NUMBER 13-15-00069-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

ROGER ANTHONY MARTINEZ, **Appellee.**

On appeal from the 24th District Court of Victoria County, Texas.

MEMORANDUM OPINION ON REMAND

Before Justices Contreras,[1] Benavides and Longoria
Memorandum Opinion on Remand by Justice Contreras

Appellee, Roger Anthony Martinez, was charged by indictment with one count of possession of a controlled substance in a correctional facility, a third-degree felony, *see* TEX. PENAL CODE ANN. § 38.11(d)(1) (West, Westlaw through 2015 R.S.), and one count

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[1] Justice Dori Contreras, formerly Dori Contreras Garza. *See* TEX. FAM. CODE ANN. § 45.101 *et seq.* (West, Westlaw through 2015 R.S.).

of possession of less than one gram of cocaine, a state jail felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(b) (West, Westlaw through 2015 R.S.). Martinez moved to suppress the drug evidence. The trial court granted the motion and we affirmed. *State v. Martinez*, No. 13-15-00069-CR, 2015 WL 5797604, at *6 (Tex. App.—Corpus Christi Oct. 1, 2015) (mem. op., not designated for publication).

On its own petition, the Texas Court of Criminal Appeals vacated our judgment and remanded to this Court with instructions to "abate it to the trial court for supplemental findings of fact and conclusions of law consistent with this opinion." *State v. Martinez*, No. PD-1337-15, 2016 WL 7234085, at *7–8 (Tex. Crim. App. Dec. 14, 2016) (not designated for publication) (plurality op.) (finding that the trial court "failed to apply an appropriate legal standard" because "it erroneously believed that evidence of [the arresting officer's] knowledge could come only from his mouth or from what he was expressly told"). We abated the appeal on January 26, 2017, received a supplemental clerk's record containing the trial court's supplemental findings of fact and conclusions of law on February 14, 2017, and reinstated the appeal. We affirm.

I. BACKGROUND

Martinez's motion to suppress argued that police lacked probable cause to arrest him for public intoxication. On original submission, we described the suppression hearing testimony as follows:

> Javier Guerrero stated that he was an officer with the Victoria Police Department on January 5, 2014. On that date, at around 11:40 p.m., he was dispatched to the G & G Lounge, a bar located on South Laurent in Victoria, to investigate a possible fight in the parking lot. Three other officers eventually responded to the call. When Guerrero arrived at the scene, he observed Martinez and his wife, Daniela Jaquez, arguing and screaming at each other in the back parking lot. Guerrero stated he believed that both individuals were intoxicated because they smelled of alcohol, they were

having trouble standing, their eyes were glassy, and their speech was slurred. Additionally, Martinez's behavior was "very aggressive." According to Guerrero, Martinez was being uncooperative with police and would not let the officers talk or ask questions. Guerrero stated that "[w]e couldn't talk to him" because "[h]e would just talk over us."

Guerrero stated that fellow officer Patrick Quinn arrested Martinez for public intoxication.[2] *See* TEX. PENAL CODE ANN. § 49.02(a) (West, Westlaw through 2015 R.S.) ("A person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another."). Guerrero stated that police administered no field sobriety tests to Martinez, and the encounter was not video-recorded because "the placement of the car was probably not [near] to where the scene was." According to Guerrero, the parking lot in question was in use at the time of the incident. Guerrero explained: "There is a Highway 185 directly in front of the bar. Then you have the local road to the other side of the bar where the parking lot is. So cars freely go in and out."

On cross-examination, Guerrero conceded that, in a report he filed regarding the incident, he did not mention that Martinez showed various signs of intoxication. Guerrero explained that this information was instead contained in the "main officer report," which had been filed by Quinn, as Quinn was the arresting officer. Guerrero also conceded that he did not observe anyone physically fighting. Guerrero agreed that he was "more focused" on Jaquez during the investigation. Defense counsel asked Guerrero: "Isn't it true that [Jaquez] was trying to tell you about her being assaulted?" Guerrero replied: "Yes, but she was being very uncooperative also. . . . She wasn't answering my questions when I was asking her. . . . I asked her what happened, and she said she don't give a [****]." Guerrero later denied that Jaquez told him that she had been assaulted.

