TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00133-CR

The State of Texas, Appellant

v.

Samuel Martinez, Appellee

FROM THE COUNTY COURT AT LAW NO. 1 OF COMAL COUNTY
NO. 2018CR1273, THE HONORABLE LINDA A. RODRIGUEZ, JUDGE PRESIDING

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

Appellant Samuel Castro Martinez was charged with the offense of driving while intoxicated ("DWI") with an alcohol-concentration level of 0.15 or more, a class-A misdemeanor. *See* Tex. Penal Code § 49.04(a), (d). Martinez filed two pretrial motions to suppress evidence obtained during the police investigation. Following a hearing, the trial court granted the motions and entered findings of fact and conclusions of law. In four issues, the State contends that the trial court abused its discretion by granting Martinez's motions to suppress. We will reverse the trial court's order and remand for further proceedings.

BACKGROUND[1]

At approximately 5:27 p.m. on April 21, 2018, a 911 caller[2] reported that a driver, subsequently identified as Martinez, had been involved in a one-vehicle accident with a utility pole. Martinez was reportedly the sole occupant of the vehicle involved in the collision. The caller stated that following the accident, Martinez got out his truck, surveyed the damage to it, and left the scene. According to the caller, Martinez appeared to be bleeding from his ear. A contemporaneous Computer-Aided Dispatch ("CAD")[3] log recorded that the caller, who witnessed the accident, stated that Martinez had "spun out" before hitting the pole and that he was not saying much.

The 911 caller followed Martinez to his residence and provided the dispatcher with the address. The CAD log notes that the caller related that Martinez's truck had a "popped" rear tire, was missing a side mirror, and was "barely drivable." New Braunfels Police Department ("NBPD") Detective Donald Kimbrell, wearing his department-issued uniform and driving a black-and-white squad car with distinctive striping and overhead emergency lights, responded to the residence and attempted to contact Martinez.

Det. Kimbrell was the only witness at the suppression hearing. He testified that he had noticed Martinez's truck in front of the house and had assumed that Martinez had gone

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[1] The facts recited are taken from the testimony and evidence presented at the pretrial suppression hearing.

[2] The 911 caller was not identified at the hearing and did not testify.

[3] A CAD system "provides an automated interface between 911 operators or dispatchers and various record-management systems, compiling information about the caller, the origination location and time of the call, the nature and assigned priority of the call, and information in the system about a person." *City of Carrollton v. Paxton*, 490 S.W.3d 187, 191 (Tex. App.—Austin 2016, pet. denied).

inside. On Det. Kimbrell's dash-cam video, admitted into evidence at the hearing, the truck, visibly damaged, can be seen parked partially off of the driveway with its right wheels in the grass. Det. Kimbrell parked behind the truck, blocking it from leaving.

As he approached the front door of Martinez's residence, Det. Kimbrell drew his pistol. He testified that he did so for his own safety as well as that of "any innocent civilians that may be nearby" because he did not know what was on the other side of the door and because "the person inside may be trying to hide, be subject to a warrant, or have drugs or weapons on their person."

Det. Kimbrell's body-cam footage reflects that he knocked on Martinez's door six times over a period of approximately four minutes, identifying himself as a police officer and requesting that Martinez open the door. After his fifth and sixth knocks, Det. Kimbrell announced that Martinez needed to be checked out by medics or EMS. While at the door, Det. Kimbrell waved off residents of the home who had pulled up in a vehicle. He testified at the hearing that he had not known they were residents at the time. Approximately four-and-a-half minutes after Det. Kimbrell first knocked, Martinez, holding a cloth, opened the door.

Although Det. Kimbrell was still holding his firearm as Martinez opened the door, the dash-cam video supports his testimony that he holstered the weapon as soon as he saw that Martinez was unarmed. Det. Kimbrell was positioned to the side of the door, and he testified that he did not display the firearm to Martinez.

The body-cam footage shows that after Martinez opened the door, Det. Kimbrell asked him who had been driving the black truck and if Martinez had been in an accident. When Martinez confirmed that he had, Det. Kimbrell gestured toward the front porch and stated,

"Okay, come step outside." Martinez held the cloth against his ear, and Det. Kimbrell asked him additional questions about the accident and instructed him to have a seat. At the hearing, Det. Kimbrell testified that he had requested that Martinez sit down because he noticed that Martinez was bleeding from his ear and because he did not want Martinez to fall on the concrete. Det. Kimbrell radioed for EMS to approach and, after several more questions concerning the accident, stepped away while EMTs attended to Martinez.

After EMTs had finished treating Martinez, he was questioned by a second officer, Officer Menser, and asked to submit to standardized field sobriety tests, to which Martinez consented. He was ultimately arrested for DWI, read his *Miranda* rights, and, after voluntarily agreeing to provide two breath samples that reflected alcohol-concentration levels of 0.173 and 0.180, respectively, charged with class-A misdemeanor DWI.

Martinez filed two motions to suppress evidence obtained during the investigation. In his first motion, he contended that any statements that he made during the investigation, as well as any evidence obtained as a result of their having been made, were inadmissible because the statements had been made while he was in custody but had not been read his *Miranda* or Article 38.22 rights. In his second motion, Martinez argued that Det. Kimbrell effected an illegal warrantless arrest of Martinez in violation of Article 14.03 of the Code of Criminal Procedure by pounding on Martinez's door with a drawn weapon while ordering that Martinez open the door, motioning for other residents of the home to leave, and ordering Martinez to sit down. *See generally* Tex. Code Crim. Proc. art. 14.03 (listing categories of persons whom an officer may arrest without a warrant). Martinez requested that the trial court

suppress the "sample of [his] blood"[4] seized without a warrant as a result of the arrest, together with evidence relating to the seizure and "[a]ny statements made or alleged to have been made by [him]" after the illegal arrest.

Following a hearing, the trial court granted both motions and entered the following relevant findings of fact and conclusions of law:[5]

FINDINGS OF FACT

> On April 21, 2018 at approximately 5:27 p.m., according to a 911 caller unidentified at the hearing, Defendant was involved in a one vehicle accident with a utility pole. There were no reports of other occupants in Defendant's vehicle or other vehicles involved.
>
> The unidentified 911 caller told dispatch that the Defendant got out of his vehicle after the accident, surveyed the damage, and then drove to 639 Cherokee Boulevard in New Braunfels.
>
> The unidentified 911 caller told dispatch that the Defendant appeared to be bleeding from his ear, but no other identifying information was given.
>
> When Officer Kimbrell arrived at 639 Cherokee Boulevard, he parked diagonally in Defendant's driveway, deliberately blocking a vehicle that was parked there. He testified that he did this to make sure no one left in a vehicle.
>
> Officer Kimbrell approached Defendant's residence and drew his pistol.
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> Officer Kimbrell's pistol was unholstered and in his hand the entire time while he pounded on Defendant's door for approximately five minutes.
>
> Officer Kimbrell pounded on Defendant's door at least five times.

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[4] While both Martinez's motion and the trial court's order refer to a sample of blood seized from Martinez, the record reflects that no such sample was obtained. Rather, the DIC-24 and offense report of Officer Terry Lee Flugrath admitted into evidence at the suppression hearing state that Martinez voluntarily provided two breath samples using an Intoxilyzer 9000.

