COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

OMAR ENRIQUE ROUBERT,	§	No. 08-20-00165-CR
Appellant,	§	Appeal from the
v.	§	207th District Court
THE STATE OF TEXAS,	§	Of Comal County, Texas
Appellee.	§	(TC# CR2018-742)

O P I N I O N

A jury convicted Appellant Omar Enrique Roubert of driving while intoxicated (DWI) with two or more previous DWI convictions, and the trial court sentenced him to six years confinement in the Texas Department of Criminal Justice. *See* TEX.PENAL CODE ANN. §§ 49.04, 49.09. In three issues, Roubert challenges the sufficiency of the evidence, the trial court's procedures, and the trial court's jury charge. We affirm.

I. BACKGROUND

Roubert's vehicle caught fire on July 2, 2018, on the I-35 access road near New Braunfels, Texas. Responding police officers observed that Roubert's eyes were bloodshot, his speech was slurred, and his breath smelled like alcohol. Consequently, they administered the standardized field sobriety tests (SFTS), which Roubert failed. A subsequent analysis of a sample of Roubert's blood showed that his blood-alcohol concentration was 0.236, a reading well-over the legal limit. *See*

TEX.PENAL CODE ANN. § 49.01(2)(defining "intoxicated" to include "having an alcohol concentration of 0.08 or more.").

The evidence presented to the jury is detailed below.

A. Events of July 2, 2018

The State presented four witnesses—Paul Marler, Phillip Garcia, Zachary Menser, and Caasi Hensarling—who each testified about the events of July 2, 2018. Marler, the New Braunfels Police Department's 911 Center supervisor, authenticated the 911 call from an unidentified female caller that alerted the NBPD about Roubert's car fire. The caller placed the 911 call at approximately 10:25 p.m. In the approximately four-minute call, the unidentified caller told police dispatch there was a car on fire off I-35. The caller stated, as she apparently approached the burning car, that the driver was just in his boxer shorts and not in the vehicle on the floor. She told dispatch the driver did not want to move away from the vehicle.

Phillip Garcia and Zachary Menser are police officers with the NBPD. Officer Garcia testified that he initially responded to the scene to conduct traffic control while the fire department worked to put out the fire. Video from his car's dash-cam, shows a vehicle on the shoulder of the road with its hazard lights on and smoke coming from the car. It also shows Officers Garcia and Menser approaching and talking to several people in the ditch near the burning car, but there is no audio capturing their conversations. Officer Garcia testified that an individual seen in the video approaching the officers was Roubert.

Officer Menser testified that as Roubert approached him, he observed that his eyes were red and bloodshot, his speech was slurred, his body swayed as he walked, and his breath smelled like alcohol. Roubert identified himself as the vehicle driver and stated that he believed the fire started in the engine block. Roubert responded to Menser's questions that he had drank about five

beers and was drinking from approximately noon until 9:00 p.m. Officer Menser admitted on cross-examination that he did not ask Roubert when he stopped operating his vehicle and that nobody saw Roubert behind the steering wheel.

Officer Garcia testified in front of the jury that Roubert, while not arrested, was detained pending the outcome of the SFSTs. Officer Menser testified to the same fact during the motion to suppress hearing held outside the jury's presence. Both officers testified that Roubert was escorted to a nearby gas station parking lot where Officer Menser performed the SFSTs, which Roubert failed. According to his testimony, Officer Menser again asked Roubert what time he had started drinking, to which Roubert responded noon. Roubert also reiterated that he had stopped drinking at 9:00 p.m. Officer Menser asked Roubert to judge on a scale of zero to ten, zero being completely sober and ten being the most intoxicated you have ever been, how intoxicated Roubert thought he was. Roubert responded he was "at a two."

Officer Menser testified that he arrested Roubert by handcuffing him and putting him in the back of his police car. Roubert refused to provide a sample of his breath, so Officer Menser applied for and received a search warrant to obtain a sample of Roubert's blood. Officer Menser then transported Roubert to Resolute Health Hospital, where Hensarling, a registered nurse, drew Roubert's blood. Hensarling testified that the blood draw, which took place shortly after midnight on July 3, 2018, was done in a sanitary environment and after following proper procedure. She also testified that Roubert was not cooperative and that several officers had to be called to the hospital to hold him down so she could draw his blood.