Another officer, Timothy Ramirez, was at the scene and testified that he believed Martinez was intoxicated because "[h]e had slurred speech, a swayed stance; his eyes were red and glassy; and I could smell the odor of alcohol emitting from his breath and on his person." According to Ramirez, Martinez was "very aggressive and belligerent" and "would not cooperate with our investigation." Martinez repeatedly complained that it took "[****]ing

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[2] We noted:

At the outset of the suppression hearing, the prosecutor informed the trial court that Quinn would not be testifying because he is currently "under indictment in Harris County for charges of bribery and official oppression." The prosecutor explained that, according to Quinn's attorney, Quinn would invoke his Fifth Amendment right against self-incrimination and would not testify in the case. Guerrero testified that he saw no misconduct from Quinn at the time of the arrest.

State v. Martinez, No. 13-15-00069-CR, 2015 WL 5797604, at *1 n.1 (Tex. App.—Corpus Christi Oct. 1, 2015) (mem. op., not designated for publication).

forever" for police to arrive.

> Ramirez explained that the parking lot was "[a]pproximately 15 feet from the roadway, and that was the roadway between that parking lot and the bar and maybe 15 to 20 feet away from South Laurent." He opined that Martinez was not in a suitable condition to drive or to walk home because "[h]e could possibly pose a danger to himself and possibly others that close to an active roadway." Ramirez also stated that Martinez never identified anyone who could come pick him up and never asked to call for a taxi; although he acknowledged on cross-examination that police never asked Martinez whether there was anyone who could pick him up or if he was going to call for a taxi.
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> Jaquez testified that Martinez's uncle owns the G & G Lounge and that "a lot of his family" was present at the bar on the night in question. She stated that she got into a fight with an unknown female, and that she was punched by the male companion of the unknown female. She testified that she told officers she was looking for her glasses, but the officers "just said that we needed to hurry up and leave there." She stated that she had one beer that night, and Martinez had "[m]aybe around, like, three, four." She did not know that Martinez had cocaine on his person. According to Jaquez, "[t]here was plenty of family" at the bar that night to drive her and her husband home.

Martinez, 2015 WL 5797604, at *1–2.

On remand, the trial court issued the following supplemental findings of fact and conclusions of law:

> **A. Testimony of Officer Javier Guerrero.**
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> The Court finds that Officer Javier Guerrero (Guerrero) was the first officer at the scene. The Court finds that Guerrero heard the Defendant and others arguing. The record supports the notion that Guerrero perceived several indicators of intoxication on the defendant such as: odor of alcohol, swaying, and slurred speech. The Court does not find any credible evidence demonstrating that Officer Quinn perceived any indicators of intoxication based on the testimony of Guerrero. The Court finds that it is reasonable to believe that Officer Quinn heard the defendant yelling and screaming; however, that in and of itself is not sufficient to support an arrest of the defendant for the offense of public intoxication. Texas Penal Code § 49.02 (2015).
>
> The record does not show when and for how long Quinn was present during the interactions between Guerrero and the Defendant. Based on Guerrero's testimony, the Court does not find that Quinn was physically present during the time that Guerrero perceived all the indicators of intoxication. Therefore,

upon review of Guerrero's testimony, the Court cannot infer that Quinn perceived any indicators of intoxication.

B. Testimony of Officer Timothy Ramirez.

The Court finds that Officer Timothy Ramirez (Ramirez) was the second officer at the scene. The Court believes that Ramirez noticed that the defendant showed signs of intoxication. Specifically, the court finds that Ramirez observed the defendant to have slurred speech, and a swayed stance. However, the Court does not find any credible evidence from Ramirez'[s] testimony that demonstrates that Quinn was physically present during the time which Ramirez perceived the defendant to be intoxicated. Once again, the record does not demonstrate when and for how long Quinn was present during the interactions between Ramirez and the Defendant. Therefore, the Court is unable to infer that Quinn perceived any indicators of intoxication upon review of Ramirez'[s] testimony.