[5] In response to multiple remands, the trial court has entered four sets of findings and conclusions. The most recent are provided.

While at Defendant's door, Officer Kimbrell yelled and identified himself as a New Braunfels Police Officer and ordered Defendant to open his door at least five times.

Towards the end of his banging on Defendant's door, Officer Kimbrell yelled though the door that he wanted to have 'medics check him out'.

While at Defendant's door, Officer Kimbrell waved off other residents of Defendant's home as they neared in their vehicle, indicating to them that they should not approach.

Officer Kimbrell's weapon was still drawn and in his hand as Defendant opened the door but according to his testimony, he holstered it at that time.

As soon as Defendant opened the door, Officer Kimbrell commanded Defendant to sit on the edge of the porch at least three times.

Officer Kimbrell testified that he noticed bleeding from the Defendant's ear.

Before having EMS check on Defendant, Officer Kimbrell proceeded to question him about the alleged offense.

At no time did Officer Kimbrell testify he observed driving behavior, an odor of alcohol emanating from the Defendant, unsteadiness on his feet, slurred speech, bloodshot eyes, consumption of alcohol or any possible signs of intoxication at the time he initiated contact with the Defendant.

Officers Kimbrell, Menser and Flugrath did not read *Miranda* Warnings to Defendant before questioning him regarding the accident or intoxication.

Officer Kimbrell's testimony regarding the status of Defendant as not being in custody was not credible. He purposely blocked the vehicle he presumed was Defendant's in the driveway so he could not leave. He drew his weapon and kept it drawn while he banged on Defendant's door. He waved off other residents attempting to arrive at their home. After banging on his door for up to five minutes with weapon drawn, he ordered the Defendant to sit down on the edge of his porch and to answer questions related to the accident. At that time, he had no information as to damages to the pole nor evidence of intoxication, but he began his investigation thereon.

Officer Kimbrell's testimony in relation to a community caretaking function was not credible. H[e] yelled at the Defendant through the door that he wanted to get him checked by a medic. He testified that he wanted the Defendant to exit the residence so EMS could check him out. However, when Defendant exited the home, Officer Kimbrell first ordered him to sit and answer questions about the incident with the utility pole. He testified he observed bleeding from the

Defendant's ear, but he did not immediately call on EMS and delayed their approach until his questions were answered.

Officer Kimbrell noted damage to a truck parked in the driveway of the home where Defendant was located. This testimony was credible.

Officer Kimbrell was truthful and credible when he testified why he drew his weapon upon approaching Defendant's front door.

There was no evidence presented on whether the Defendant saw the weapon as drawn by Officer Kimbrell.

The Defendant was not placed in handcuffs during the time he was on the porch.

CONCLUSIONS OF LAW

Both of Defendant's Motions to Suppress are granted in their entirety.

Neither exigent circumstances nor the community caretaking function excused any of the officers' conduct from complying with the requirements to obtain a search warrant and arrest warrant. Neither exigent circumstances nor the community caretaking function was evidenced by the Officer's actions and words.

The initial contact by Officer Kimbrell at Defendant's door amounted to a detention and a custodial arrest. The initial contact at Defendant's door was not a consensual encounter. A reasonable innocent person presented with the actions of Officer Kimbrell would believe that their freedom of movement was restrained to the degree associated with a custodial arrest. Defendant was therefore placed in custody when Officer Kimbrell ordered him from his home and commanded him to sit on the edge of the porch. His vehicle was blocked, and his movements were restricted.

Officer Kimbrell's actions in ordering Defendant from his home amounted to an unreasonable intrusion into Defendant's home without a warrant and [were] contrary to the requirements of the Fourth Amendment to the United States Constitution and Article 1, Section 9 of the Texas Constitution.

When Officer Kimbrell ordered Defendant from his home, he did not possess reasonable suspicion or probable cause to detain or arrest Mr. Martinez for any offense, including but not limited to the offenses of Driving While Intoxicated or Texas Transportation Code 550.025. He was unaware of any damages to the utility pole, the amount of any damages, if any, which would determine the degree of the misdemeanor offense. He did not testify to any signs of intoxication at his

initial contact with the Defendant nor to any information of erratic driving other than the incident with the utility pole given to him by others.

The Defendant was subjected to custodial interrogations from the moment he was ordered by Officer Kimbrell out of his home and through the remainder of the contact with all law enforcement officers involved on the day in question. Said custodial interrogations were conducted without the requisite constitutional and statutory warnings being given to Defendant.

Officer Kimbrell's actions of placing Defendant in custody were in violation of Texas Code of Criminal Procedure Article 14.03(a)(1).[6]

The fruit of the poisonous tree doctrine and Texas Code of Criminal Procedure Article 38.23 preclude the use, both direct and indirect, of any evidence collected after the illegal arrest and detention of the Defendant by Officer Kimbrell. This includes any evidence subsequently obtained from the Defendant by Officers Menser, Kimbrell or Flugrath, as well as any evidence collected from Mr. Martinez by Officer Flugrath during the DWI investigation.

The prosecution did not meet its burden to show that the taint of Officer Kimbrell's illegal arrest and detention was sufficiently attenuated when Officer Flugrath questioned Mr. Martinez and had him perform field sobriety tests.

Because the aforementioned constitutional and statutory rights of Mr. Martinez were violated, any evidence collected from Mr. Martinez by Officers Kimbrell, Menser and Flugrath should be suppressed.

Based on information known to the officers on the scene, the officers created a situation that would lead a reasonable person to believe that his freedom of movement was significantly restricted.

Given the totality of the facts and circumstances, the Defendant was in custody for *Miranda* purposes when he acquiesced to the commands of the officer and crossed the threshold of his doorway. A reasonable person would not have

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[6] Article 14.03(a)(1) authorizes the warrantless arrest of:

> persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section 49.02, Penal Code, or threaten, or are about to commit some offense against the laws.

Tex. Code Crim. Proc. art. 14.03(a)(1).

refused to exit his house, would not believe that he could leave once outside the house, or go back inside the house either before or after having been examined by EMS.

DISCUSSION

In four issues on appeal, the State contends that the trial court abused its discretion by granting Martinez's motions to suppress because (1) at the time Det. Kimbrell approached Martinez's front door, Det. Kimbrell "could have [had] objectively reasonable suspicion or probable cause," and he "conducted a reasonable and necessary 'knock-and-talk' investigation"; (2) "alternatively or additionally, . . . the totality of the circumstances provided objective, exigent, 'emergency aid,' circumstances to actually enter the home, and Kimbrell's actions were not unreasonable"; (3) Martinez was not subject to custodial interrogation during "the brief investigative detention either before or after he was checked out by medics," and "his field-sobriety testing and other evidence was not testimonial in any event"; and (4) at the time of Martinez's arrest, there was probable cause to arrest him for DWI. Alternatively, the State requests that the Court find that "the trial court impliedly found facts favorable to the State on any issues on which it did not make explicit findings" or "abate and remand the case and require the trial court to make explicit findings and conclusions on the State's detailed, essential and potentially dispositive issues."