Officers Garcia and Menser both testified that the NBPD inventoried the contents of Roubert's vehicle after the fire department extinguished the fire. It did not find any alcohol or

empty alcohol containers in the vehicle or outside the vehicle. They did find an empty twelve-pack beer carton in the vehicle.

Roubert testified in his defense. He testified that, on July 2, 2018, he left his house in San Antonio with nine beers and met some friends to go tubing on the Comal River in New Braunfels. Roubert stated that he drank five beers on the river from approximately noon until 5:00 or 6:00 p.m. After exiting the river, according to Roubert, he got in his car and drove to the I-35 access road, where he pulled over to engage in an argument through text messages with his girlfriend. He said he stopped on the side of the road around 7:00 p.m. instead of pulling into the gas station parking lot just ahead of him because he was "in a bathing suit and I figured I wasn't quite dressed for public . . . ." Roubert then testified that from 7:00 p.m. until 10:00 p.m., he sat in his car on the side of I-35 and drank "nine or ten" beers. On direct examination, when asked why the police did not find any empty beer cans in his car, Roubert initially testified that he was "not too sure about that." He later testified that the empty beer cans "should have all still been either in the vehicle or probably thrown away at the gas station, but I never entered the gas station."

On cross-examination, Roubert testified to driving his car from the Comal River to where it caught on fire on I-35:

> Q. And you took off and went where?
>
> A. That is when I left the river and went to where my vehicle was seen in the [dash-cam] video.
>
> Q. How did you get to where your vehicle was seen in the video?
>
> A. I drove it there.
>
> Q. Was anyone else in the vehicle when you drove it there?
>
> A. No.

He also testified that he could not have drank nine beers on the side of the road while sitting in his car:

> Q. Earlier you testified that there was nine beers in that carton. Your math doesn't add up if you testified that there was three out of that 12-pack when you left San Antonio.
>
> A. Uh-huh.
>
> Q. —and you took five on the river. You wouldn't have nine left, would you?
>
> A. If it's 12 minus three, then there's nine.
>
> Q. Minus five because you took five on the river; right?
>
> A. Nine left my house — or nine left the house because it starts off with 12 minus nine — or the three that I drank at the house. So nine leave the house. Five leave my vehicle in a case to the river with me. When I get back to the — when I get back to my vehicle and I drive to — to where that location is, there's the remaining nine in there.
>
> Q. You would agree with me that nine plus five plus three is more than 12?
>
> A. No. The three — the three never left my house. I — it's a 12-pack. Three is gone. So I took nine with me when I left the house.
>
> Q. Correct.
>
> A. And then five came out of that nine with me on the river.
>
> Q. Leaving how many?
>
> A. Four left in the case.
>
> Q. Okay. But you just testified over and over and over again that when you stopped at seven p.m. on the side of the road, that you had nine beers there.
>
> A. Nine all together for the day.
>
> Q. So now you're changing your testimony?
>
> A. I might have misunderstood the question earlier.

Roubert also testified that he fell asleep in his car until the woman he presumes made the 911 call woke him up:

> Q. You're expecting this jury to believe that you sat on the side of the road from seven p.m. to 10:20 when the 911 calls start coming in when it spontaneously erupted and you just sat there after floating the river the entire day?
>
> A. I was actually — I went to sleep and I was woken up by the lady who I'm guessing made the — the 911 call.
>
> Q. Okay. So your testimony is [ ] that you were in the burning vehicle when the lady who made the 911 call approached you and woke you up inside the vehicle?
>
> A. Yeah. And I — and then I got out . . . .

B. Expert Evidence

Dana Paris, a forensic scientist with the Texas Department of Public Safety Crime Lab, testified that Roubert's blood sample from July 3, 2018, contained 0.236 grams of alcohol per 100 milliliters of blood. She testified that an alcohol concentration of 0.236 is over the legal limit of 0.08 in Texas.

Paris also generally testified about the effects of alcohol on the body. She explained that the human body finishes absorbing alcohol approximately an hour after somebody finishes their last drink. Paris also stated that the average human body eliminates alcohol at a rate of 0.02 per hour. After explaining how alcohol is absorbed and eliminated from the body, Paris stated that an average six-foot-tall and 170-pound male, which is Roubert's size, would need to have seven to ten alcoholic drinks still in his system at the time blood was drawn to get a blood-alcohol content of 0.236. She agreed on cross-examination that somebody that drank seven to nine beers in two hours could have a blood-alcohol content of 0.236.