C. Testimony of Daniella Jaquez.

Ms. Jaquez'[s] testimony is of little help to the Court. She testified about an altercation and about the arrival of the officers. Based on Ms. Jaquez['s] testimony, the Court cannot find that Quinn was present even though the Court of Criminal Appeals noted that "Jaquez testified all of the police officers arrived close in time to one another." [*Martinez*, 2016 WL 7234085, at *6]. The Court finds that the defendant had ingested alcohol; however, her testimony does not demonstrate if Quinn knew of this fact or if Quinn interacted with anyone prior to arresting the defendant.

D. Combination of Evidence to Show Probable Cause

The Court of Criminal Appeals held that "the record is replete with testimony that 1) Appellee exhibited symptoms that a trained officer would recognize as signs of intoxication, 2) Appellee exhibited those signs of intoxication while arguing with his wife in a bar parking lot open to traffic, and 3) Quinn was present when Appellee was exhibiting those signs of intoxication." [*Id.*].

The Court [of] Appeals noted that an offense occurs within the presence of an officer when any of his senses afford him an awareness of its occurrence. *Id. citing Amador v. State*, 275 S.W.3d 872 (Tex. Crim. App. 2009). Other than the defendant being loud, there is no evidence presented that would justify Officer Quinn to arrest the defendant for public intoxication. This Court cannot find any trustworthy information that Quinn relied on to make an arrest. This Court has searched the record and the evidence presented and cannot find one piece of objective data demonstrating the "totality of the circumstances" faced by Quinn. *Amador* at 878. While this Court found that there was no misconduct on the part of Officers Guerrero and Ramirez, it cannot make a finding either way on the

> conduct of Quinn. There is no evidence as Quinn's experience, training, education, attitude or conduct as an officer (other than State's Exhibit No. I) on the day in question. State's Exhibit 1 demonstrates that Quinn was indicted for the offense of Official Oppression and Bribery.
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> This Court cannot find any credible evidence that Quinn was a "trained" officer that would recognize signs of intoxication. Further, there is no evidence that the Court found to be persuasive with regard to the defendant being intoxicated in the presence of Quinn. Finally, the Court does not find that Quinn was present when Guerrero and Ramirez perceived any signs of intoxication. Therefore, Quinn had no knowledge that the defendant probably committed the offense of public intoxication. Based on the lack of evidence and testimony presented, this Court will not find the actions of Quinn in this case to be proper. The Court finds that the defendant's arrest was contrary [to] Texas Law. Texas Code of Criminal Procedure, Art. 14.01(b) (2015).

II. DISCUSSION

The State argues by eight issues that the trial court erred in granting the motion to suppress. Specifically, the State contends: (1) the trial court's findings of fact are insufficient for proper appellate review; (2) the standard of review should be *de novo*; (3) the facts known to Quinn were "sufficient to establish probable cause" to Martinez arrest for public intoxication; (4) the facts known to Quinn were sufficient to establish a valid arrest under article 14.01 of the Texas Code of Criminal Procedure; (5) facts known to Guerrero and Ramirez but not found to be communicated to Quinn can be used to establish probable cause; (6) an officer need not communicate his observations to the arresting officer to be considered part of the "arrest team" for purposes of article 14.01; (7) Martinez's constitutional right to confrontation was not violated by Quinn's failure to testify; and (8) Martinez's compulsory process rights were not violated by Quinn's failure to testify. As each of the issues challenges the propriety of the trial court's suppression ruling, we will consider them together.

A. Standard of Review

> An appellate court reviews a trial court's pre-trial suppression ruling under a bifurcated standard. Almost total deference is afforded to the trial court's determination of fact. Determinations of fact include "who did what, when, where, how, or why" and "credibility determinations." Because trial judges . . . are uniquely situated to observe first hand the demeanor and appearance of a witness, . . . they are the sole arbiter of questions of fact and of the weight and credibility to give testimony. In that capacity, a trial judge is free to believe or disbelieve any part of the testimony as he sees fit. When a trial judge makes written findings of fact, as he did in the instant case, a reviewing court must examine the record in the light most favorable to the ruling and uphold those fact findings so long as they are supported by the record. The reviewing court then proceeds to a *de novo* determination of the legal significance of the facts as found by the trial court.

Baird v. State, 398 S.W.3d 220, 226 (Tex. Crim. App. 2013) (footnotes and citations omitted).