Standard of Review

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018); *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). In a suppression hearing, 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. *Lerma v. State*, 543 S.W.3d 184, 190 (Tex. Crim. App. 2018); *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007). We therefore apply a bifurcated standard of review, *Lerma*, 543 S.W.3d at 189–90; *Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016), giving almost total deference to a trial court's findings of historical fact and credibility determinations that are supported by the record, but reviewing de novo questions of law and the trial court's application of the law to facts that do not turn on credibility and demeanor, *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016); *Cortez*, 543 S.W.3d at 203–04. The same deferential standard of review applies when a trial court's findings are based on a video admitted into evidence at a suppression hearing, and there is a factual dispute regarding its contents. *Miller v. State*, 393 S.W.3d 255, 263 (Tex. Crim. App. 2012). However, "indisputable video evidence" may be reviewed de novo, unless the trial court's findings concern "whether a witness actually saw what was depicted on a videotape." *State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013).

We review a trial court's application of search and seizure law to the facts de novo. *State v. Ford*, 537 S.W.3d 19, 23 (Tex. Crim. App. 2017); *State v. Weaver*, 349 S.W.3d 521, 525 (Tex. Crim. App. 2011); *see State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008) (distinguishing fact findings from "legal rulings on 'reasonable suspicion' or 'probable cause'" because such rulings are "legal conclusions subject to de novo review"). We view the record in the light most favorable to the trial court's ruling, *Dixon*, 206 S.W.3d at 590, and will overturn its determination only if it is arbitrary, unreasonable, or "outside the zone of reasonable disagreement," *Cortez*, 543 S.W.3d at 203. We will uphold the ruling if it is correct on any theory of law applicable to the case, *Lerma*, 543 S.W.3d at 190; *Weems*, 493 S.W.3d at 577, even

if the trial judge made the ruling for a wrong reason, *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014).

Nature of Initial Encounter

In its first issue, the State contends that Det. Kimbrell had reasonable suspicion that Martinez had been driving while intoxicated when he approached Martinez's door to conduct a "knock and talk" investigation. The State further argues that Martinez "surrendered the enhanced constitutional protection of the home" by "voluntarily crossing the threshold" in response to Det. Kimbrel's knocking.

The Fourth Amendment protects against unreasonable searches and seizures by government officials. *See* U.S. Const. amend. IV; *Hubert v. State*, 312 S.W.3d 554, 560 (Tex. Crim. App. 2010). Not every encounter between a civilian and a police officer implicates the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). There are three distinct types of police-citizen interactions: (1) consensual encounters that do not implicate the Fourth Amendment; (2) investigative detentions that are Fourth Amendment seizures of limited scope and duration, which must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures, which are constitutional only if supported by probable cause. *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016); *Wade v. State*, 422 S.W.3d 661, 667 (Tex. Crim. App. 2013); *State v. Woodard*, 341 S.W.3d 404, 410–11 (Tex. Crim. App. 2011).

A consensual encounter does not implicate the Fourth Amendment because the citizen is free to terminate the encounter at any time. *Woodard*, 341 S.W.3d at 411; *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010); *see Bostick*, 501 U.S. at 434 (so long as

citizen feels that he is free to disregard officer and go about his business, officer may approach and ask questions without implicating Fourth Amendment); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (highlighting that in consensual encounters, individuals "may decline to listen to the questions at all and may go on [their] way"). "Law enforcement is free to stop and question a fellow citizen; no justification is required for an officer to request information from a citizen." *Woodard*, 341 S.W.3d at 411. These types of encounters do not require any justification on the officer's part; an officer may initiate a consensual encounter without any indicia of criminal activity. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *State v. Castleberry*, 332 S.W.3d 460, 466 (Tex. Crim. App. 2011); *see United States v. Drayton*, 536 U.S. 194, 201 (2002) (even when police officer lacks suspicion of criminal activity he may, among other things, pose questions to suspect so long as he does not induce suspect's cooperation by coercive means); *State v. Velasquez*, 994 S.W.2d 676, 678 (Tex. Crim. App. 1999) (explaining that probable cause "does not apply to a police officer's approaching a citizen to engage in conversation").

The Supreme Court has recognized that police officers may knock on the door to a residence as part of an investigation and that the occupant has no obligation to open the door or to speak. *Kentucky v. King*, 563 U.S. 452, 469–70 (2011); *see Beaver v. State*, 106 S.W.3d 243, 248 n.4 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) ("An officer is permitted to knock on a door for investigative purposes."). The Court has also explained that officers "have a very good reason to announce their presence loudly and to knock on the door with some force," as "[a] forceful knock may be necessary to alert the occupants that someone is at the door." *King*, 563 U.S. at 468. Indeed, officers may be "as aggressive as the pushy Fuller-brush man" as long as they do not employ "official coercion." *State v. Garcia-Cantu*, 253 S.W.3d 236, 243 (Tex. Crim.

App. 2008); *see Wade*, 422 S.W.3d at 667 ("Such consensual encounters may be uncomfortable for a citizen, but they are not Fourth Amendment seizures.")

There is no bright-line rule for determining when a consensual encounter becomes a seizure. *Furr*, 499 S.W.3d at 877; *Wade*, 422 S.W.3d at 667; *Woodard*, 341 S.W.3d at 411; *see Garcia-Cantu*, 253 S.W.3d at 243 ("Each citizen-police encounter must be factually evaluated on its own terms; there are no per se rules."). The "crucial test" is "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437; *accord Hunter v. State*, 955 S.W.2d 102, 104 (Tex. Crim. App. 1997) ("[T]he dispositive question is whether the officers conveyed a message to appellant that compliance with their requests was required.").

In other words, a person is "seized" when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Mendenhall*, 446 U.S. at 552 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Garcia-Cantu*, 253 S.W.3d at 243–44. What constitutes a sufficient restraint on liberty "will vary, not only with the particular conduct at issue, but also with the setting in which the conduct occurs." *Id.* at 244. Examples of circumstances that might indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554. Furthermore, the test is objective; it does not rely on the subjective belief of the detainee or the police. *Furr*, 499 S.W.3d at 878; *Wade*, 422 S.W.3d

at 668. Whether the facts surrounding the interaction between an officer and a citizen constitute a consensual encounter or a Fourth Amendment detention is subject to de novo review. *Furr*, 499 S.W.3d at 877; *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013).

In the present case, Det. Kimbrell arrived at Martinez's residence around 5:30 p.m. and parked his squad car behind Martinez's truck, blocking it in; a second vehicle in the driveway was unobstructed. Det. Kimbrell did not activate his overhead lights or siren. As he approached Martinez's front door, Det. Kimbrell unholstered his pistol, which he held by his side until Martinez came to the door. Over a period of approximately four minutes, Det. Kimbrell—standing to the side of the door—knocked six times, announced himself as a police officer, and called for Martinez to open the door. Det. Kimbrell added that Martinez needed to be seen by medics or EMS to make sure that he was okay. After approximately four-and-a-half minutes, Martinez answered the door holding a cloth to his ear and took a step onto the porch. Det. Kimbrell gestured to the porch and stated, "Come step outside." The trial court found that there was no evidence that Martinez saw Det. Kimbrell's pistol, which he holstered after seeing that Martinez was unarmed. Det. Kimbrell testified that he did not display the gun to Martinez. Martinez subsequently told Det. Kimbrell that he had not come to the door sooner because he had been in the restroom.

