review. *Hamal*, 390 S.W.3d at 306; *State v. Mendoza*, 365 S.W.3d 666, 669–70 (Tex. Crim. App. 2012).

If an officer has a reasonable basis for suspecting that a person has committed a traffic offense, the officer may legally initiate a traffic stop. *Graves v. State*, 307 S.W.3d 483, 489 (Tex. App.—Texarkana 2010, pet. ref'd). There is no requirement that an actual traffic violation be committed; it is sufficient to show that the officer reasonably believed that a violation

was in progress. *Davis v. State*, No. 03-13-00456-CR, 2014 WL 5107129, at *2 (Tex. App.—Austin Oct. 8, 2014, no pet.) (mem. op., not designated for publication); *Fernandez v. State*, 306 S.W.3d 354, 357 (Tex. App.—Fort Worth 2010, no pet.); *Green v. State*, 93 S.W.3d 541, 545 (Tex. App.—Texarkana 2002, pet. ref'd); *Cook v. State*, 63 S.W.3d 924, 929 n.5 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd); *Davy v. State*, 67 S.W.3d 382, 393 (Tex. App.—Waco 2001, no pet.). Thus, at a suppression hearing, the State need not establish that a crime occurred prior to the investigatory stop, but must only elicit testimony showing sufficient facts to prove that reasonable suspicion existed that a particular person has engaged in criminal activity. *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011); *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001).

In this case, at the suppression hearing, the parties did not dispute that failing to come to a complete stop at a stop sign is a traffic violation. *See* Tex. Transp. Code §§ 541.401(10)(A), 544.010(a). Rather, the parties disputed whether appellant came to a complete stop. Officer Salinas testified, repeatedly, that she observed appellant "roll through" the stop sign. Appellant maintained that the traffic-stop video demonstrated that he did come to a complete stop. Similarly, neither party disputed that the failure to yield the right-of-way constitutes a traffic violation. *See id.* § 545.151. The parties only disputed whether appellant, under the circumstances that night, had the obligation to yield the right-of-way.

After multiple viewings of the traffic stop video,[7] the trial court ultimately found that appellant did stop at the stop sign but that he failed to yield the right-of-way. The court concluded that appellant's failure to yield the right-of-way constituted a traffic violation that provided "a legal reason that was adequate to stop [appellant's] vehicle." However, whether or not appellant committed a traffic violation—be it the failure to completely stop at the stop sign or the failure to yield the right-of-way—is not the issue. The question is whether Officer Salinas had a reasonable suspicion that appellant committed one when she initiated the traffic stop. *See Jaganathan*, 2015 WL 5449576, at *2 ("The question in this case is not whether appellant was guilty of the traffic offense but whether the trooper had a reasonable suspicion that she was.").

The entirety of the stop-sign encounter occurred during a very brief time span around 10:00 at night.[8] Officer Salinas observed appellant's SUV at the same time two other vehicles were approaching the four-way stop: one traveling directly in front of her and one traveling from the right in the left-hand lane on the cross street, next to the right-hand lane appellant was driving in. The vehicle in the lane next to appellant obscured the officer's view of appellant's SUV for a few seconds. The trial court reached its determination about the traffic violations after having the benefit of reviewing the video numerous times. Our review of the video—even multiple times—demonstrates that it is difficult to discern whether appellant completely stopped or not. At the very least, it is not immediately obvious from the video that he did so. Further, as the Court of

[7] The record reflects that the video was played eight times during the suppression hearing: three times by the State (once at the trial court's request), four times by the defense, and then once again by the court off the record before the court heard argument and ruled.

[8] The relevant portion of the traffic-stop video lasts approximately 7 to 10 seconds.

Criminal Appeals recently recognized, "[T]here is a difference between what an officer sees during an ongoing event and what [a reviewing court] see[s] when reviewing a video. . . . [A court] would be much closer to knowing what the officer observed if [the court] were to view the video only one time, from start to finish, without stopping. But even then, [the court] might not focus on what the officer focused on at the time of the stop."[9]