B. Applicable Law

A warrantless arrest is generally considered an unreasonable seizure under the Fourth Amendment to the United States Constitution. *See* U.S. CONST. amend. IV; *Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)); *see also* TEX. CONST. art. I, § 9. However, a warrantless arrest is reasonable under the Fourth Amendment where there is probable cause for the arresting officer to believe that a criminal offense has been or is being committed. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *Baldwin v. State*, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009). Moreover, "[a] peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (West, Westlaw through 2015 R.S.).

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, or of which the officer has reasonably trustworthy information, are sufficient to warrant a prudent person to

believe that the arrested person had committed or was committing an offense. *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)); *Torres*, 182 S.W.3d at 901. 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; *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002). A finding of probable cause requires more than bare suspicion but less than would justify conviction. *Amador*, 275 S.W.3d at 878 (citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

A person commits the offense of public intoxication, a Class C misdemeanor, "if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another." TEX. PENAL CODE ANN. § 49.02(a), (c). "Public place" means "any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops." *Id.* § 1.07(a)(40) (West, Westlaw through 2015 R.S.); *see York v. State*, 342 S.W.3d 528, 536–37 (Tex. Crim. App. 2011) (holding that the "parking and sidewalk area" outside a gas station was a "public place"); *Kapuscinski v. State*, 878 S.W.2d 248 (Tex. App.—San Antonio 1994, writ ref'd) (holding that the evidence was sufficient to show that a nightclub parking lot, provided for guests of the nightclub and open to the public, was a "public place").

C. Analysis

The State contends by its second issue that we should review the trial court's decision *de novo* because "there are no meaningful factual issues in dispute." However,

the parties apparently disagree about the central fact issue involved in this case—i.e., whether Quinn observed or was informed that Martinez was committing a crime. *See Amador*, 275 S.W.3d at 878. The parties also disagree as to whether the "viewing officers"—Guerrero and Ramirez—effectively participated in the arrest such that Quinn's objective knowledge would be irrelevant. We will, in accordance with applicable law, defer to the trial court's fact findings that are supported by evidence and review its legal conclusions *de novo*.

The State cites *Willis v. State*, 669 S.W.2d 728, 730 (Tex. Crim. App. 1984), and *Astran v. State*, 799 S.W.2d 761, 764 (Tex. Crim. App. 1990), in arguing that the testimony of officers Guerrero and Ramirez established the legality of Martinez's arrest. In *Willis*, an undercover officer arranged by telephone to purchase heroin from the appellant. 669 S.W.2d at 730. After the purchase was completed, the undercover officer signaled other officers, who were waiting about two blocks away, that the appellant retained some drugs on his person. *Id.* The other officers followed appellant, stopped him, searched him, and arrested him. *Id.* The court of criminal appeals found that the arrest and search were valid—despite the fact that that the arresting officers did not observe the drug sale—because a crime had been committed in the undercover officer's presence. *Id.* The Court noted the undercover officer "had first-hand knowledge of the offense and relayed that knowledge to his fellow officers." *Id.* Moreover, the undercover officer observed the arrest from about three-quarters of a mile away. *Id.* Thus, even though the undercover officer did not personally make the arrest, he "was just as much a participant in the arrest as if he had seized appellant himself." *Id.* Accordingly, the arrest was proper under article 14.01. *Id.*

In *Astran*, which also involved a controlled undercover drug purchase, the appellant similarly argued that his arrest and search were constitutionally invalid "because the [undercover] officer who saw the felony did not actually make the arrest." 799 S.W.2d at 762. Unlike in *Willis*, the undercover officer in *Astran* did not observe the eventual arrest. *Id.* Nevertheless, the Court found that the arrest and search were valid because the undercover officer "saw the felony, was part of a team of officers present at the scene of the offense, and relayed appellant's physical description and geographic location to the arresting officer." *Id.* at 763. Additionally, "[e]ven though [the undercover officer] did not visually observe the arrest, he was parked two blocks away and maintained constant radio communication with [the arresting officer] during the arrest." *Id.* The Court held that that an arrest is proper under article 14.01 "[a]s long as the facts show that the viewing officer effectively participated in the arrest and was fully aware of the circumstances of the arrest." *Id.* at 764.