Under the totality of the circumstances, Det. Kimbrell's words and actions were not such that a reasonable individual would have been coerced into complying or felt that Det. Kimbrell's requests could not have been ignored, avoided, or declined. *See Bostick*, 501 U.S. at 439–40; *Hunter*, 955 S.W.2d at 104; *Garcia-Cantu*, 253 S.W.3d at 243. Det. Kimbrell neither made an "unreasonable show of force . . . compel[ling Martinez] to open his door," *Orosco v. State*, 394 S.W.3d 65, 74 (Tex. App.—Houston [1st Dist.] 2012, no pet.),

nor threatened—expressly or impliedly—that Martinez would be taken forcibly, *Howard v. State*, 624 S.W.3d 14, 21 (Tex. App.—Houston [1st Dist.] 2021, pet. ref'd).

The facts of this case are markedly distinct from those in which courts have found that officers' conduct constituted an unconstitutional seizure. In *Orosco*, our sister court found that officers unconstitutionally seized the defendant by causing him to exit his home in response to an unreasonable show of force. *Orosco*, 394 S.W.3d at 75. There, seven officers entered the property before daylight, formed a perimeter around the home, knocked on the front door and windows for approximately 20 to 30 minutes, looked in through the windows, and fired a shotgun at a neighbor's dog. *Id.* at 74–75. When the defendant finally exited the home, he told the officers, "You know, y'all were laughing about [shooting] the dog. I was afraid of what you'd do to me if I didn't come out." *Id.* at 75. The court, addressing the issue for the "first time," noted that the defendant had not cited any Texas cases to support his position but—relying on cases from federal circuit courts—concluded that because the defendant opened his door "in response to an unreasonable show of authority by the officers," he was unconstitutionally seized at that time. *Id.* at 72, 75; *see United States v. Gomez-Moreno*, 479 F.3d 350, 355 (5th Cir. 2007), *overruled on other grounds by King*, 563 U.S. at 452 (finding officers' conduct impermissibly created exigent circumstances to enter residence where 10 to 12 armed officers, accompanied by helicopter and several additional officers in general area, knocked, tried to turn doorknob, and demanded that occupants open door); *United States v. Reeves*, 524 F.3d 1161, 1165 (10th Cir. 2008) (concluding reasonable person would not have felt free to ignore "implicit command" to open door when between 2:30 and 3:00 in the morning, officers pounded on door and window of motel room with their flashlights while yelling and loudly identifying themselves as police for at least 20 minutes); *United States v. Morgan*, 743 F.2d 1158, 1164 (6th Cir. 1984)

(finding defendant was arrested without warrant when nine officers and several patrol cars surrounded his residence in the dark, blocked any movement of his car, and called for him to come out of house); *United States v. Hernandez*, 392 F. App'x 350, 351 (5th Cir. 2010) (finding Fourth Amendment violation where officers—after knocking on door of residence and receiving no response—banged on doors and windows, shouted that occupants should open door, tried to open door, broke glass pane of screen door with baton, and spoke with occupant while holding drawn weapons); *cf. State v. Perez*, 85 S.W.3d 817, 818–19 (Tex. Crim. App. 2002) (finding consensual encounter where officer chased purse-snatching suspect to his apartment and knocked on door); *State v. Donohoo*, No. 04-15-00291-CR, 2016 WL 3442258, at *4 (Tex. App.—San Antonio June 22, 2016, no pet.) (mem. op., not designated for publication) (concluding defendant was not detained when around 9:30 p.m., two officers "repeatedly knocked on [his] door" and told him that his car was about to be towed).

Martinez responds to the State's contention by citing the Supreme Court's decision in *Florida v. Jardines*, 569 U.S. 1, 8 (2013), to argue that Det. Kimbrell "did not have an implied license to linger [on Martinez's curtilage] after not receiving a response" to his knock and, consequently, his conduct amounted to an "unreasonable search absent a warrant or an exception thereto." Yet the suggestion that the implied license to knock on a home's front door might end once the knocker has waited briefly without response is mere dicta. *See Cook v. State*, 509 S.W.3d 591, 596, 601 (Tex. App.—Fort Worth 2016, no pet.) (finding that defendant "voluntarily answered her door" when officers rang doorbell, and it took defendant "about five to ten minutes" to answer); *Gonzalez v. State*, No. 01-17-00337-CR, 2018 WL 1473789, at *3 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018, no pet.) (mem. op., not designated for publication) (holding that security guard "freely and voluntarily" consented to deputies' entry when, after

they knocked and waited "a few minutes," he unlocked door and let them in). Martinez is correct that police officers "have an implied license to approach a home via the front walkway and knock on the front door." *Sayers v. State*, 433 S.W.3d 667, 674 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see Washington v. State*, 152 S.W.3d 209, 214 (Tex. App.—Amarillo 2004, no pet.) (observing that officer can enter curtilage to contact occupant "when the occupant has not manifested his intent to restrict access by locking a gate or posting signs informing the officer he is not invited or the officer does not deviate from the normal path of traffic"); *Howard*, 624 S.W.3d at 20 (finding officers were not trespassing when they approached defendant's door and did not need reasonable suspicion to knock and ask him questions). However, *Jardines* did not "create a new constitutional protection or fundamental right," *Fuentes-Sanchez v. State*, No. 03–12–00281–CR, 2014 WL 1572448, at *6 n.12 (Tex. App.–Austin Apr. 17, 2014, no pet.) (mem. op., not designated for publication), and the "opinion was limited to the question of whether the officers' behavior in using a drug-dog on the defendant's porch was a search within the meaning of the Fourth Amendment," *id.* (citing *Jardines*, 569 U.S. at 5).

Martinez's argument is substantively identical to that raised by the defendant in *Lopez v. State*, No. 04-13-00300-CR, 2014 WL 5353627, at *4 (Tex. App.—San Antonio Oct. 22, 2014, pet. ref'd) (mem. op., not designated for publication). Citing *Jardines*, Lopez contended that officers "exceeded the implied license to knock on the door of his residence by knocking continuously for five minutes" at approximately 5:50 a.m. *Id.* at *3. In an opinion that we find persuasive, our sister court concluded that "[a]lthough continuous knocking on the door for five minutes might be annoying, the officers made no 'display of official authority' suggesting that they could not be ignored" and, as such, "did not exceed the scope of a valid 'knock and talk.'" *Id.* at *4.

We therefore conclude that the interaction between Det. Kimbrell and Martinez at Martinez's front door was a consensual encounter and that no seizure occurred under the Fourth Amendment. *See Bostick*, 501 U.S. at 434; *Hunter*, 955 S.W.2d at 104.

Reasonable Suspicion

Having found that Martinez exited his residence as part of a consensual encounter, we must next determine whether officers had reasonable suspicion to detain him as part of their DWI investigation. We will assume without deciding that Martinez was detained when Det. Kimbrell instructed him to sit on the edge of the porch after Martinez stepped outside of his residence.