Nevertheless, even accepting the trial court's fact finding that appellant did completely stop, the fact that appellant did so—as demonstrated only by repeated viewings of the traffic-stop video—does not negate Officer Salinas's conclusion that reasonable suspicion to initiate a traffic stop existed at the time she observed him. "Reasonable suspicion may be validly based on articulable facts that are ultimately shown to be inaccurate or false." *Milligan v. State*, No. 03-12-00485-CR, 2014 WL 3562714, at *3 (Tex. App.—Austin July 18, 2014, no pet.) (mem. op., not designated for publication). A police officer's reasonable mistake about the facts may yet legitimately justify the officer's conclusion that reasonable suspicion to detain exists. *Robinson v. State*, 377 S.W.3d 712, 720 (Tex. Crim. App. 2012); *State v. Losoya*, No. 04-15-00017-CR, 2015 WL 9594721, at *2 (Tex. App.—San Antonio Dec. 30, 2015, no pet. h.) (mem. op., not designated for publication); *Parson v. State*, 392 S.W.3d 809, 817 (Tex. App.—Eastland 2012, pet. ref'd). A mistake about the facts, if reasonable, will not vitiate an officer's actions in hindsight so long as his actions were lawful under the facts as he reasonably, albeit mistakenly, perceived them

[9] Officer Salinas's testimony before the jury demonstrates this potential discrepancy: when appellant's counsel cross examined her about the traffic stop, reviewing the video with her several times, the officer maintained that regardless of what the video suggested, "what [she] saw that night was [appellant] not stopping."

to be.[10] *Robinson*, 377 S.W.3d at 720–21; *Parson*, 392 S.W.3d at 817. Even if Officer Salinas was mistaken about whether appellant came to a complete stop, we find that this mistake was reasonable under the circumstances under which she observed appellant at the stop sign.[11] *See Jaganathan*, 2015 WL 5449576, at *2 ("[T]the real issue here is whether the facts surrounding that conduct somehow coalesced in a manner that made it unreasonable for the trooper to think she was violating the law."). There is no dispute here that the traffic stop was lawful if appellant did in fact fail to come to a complete stop at the stop sign—that is, that the traffic stop was lawful under the facts as Officer Salinas perceived them to be.

Viewing the evidence in the light most favorable to the trial court's ruling, we conclude that the record supports the trial court's conclusion that reasonable suspicion supported the

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[10] We contrast this type of mistake with a mistake about the law: "An officer's mistake about the law, or about the legal significance of undisputed facts, *even if* eminently reasonable, cannot serve to provide probable cause or reasonable suspicion." *Robinson v. State*, 377 S.W.3d 712, 722 (Tex. Crim. App. 2012); *see Abney v. State*, 394 S.W.3d 542, 550 (Tex. Crim. App. 2013) (reiterating that "an officer's mistake about the legal significance of facts, even if made in good faith, cannot provide probable cause or reasonable suspicion").

[11] At the suppression hearing, appellant's counsel asked Officer Salinas to "just focus on the headlights" of the vehicles (when reviewing the traffic-stop video for the seventh time) to assess whether appellant completely stopped. Later, counsel began her argument to the court stating, "Now that we watched that video multiple, multiple times, I think it is pretty obvious that [appellant] did come to a complete stop in the right-hand lane." She also attributed "the confusion" about whether appellant stopped completely to the fact that the two vehicles on the cross road traveled in separate lanes (with the one blocking the view of appellant's SUV), approached the intersection at different times, and stopped at different points behind the stop sign.

traffic stop. Thus, the denial of appellant's motion to suppress was not an abuse of discretion.[12] Accordingly, we overrule appellant's second point of error.

Clerical Error in Judgment

On review of the record, we observe that one of the written judgments of conviction in this case contains a clerical error. The judgment of conviction in appeal number 03-14-00010-CR (trial court number CR-13-0394) states that the "Statute for Offense" is "481.112(d) Health and Safety Code." The applicable statutory provisions for the offense as alleged in the indictment here, however, also include subsection (a) of that statutory section, which sets forth the offense. This Court has authority to modify incorrect judgments when the necessary information is available to do so. *See* Tex. R. App. P. 46.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993). Accordingly, we modify the judgment to reflect that the "Statute for Offense" is "481.112(a), (d) Health & Safety Code."

CONCLUSION

Having concluded that the evidence is sufficient to support appellant's convictions and that the trial court did not abuse its discretion in denying appellant's motion to suppress, we affirm the trial court's judgment of conviction for possession of a controlled substance, modify the

[12] Because we resolve this issue based on the failure-to-stop traffic violation, we do not address appellant's challenge to the trial court's fact finding and legal conclusion that he failed to yield the right-of-way. *See Wade v. State*, 422 S.W.3d 661, 667 (Tex. Crim. App. 2013) ("[An appellate court] will uphold the trial judge's ruling [on a motion to suppress] if it is reasonably grounded in the record and correct on any theory of law applicable to the case.").

trial court's judgment of conviction for possession of a controlled substance with intent to deliver as noted above, and affirm that judgment as modified.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

03-14-00009-CR Affirmed

03-14-00010-CR Modified and, as Modified, Affirmed

Filed: February 5, 2016

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