Martinez argues that *Willis* and *Astran* are distinguishable because, here, there was no evidence that the undercover officers (i.e., the "viewing" officers) ever related their information to the arresting officer. We agree that the cases are distinguishable on that basis. In both *Willis* and *Astran*, the viewing officer "participated in the arrest" by relaying his observations to other officers, who then made the arrest based on those observations. *See id.* at 763; *Willis*, 669 S.W.2d at 730. On the other hand, here, neither viewing officer testified at the suppression hearing as to what Quinn, the arresting officer, knew or was able to observe personally. The prosecutor did not ask the testifying officers what Quinn observed or was able to observe. The testifying officers did not state that they informed

Quinn of what *they* personally observed—i.e., that Martinez was intoxicated to the extent that he endangered himself or others.

The court of criminal appeals noted that a finding of probable cause does not require direct testimony about what an arresting officer observed or what he was told; instead, circumstantial evidence can suffice in that regard. *Martinez*, 2016 WL 7234085, at *1. The Court further noted that, in this case in particular, the testimony provided at the suppression hearing "provided circumstantial evidence that, *if believed*, would show that Quinn had probable cause to arrest Appellee for public intoxication." *Id.* at *8 (emphasis added).

But the trial court did not believe such circumstantial evidence in this case. The trial court found that "[o]ther than the defendant being loud, there is no evidence presented that would justify Officer Quinn to arrest the defendant for public intoxication." In particular, it found that Guerrero's testimony contained no "credible evidence demonstrating that Officer Quinn perceived any indicators" that Martinez was intoxicated; that Ramirez's testimony does not "demonstrate[] that Quinn was physically present during the time which Ramirez perceived [Martinez] to be intoxicated"; and that Jaquez's testimony "does not demonstrate if Quinn knew [that Martinez had ingested alcohol] or if Quinn interacted with anyone prior to arresting [Martinez]."[3] Overall, the trial court found "no evidence that the Court found to be persuasive with regard to the defendant being intoxicated in the presence of Quinn" and "[did] not find that Quinn was present when Guerrero and Ramirez perceived any signs of intoxication." The trial court concluded

[3] The trial court further found that there was no "credible evidence that Quinn was a 'trained' officer that would recognize signs of intoxication." This finding is irrelevant, however, because "[t]he test for probable cause is an objective one, unrelated to the subjective beliefs of the arresting officer." *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009).

that, based on all the evidence presented—including circumstantial evidence—"Quinn had no knowledge that [Martinez] probably committed the offense of public intoxication." The trial court's fact findings are sufficient to provide a basis upon which we may review the trial court's application of law to the facts. *See State v. Cullen*, 195 S.W.3d 696, 700 (Tex. Crim. App. 2006) ("[U]pon the request of the losing party on a motion to suppress evidence, the trial court shall state its essential findings. By 'essential findings,' we mean that the trial court must make findings of fact and conclusions of law adequate to provide an appellate court with a basis upon which to review the trial court's application of the law to the facts."). And, viewing the findings in the light most favorable to the trial court's ruling, we conclude that they are supported by the record.[4] *See Baird*, 398 S.W.3d at 226 (noting that the trial court is the sole factfinder at a suppression hearing and may believe or disbelieve all or any part of a witness's testimony); *Amador*, 275 S.W.3d at 878. Accordingly, we may not disturb these findings. *See Baird*, 398 S.W.3d at 226.

Reviewing the legal significance of the fact findings *de novo*, we conclude that the trial court did not err in its determination that the State failed to meet its burden to show that the search was reasonable. *See id.*; *Ford*, 158 S.W.3d at 492. We overrule the State's first three issues and need not reach the remaining issues. *See* TEX. R. APP. P. 47.1.

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[4] On original submission, we mentioned that the State also contends on appeal that the arrest was valid because officers Guerrero and Martinez "participated in the arrest" and were "fully aware of the circumstances of the arrest." *See Astran*, 799 S.W.2d at 764. We noted that, though this may have been a reasonable inference from the suppression hearing testimony, the trial court evidently did not make that inference because it found that "only Officer Quinn made 'personal' contact" with Martinez and that "Officer Quinn was the only officer who effectuated the arrest of the defendant." The Texas Court of Criminal Appeals did not mention this part of our analysis in its opinion.

III. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
16th day of March, 2017.