Under the Fourth Amendment, warrantless detention of a person "that amounts to less than a full-blown custodial arrest" must be justified by reasonable suspicion. *Derichsweiler v. State*, 348 S.W.3d 906, 914–15 (Tex. Crim. App. 2011); *see Kansas v. Glover*, 140 S.Ct. 1183, 1187–88 (2020). "'Reasonable suspicion' means 'a particularized and objective basis for suspecting the particular person . . . of criminal activity.'" *Johnson v. State*, 622 S.W.3d 378, 384 (Tex. Crim. App. 2021), *cert. denied* 142 S.Ct. 589 (2021) (quoting *Glover*, 140 S.Ct. at 1187). In other words, reasonable suspicion exists if an 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) engaged in criminal activity." *State v. Cortez*, 543 S.W.3d 198, 204 (Tex. Crim. App. 2018). "The articulable facts need only show that some activity out of the ordinary has occurred, some suggestion to connect the detainee to the unusual activity, and some indication that the unusual activity is related to crime." *Johnson*, 622 S.W.3d at 384. The detaining officer need not be able to pinpoint a particular

penal infraction. *Id.*; *Derichsweiler*, 348 S.W.3d at 916. Determining reasonable suspicion depends upon "both the content of the information known to the officer and its degree of reliability." *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011). Reasonable suspicion requires a level of suspicion more than a mere "hunch" but less than probable cause. *Johnson*, 622 S.W.3d at 384. An investigative detention amounts to a "significantly lesser intrusion upon the privacy and integrity of the person than a full-blown custodial arrest" and therefore "the specificity with which the articulable information known to the police must demonstrate that a particular penal offense has occurred, is occurring, or soon will occur, is concomitantly less." *Derichsweiler*, 348 S.W.3d at 916. "So long as the intrusion does not exceed the legitimate scope of such a detention and evolve into the greater intrusiveness inherent in an arrest-sans-probable-cause, the Fourth Amendment will tolerate a certain degree of police proaction." *Id.* at 916–17.

The test for reasonable suspicion looks at the totality of the circumstances and focuses "solely on whether an objective basis exists for the detention," disregarding the officer's subjective intent. *State v. Kerwick*, 393 S.W.3d 270, 274 (Tex. Crim. App. 2013). Reasonable suspicion "does not require negating the possibility of innocent conduct." *Johnson*, 622 S.W.3d at 385. "Sometimes, a police officer's limited knowledge of the circumstances can give rise to reasonable suspicion, even though the presence of additional facts might dispel reasonable suspicion." *Id.* Moreover, the detaining officer need not be personally aware of every fact establishing reasonable suspicion; rather, the reviewing court must consider the cumulative information known to cooperating officers, including a 911 dispatcher, in making the determination. *Derichsweiler*, 348 S.W.3d at 914.

When Det. Kimbrell instructed Martinez to sit on the porch, officers were aware of the following information giving rise to reasonable suspicion[7]: (1) a witness had reported that an individual had been involved in a single-vehicle accident in which his vehicle "spun out," left the roadway, and collided with a utility pole; (2) the day was clear, with no indication of inclement weather; (3) the witness reported that the vehicle involved in the accident was "barely drivable" because its rear tire was popped and had been "knocked off the rim"; (4) the witness reported that the driver had gotten out the vehicle and was "bleeding from his ear"; (5) the witness reported that despite his injury and the vehicle's condition, the driver got back into the vehicle and "fled the scene"; (6) the witness followed the vehicle's driver to Martinez's residence and reported that the driver had gone inside; (7) when Det. Kimbrell neared Martinez's house, a man approached his squad car and stated that the driver "hit something over there—a pole—and he took off"; (8) the man identified the vehicle that had been involved in the accident and informed Det. Kimbrell that the driver had gone into Martinez's house; (8) Det. Kimbrell observed the vehicle described by the 911 caller in Martinez's driveway; (9) the vehicle was parked partway off of the driveway with its right-side wheels in the grass; (10) despite Det. Kimbrell's repeated knocking and calls to open the door, Martinez took over four minutes to come to the door; and (11) when asked what had happened, Martinez replied, "I just lost control of my truck."

In its findings of fact, the trial court found that "[t]here was no evidence presented that [Martinez] ran inside his house or was attempting to flee." The trial court's finding, however, is contrary to the evidence. The CAD log notes that the 911 caller who witnessed the

[7] The information listed is taken from officers' incident reports, the CAD log, and Det. Kimbrell's dash- and body-cam footage.

accident reported that Martinez "TOOK OFF GOING TOWARDS THE SUBDV ON THE LEFT TOWARDS SOLMS." Similarly, the individual[8] who approached Det. Kimbrell's squad car told him that the driver of the vehicle that had been involved in the accident "went into that house there with that black Chevy and that tan car. But his tire on his right side is all torn up. He hit something over there—a pole—and he took off." Ofc. Menser's offense report likewise records that "[d]ispatch further advised the male got into the vehicle and fled the scene going towards Bee Blvd." Black's Law Dictionary defines "flee" as "[t]o run away; to hasten off"; "[t]o run away or escape from danger, pursuit, or unpleasantness; to try to evade a problem." *Flee*, Black's Law Dictionary (11th ed. 2019). Miriam-Webster similarly provides the following definitions: "to run away often from danger or evil"; "to hurry toward a place of security." Merriam-Webster, https://www.merriam-webster.com/dictionary/flee (last visited Dec. 12, 2022). We conclude that the trial court's finding as it concerns evidence presented as to whether Martinez was attempting to flee is not supported by the record, and we need not defer to it. *See State v. Groves*, 837 S.W.2d 103, 106 (Tex. Crim. App. 1992) ("Though we defer to a trial court's factual findings when they are supported by the record, we conclude that the record does not support the trial court's finding...."). The evidence in the record indicates that Martinez fled from the accident scene to his home. *See Clay v. State*, 240 S.W.3d 895, 905 n.11 (Tex. Crim. App. 2007) ("Evidence of flight evinces a consciousness of guilt.")

The State asserts that the present circumstances are greater than those from which the United States Supreme Court found reasonable suspicion in *Navarette v. California*, 572 U.S. 393, 398–404 (2014). In that case, a 911 caller reported that a silver Ford F-150 pickup truck, for which she gave the license plate number, had run her off the road. *Id.* at 395, 399.

[8] The record is unclear as to whether this individual was the 911 caller.

Officers pulled the truck over, smelled marijuana, and subsequently discovered 30 pounds of marijuana in the truck's bed. *Id.* at 395.

The Court found that the call was sufficiently reliable to credit the caller's allegation because, even assuming that the caller was anonymous, she had "claimed eyewitness knowledge of the alleged dangerous driving," reported the incident soon after it occurred, and utilized the 911 emergency system—"adequate indicia of reliability for the officer to credit the caller's account." *Id.* at 398–400. The Court concluded that these indicia of reliability were sufficient to provide the officer with reasonable suspicion that the truck's driver had run another vehicle off the road, which in turn made it reasonable for the officer to stop the truck. *Id.* at 404. In supporting its conclusion, the Court emphasized that the caller had reported "more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving" and that running a vehicle off the road "bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness." *Id.* at 403. Such behavior, the Court continued, is a "significant indicator of drunk driving." *Id.*

Martinez attempts to distinguish *Navarette* by noting that "running a car off the roadway is not the same as hitting a pole and stopping to assess the damage before leaving." He also asserts that Det. Kimbrell "knew very few facts relative to developing reasonable suspicion" when he knocked on Martinez's door. We find the attempted distinction unavailing. As listed above, when the officers began their DWI investigation, they were cumulatively aware of several facts tending to show that "criminal activity may be afoot." *See Terry*, 392 U.S. at 30. Moreover, the 911 caller in this case meets each of the indicia of reliability identified in *Navarette*: he or she "alleged a specific and dangerous result of the driver's conduct," namely, leaving the roadway, spinning out, and colliding with a utility pole; reported the incident while

following Martinez from the scene of the accident; and made the report using the 911 emergency system.[9] *See Navarette*, 572 U.S. at 399–404. And while the trial court's finding that "[o]ther than the report of the accident, there was no evidence of erratic driving, weaving, swerving, [or] driving outside the lane of traffic" is correct, it overlooks the significance of the accident itself and the reasonable inferences that the collision could have occurred if Martinez had driven erratically and left his lane. *See Cortez*, 543 S.W.3d at 204 (observing that officer may draw inferences from articulable facts in formulating reasonable suspicion). A single-vehicle collision with a roadside utility pole, like running another vehicle off the road, "suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues." *Navarette*, 572 U.S. at 403; *see also Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010) (noting that evidence that defendant had "a one-car collision with an inanimate object" can help support inference that defendant's intoxication caused accident).

Conversely, Martinez argues that the circumstances of this case are similar to those in *State v. Garcia*, No. 03-14-00048-CR, 2014 WL 4364623 (Tex. App.—Austin Aug. 28, 2014, no pet.) (mem. op., not designated for publication), in which this Court concluded that the facts were insufficient to support a reasonable suspicion of intoxication. *Id.* at *4. In *Garcia*, a 911 caller alleged that the driver of a silver Acura in the to-go line of a fast-food restaurant near a bar district was possibly intoxicated because the caller had seen the vehicle swerving. *Id.* at *1. An officer who was across the street pulled up behind the Acura and detained the driver, Garcia, testifying that "he knew that intoxicated drivers tended to swerve." *Id.* The officer acknowledged that he did not know how long the caller followed the Acura, how

[9] Martinez does not challenge the reliability of the 911 caller's account.

many times the caller saw the car swerve, or whether any other vehicles were placed in danger because of the reported behavior. *Id.*

The Court concluded that a "non-specific allegation of 'swerving'—and no indication that the swerving violated lane integrity or endangered other drivers—and a conclusory allegation of 'possible intoxication'" "fall just short of sufficient evidence to have provided reasonable suspicion." *Id.* at *4. In making its conclusion, the Court underscored that "[t]he circumstances surrounding [Garcia]'s driving d[id] not describe illegal conduct"; that the caller's observations were insufficiently detailed, unlike those in *Navarette*; and that the driver's reported behavior did not reach the level of danger described in *Navarette* nor the level of its examples of reports providing sufficient indicia of drunk driving. *Id.* at *3–4.

Here, in contrast, the 911 caller provided a specific description of Martinez's aberrant driving, including the location, time, and details of the crash; Martinez's subsequent actions; and the damage to Martinez's truck. Martinez's driving, including a spin-out and collision with a roadside utility pole, plainly reaches the level of danger contemplated in *Navarette*, and the caller here, as in the cases we cited in *Garcia*, "provided details of unusual, illegal, or dangerous behaviors supporting the conclusion that the driver they saw was intoxicated." *Id.* at *3. Moreover, while the 911 caller's description was "the only evidence of" Garcia's driving in that case, Martinez's crash could be corroborated by the damage to Martinez's truck. *Id.* Lastly, as we noted above, Martinez's conduct was "more than a minor traffic accident" and is consistent with the "paradigmatic manifestations of drunk driving" identified in *Navarette*. *See* 572 U.S. at 403.

Under the totality of the circumstances, at the time Det. Kimbrell instructed Martinez to have a seat on his porch, officers had reasonable suspicion that he had driven while

intoxicated. As such, any investigatory detention of Martinez was constitutionally permissible. We sustain the State's first issue. [10]

Custody

In its third issue, the State contends that the trial court erred by "essentially suppress[ing] everything" after concluding that Martinez was "subjected to custodial interrogations . . . without the requisite constitutional and statutory warnings.[11] Specifically, the State asserts that "the totality of the circumstances demonstrate[s] a relatively casual investigative detention, particularly after the EMTs had evaluated Defendant; because Defendant has not shown 'custody,' administering *Miranda* and art. 38.22 warnings was unnecessary."

The Fifth Amendment privilege against self-incrimination prohibits the government from compelling a criminal suspect to bear witness against himself. *Pecina v. State*, 361 S.W.3d 68, 74–75 (Tex. Crim. App. 2012) (citing U.S. Const. amend. V); *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In *Miranda*, the United States Supreme Court crafted safeguards to protect the privilege against self-incrimination in the inherently coercive atmosphere of custodial interrogations. *Pecina*, 361 S.W.3d at 75 (citing *Miranda*, 384 U.S. at 441). Texas has incorporated the requirements of *Miranda* into Article 38.22 of the Code of Criminal Procedure, which sets out specific warnings that must be provided to an accused during a custodial interrogation. *See* Tex. Code Crim. Proc. art. 38.22, §§ 2–3. Both *Miranda* and

[10] Because of our disposition of the State's first issue, we need not consider the State's alternative second issue, which contends that entry into Martinez's home was justified under the emergency-doctrine exception to the Fourth Amendment's warrant requirement. *See* Tex. R. App. P. 47.1.

[11] The trial court also concluded that "the initial contact" between Det. Kimbrell and Martinez at the door amounted to a custodial arrest in violation of Article 14.03(a)(1) of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 14.03(a)(1).

Article 38.22 require that the accused be properly admonished of certain constitutional rights for any statements "stemming from custodial interrogation" to be admissible as evidence against him. *See Miranda*, 384 U.S. at 444; Tex. Code Crim. Proc. art. 38.22, §§ 2–3.

It is undisputed that Martinez was not given the *Miranda* or Article 38.22 warnings before his formal arrest. However, the warnings set out in *Miranda* and Article 38.22 are required only when a person is subjected to "custodial interrogation." *See Miranda*, 384 U.S. at 442–57, 467–79 (warnings apply only to use of statements obtained from suspect during police-initiated "custodial interrogation"); Tex. Code Crim. Proc. art. 38.22, §§ 2–3 (setting out requirements for admissibility of defendant's statement resulting from "custodial interrogation"). Under *Miranda*, "custodial interrogation" refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. What constitutes "custodial interrogation" under Article 38.22 is the same as it is under *Miranda* and the Fifth Amendment. *Thai Ngoc Nguyen v. State*, 292 S.W.3d 671, 677 n.27 (Tex. Crim. App. 2009); *see Bass v. State*, 723 S.W.2d 687, 691 (Tex. Crim. App. 1986) (court's construction of "custodial interrogation" for purposes of Article 38.22 was consistent with meaning of "custodial interrogation" under Fifth Amendment). As such, the concerns raised by a failure to comply with *Miranda* or Article 38.22 arise only when the individual is subject to both (1) custody by a law-enforcement officer and (2) an interrogation. *See Miranda*, 384 U.S. at 444; Tex. Code Crim. Proc. art. 38.22, §§ 2–3.

A person is "in custody" when he or she is placed under arrest or if, under all of the objective circumstances, a reasonable person would believe that his freedom of movement has been restricted to the degree associated with a formal arrest. *State v. Saenz*, 411 S.W.3d 488,

496 (Tex. Crim. App. 2013) (citing *Stansbury v. California*, 511 U.S. 318, 322 (1994)). The Court of Criminal Appeals has listed four "general situations" that may constitute custody:

> (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.[12]

Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). The categories, however, are "merely descriptive, not exhaustive." *State v. Ortiz*, 382 S.W.3d 367, 376–77 (Tex. Crim. App. 2012). Ultimately, we evaluate custody on an ad hoc basis, after considering all of the objective circumstances, and apply the "reasonable person" standard, *Herrera v. State*, 241 S.W.3d 520, 532 (Tex. Crim. App. 2007), which presupposes an innocent person, *Wexler v. State*, 625 S.W.3d 162, 167 (Tex. Crim. App. 2021), *cert. denied* 142 S.Ct. 821 (2022). "Two discrete inquiries are essential [: . . .] [F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Herrera*, 241 S.W.3d at 532. Whether a person is in custody is an objective determination; the subjective views of the interrogating officer and the person being questioned are irrelevant. *J.D.B. v. North Carolina*, 564 U.S. 261, 270–71 (2011); *Stansbury*, 511 U.S. at 323; *Dowthitt*, 931 S.W.2d at 255. The issue is a mixed question of law and fact that does not turn on credibility or demeanor. *Saenz*, 411 S.W.3d at 494. Consequently, we apply a deferential standard of review to the trial court's "factual assessment of the

[12] Neither the first, second, nor fourth—which requires that the officer manifest his knowledge of probable cause to the suspect—is applicable in the present case. *See State v. Saenz*, 411 S.W.3d 488, 496 (Tex. Crim. App. 2013).

circumstances surrounding the interrogation" and a de novo review to its "ultimate legal determination that appellee was in custody." *Id.*

Texas courts consider several factors when categorizing the seizure of a person, including the amount of force displayed, the duration of detainment, the efficiency of the investigative process, whether the investigation is conducted at the original location or the person is transported to another location, the officer's expressed intent—that is, whether the officer told the person that he was under arrest or was being detained—and any other relevant factors. *Sheppard*, 271 S.W.3d at 290. In general, "[i]f the degree of incapacitation appears more than necessary to simply safeguard the officers and assure the suspect's presence during a period of investigation, this suggests the detention is an arrest." *Id.* at 291 (quoting 40 George E. Dix and Robert O. Dawson, Texas Practice: Criminal Practice and Procedure § 7.34 (2d ed. 2001)).

While Martinez was seated on the edge of his porch—following his treatment by EMS—Ofc. Menser began a DWI investigation, questioning Martinez about his trip to the store, alcohol consumption, and perception of time. The question here, then, is whether Martinez was placed in custody from the beginning of Ofc. Menser's questioning until Martinez's formal arrest following the field-sobriety tests, when he was advised of his constitutional rights.

The evidence admitted at the suppression hearing shows that Ofc. Menser first approached Martinez while he was seated on the front edge of his porch still being tended by EMTs. As the EMTs asked Martinez for his date of birth, phone number, and whether he had any major medical problems, Ofc. Menser closed the front door to Martinez's residence and stood quietly behind him and off to the side. When the EMTs stepped away, Det. Kimbrell also approached and, standing a few feet in front of Martinez, took notes on a small, lined pad as Ofc. Menser questioned Martinez, asking what he had bought at the store and how much he had

had to drink. During the questioning, Ofc. Menser stood in a relaxed posture, and Martinez sat unrestrained with his legs spread and his back resting against the brick wall of his house. *See Garcia-Cantu*, 253 S.W.3d at 244 ("The officer's conduct is the primary focus, but time, place, and attendant circumstances matter as well."). Around this time, a couple pushing a baby in a stroller walked up Martinez's driveway and greeted the first responders. An EMT explained to Ofc. Menser that he needed to have Martinez sign some documents, and Ofc. Menser told Martinez, "I still want to talk to you for a few minutes. Just hear him out real quick." Det. Kimbrell and Ofc. Menser stepped away as the EMT spoke with Martinez. When the EMT and Martinez had finished speaking, Det. Kimbrell left to photograph Martinez's vehicle, and Ofc. Menser continued to question Martinez; no other officers appeared to be near the two of them.

A third officer, Terry Lee Flugrath, was subsequently asked to assist with the DWI investigation. Ofc. Flugrath also questioned Martinez and asked if he would agree to take field-sobriety tests, to which Martinez assented. When Martinez performed poorly, Ofc. Flugrath told him that he was under arrest for DWI, handcuffed him, read him his *Miranda* rights, and placed him in the rear of a squad car. At no point prior to this was Martinez physically restrained or told that he was under arrest or not free to leave. During the DWI investigation, Det. Kimbrell's squad car was parked in the driveway, blocking in Martinez's vehicle but not the other vehicle parked in the driveway; a police SUV was parked alongside the curb across the street; and an ambulance and fire truck were parked further down the block. Neither police vehicle appeared to have activated its siren or overhead lights. Det. Kimbrell's body-cam footage records that he turned off his squad car's siren as he neared Martinez's residence.

The duration of the questioning is unclear. The CAD log notes that Det. Kimbrell "made contact" with Martinez at 5:40 p.m., and the body-cam video records an approximately four-and-a-half-minute interval from Martinez exiting the house until Ofc. Menser's questioning, a period which includes Martinez's treatment by EMTs. The CAD log also notes that "Menser . . . has one in custody" at 6:10 p.m. If this latter entry records the time at which Martinez was handcuffed and placed in the squad car, the time from the beginning of Ofc. Menser's questioning until Martinez's formal arrest would be approximately 25 minutes. During some of this time, Ofc. Flugrath was administering field-sobriety tests to Martinez. *See United States v. Sharpe*, 470 U.S. 675, 685–86 (1985) (declining to establish per-se rule that 20–minute detention is too long and would constitute de facto arrest); *Belcher v. State*, 244 S.W.3d 531, 540–42 (Tex. App.—Fort Worth 2007, no pet.) (concluding that detaining individual for additional twenty-seven minutes after already detaining him for twelve minutes so that another police officer could perform investigation regarding whether defendant was driving while intoxicated was not unreasonable under circumstances).

The factors distinguishing detentions from arrests support a conclusion that any seizure of Martinez prior to his formal arrest was a detention. No force was displayed; the detention was of short duration; the officers' investigative efforts were efficient; Martinez was not taken to a second location prior to his arrest; and he was never told that he was under arrest or not free to leave prior to being read his *Miranda* rights. *See Sheppard*, 271 S.W.3d at 290.

Similarly, the evidence in the record does not indicate that Martinez was in custody before his formal arrest. *See Crain*, 315 S.W.3d at 49–50 (citing *Mendenhall*, 446 U.S. at 554). Martinez never attempted to leave or to end the questioning. The questioning occurred in a public place—Martinez's own home—and he was not restrained. At most, two officers were

near him during the questioning, neither of whose presence could be reasonably perceived as threatening. Indeed, at one point both officers stepped away while Martinez spoke with an EMT. At no time during the questioning was a weapon displayed by the officers. Martinez was not physically touched during the encounter, and officers' language and tone of voice were not indicative of compulsion. *Id.*

We find the State's contrast of the present facts with those in *Wexler* useful for illustrating the character of Martinez's detention. In *Wexler*, as part of a narcotics investigation, officers blocked off the ends of a street, and 20 to 25 members of the Harris County Sheriff's Office High Risk Operations Unit ("HROU"), "a SWAT-like team," surrounded a house and announced over a loudspeaker (from an armored vehicle) that it was being searched and that any occupants must exit. 625 S.W.3d at 165. Wexler exited and was seated in the back of a patrol car while HROU did a protective sweep of the house. *Id.* at 168. Before narcotics officers could search the house, a detective told Wexler, "We have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what." *Id.* at 166, 168. Wexler replied that the drugs were in her bedroom in a dresser drawer, and officers subsequently recovered narcotics in that location. *Id.* at 166.

The court of appeals concluded that Wexler had not been in custody during the questioning and upheld the admission of her statement. *Id.* The Court of Criminal Appeals agreed, noting that "the detention was brief, the investigation was efficient, Hill was the only officer to question [Wexler], [Wexler] was not removed from the location of the search, and she was not told she could not leave." *Id.* at 168. In addition, the detention occurred in a public setting, and there was no evidence that she was "aware of an overwhelming police presence." *Id.* at 170. Consequently, the Court of Criminal Appeals concluded that "the court of appeals

correctly held that Appellant failed in her burden of proving that she experienced the functional equivalent of a formal arrest." *Id.*

Under the circumstances reflected in the record—which are significantly less intimidating than those in *Wexler*—a reasonable person in Martinez's situation would not have felt that there was a restraint on his freedom to a degree associated with arrest or believed that he was not free to leave. *See Mendenhall*, 446 U.S. at 554; *Wexler*, 625 S.W.3d at 168. As such, Martinez's statements to officers did not result from a "custodial interrogation," and *Miranda* or Article 38.22 warnings were not required prior to the questioning. We sustain the State's third issue.

Probable Cause

In its fourth issue, the State contends that there was "objective probable cause to arrest [Martinez] for diving while intoxicated."

An arrest is valid under Texas law if the arresting officer had probable cause with respect to the person being arrested as well as statutory authority to make the arrest. *State v. Martinez*, 569 S.W.3d 621, 628 (Tex. Crim. App. 2019); *Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008); *see* Tex. Code Crim. Proc. arts. 14.01–14.04. "Probable cause is a fluid concept that cannot be readily reduced to a neat set of legal rules." *Ford*, 537 S.W.3d at 23; *accord Baldwin v. State*, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009); *see Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003) ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.") (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). "Although the concept evades precise definition, it involves 'a reasonable ground for belief of guilt' that is

'particularized with respect to the person to be searched or seized.'" *Ford*, 537 S.W.3d at 23 (quoting *Baldwin*, 278 S.W.3d at 371); *see Pringle*, 540 U.S. at 371. "It is a greater level of suspicion than 'reasonable suspicion' but falls far short of a preponderance of the evidence standard." *Ford*, 537 S.W.3d at 23–24; *accord Baldwin*, 278 S.W.3d at 371. "[I]t is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" *Gates*, 462 U.S. at 235 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969), *abrogated on other grounds by Gates*, 462 U.S. at 238).

For cases involving driving while intoxicated, there is no requirement that certain "intoxication indicators"—for example, failing field sobriety tests—be present to establish probable cause because the factors may differ in each case. *See Woodward v. State*, 668 S.W.2d 337, 345 (Tex. Crim. App. 1982) (explaining that "[i]t must be kept in mind in reviewing a question of sufficiency of probable cause that such a question is a quintessential example of the necessity for case-by-case determination based upon the facts and circumstances shown"). Nevertheless, the Court of Criminal Appeals has provided examples of "evidence that would logically raise an inference that the defendant was intoxicated at the time of driving," including: "erratic driving, post-driving behavior such as stumbling, swaying, slurring or mumbling words, inability to perform field sobriety tests or follow directions, bloodshot eyes, any admissions by the defendant concerning what, when, and how much he had been drinking." *Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010).

Probable cause for a warrantless arrest exists if, at the time the arrest is made, the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent person to believe that the arrested person had committed or was committing an offense. *Woodard*, 341 S.W.3d at 412; *Amador*

v. State, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009); *see Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Martinez*, 569 S.W.3d at 628. "The test for probable cause is an objective one, unrelated to the subjective beliefs of the arresting officer, and it requires a consideration of the totality of the circumstances facing the arresting officer." *Amador*, 275 S.W.3d at 878 (citing *Beck*, 379 U.S. at 97; *Pringle*, 540 U.S. at 371).

Here, the record reflects that Martinez was involved in a single-vehicle accident in which he spun out, left the roadway, and collided with a utility pole. According to the 911 caller, Martinez surveyed the damage and "took off" to his home despite bleeding from his ear and his vehicle being barely drivable. When asked what had happened, Martinez told Det. Kimbrell, "I don't know. I was just driving, and I just lost control of it." Martinez later told Ofc. Menser and Ofc. Flugrath that he had been talking to his wife on the phone when he lost control. Martinez stated that he had drunk three 16 oz. beers before going to the store but later stated that he had drunk two and had gone to the store to purchase bean dip and another beer. Ofc. Menser reported that Martinez "had a strong odor of an intoxicating beverage emitting from his breath," that his eyes were "bloodshot and glassy," and that his speech was slurred. When at 5:45 p.m. Ofc. Menser asked Martinez what time it was, Martinez responded that it was noon. Ofc. Flugrath likewise reported that Martinez's eyes were glassy, watery, and bloodshot and that he smelled a strong odor of alcohol coming from his breath and person. When asked, Martinez told both officers that he knew he was supposed to stay on the scene after an accident. At Martinez's residence, Det. Kimbrell spoke with Martinez's daughter-in-law, who stated that although Martinez reportedly used to have seizures, he had not had one in 11 years, and she was not aware of any medical condition that would cause him to lose consciousness.

Martinez consented to undergo field-sobriety tests administered by Ofc. Flugrath. Ofc. Flugrath observed six of six possible clues during the horizontal-gaze nystagmus test. During the finger-touch test, when asked to hold out his hand and count one through four while touching each finger to Ofc. Flugrath's thumb, Martinez stated that he understood and "counted 1 through 5, touching fingers in a random pattern." While reciting the alphabet, Martinez repeated "wx" twice. Ofc. Flugrath concluded, based on his training and experience, that Martinez was too drunk to be driving and placed him under arrest.

The facts and circumstances present in this case were sufficient to warrant a prudent person to believe that Martinez was intoxicated and had committed the offense of driving while intoxicated. *See* Tex. Penal Code § 49.04. We therefore sustain the State's fourth issue.

CONCLUSION

Based on our resolution of the State's issues, we conclude that the trial court abused its discretion by granting the motions to suppress evidence.[13] We therefore reverse the trial court's order granting Martinez's motions to suppress and remand this cause for further proceedings consistent with this opinion.

[13] Consequently, we need not address the State's alternative requested relief. *See* Tex. R. App. P. 47.1.

Edward Smith, Justice

Before Justices Goodwin, Kelly, and Smith

Reversed and Remanded

Filed: December 15, 2022

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