C. Motion to Suppress

Roubert's attorney filed two pretrial motions to suppress. Both of Roubert's motions were generic and lacked any factual detail related to his case. In the first motion to suppress, Roubert requested that the trial court suppress "[a]ll written and oral statements made by [Roubert]" because they "were obtained in violation of Article 38.22 of the Texas Code of Criminal Procedure" and several constitutional rights. In his second motion to suppress, Roubert alleged, without any factual support, illegal detention, search and seizure, denial of counsel, and an illegal blood test. Again, with no factual support, he also alleged that any statements he made resulted from an unlawful custodial interrogation that violated *Miranda*[1] and Article 38.22 of the Texas Code of Criminal Procedure. He ended his second motion to suppress by requesting that the "court make a fact finding on the voluntariness/involuntariness of the evidence complained of in this motion."

The trial court held a hearing on Roubert's motion to suppress during trial. As he did in front of the jury, Officer Menser testified that based on his observations of Roubert, he asked him if he had drunk any alcohol. As previously detailed, Roubert responded that he had. Officer Menser also testified that he decided to detain Roubert in order for him to perform SFSTs after he admitted to drinking alcohol, but that he was not arrested until he failed the tests. Officer Menser did not give Roubert any *Miranda* warnings.

Roubert's attorney focused his questioning on the nature of Officer Menser's custody of Roubert and whether his client gave statements in violation of *Miranda*. The following is demonstrative of his approach during the motion to suppress hearing:

> Q. (By Mr. Brown) Okay. At any time from the time he walked up to you to the — until he got up to the gas station, was he free to leave or were you — or were you detaining him?

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

A. So while he was standing on the side of the roadway before I contacted him, he was absolutely free to leave.

Q. Okay. But once you started talking to him, you decided to detain him?

A. After all of the clues and the indications, yes.

Q. Okay. At any time did you read him his Miranda rights?

A. No.

Q. So anything he said to you would be constitutionally inferred.

Following Officer Menser's testimony, the trial court summarily denied the motion to suppress from the bench. Roubert did not object to the trial court's lack of written findings of fact or conclusions of law.

D. Jury Charge Objection

After the close of evidence, Roubert's attorney requested that the jury charge include an instruction under Texas Code of Criminal Procedure Article 38.23. Specifically, he claimed that his motion to suppress raised a factual issue to be determined by the jury: "On our motion to suppress to the jury. They heard at least part of the evidence. The issue was raised." Roubert's attorney did not specify what evidence the jury heard or what issue was allegedly raised. The trial court denied his request and pointed out that determining the constitutionality of a warrantless search is a question for the court, not the jury.

II. ISSUES PRESENTED

Roubert presents three issues on appeal. In his first issue, he claims the trial court erred when it failed to instruct the jury under Article 38.23 of the Texas Code of Criminal Procedure. Roubert's second issue presents two parts. First, he claims the trial court erred in failing to provide a jury instruction regarding the voluntariness of his statements to Officer Menser pursuant to Article 38.22 of the Texas Code of Criminal Procedure. In the second part of Issue Two, Roubert

asserts that the trial court failed to follow Article 38.22 because it did not issue written findings of fact and conclusions of law when it denied his motion to suppress. Roubert's third issue claims there was insufficient evidence for the jury to find he operated his vehicle while intoxicated. Because the first issue and the first part of the second issue argue the trial court erred in failing to instruct the jury, we address those portions together. Separately and in turn, we address the second part of the second issue followed by the third issue.

III. DISCUSSION

A. Issues One and Two (Part 1) — Jury Charge

In his first two issues, Roubert complains that the trial court erroneously failed to instruct the jury regarding his statements to Officer Menser. We disagree.

We review a complaint of jury-charge error under a two-step process, and we first consider whether an error exists. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005). If an error does exist, we then analyze that error for "some harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985). "The standard of review for jury charge error depends on whether the error was preserved." *Jordan v. State*, 593 S.W.3d 340, 346 (Tex.Crim.App. 2020)(citing *Almanza*, 686 S.W.2d at 171); *Mendez v. State*, 545 S.W.3d 548, 552 (Tex.Crim.App. 2018)(explaining that when a defendant fails to object to the charge on the law applicable to the case, a claim of jury-charge error is not necessarily forfeited on appeal but, instead, whether the error was preserved effects which of *Almanza's* dual standards of review is to apply).

Unpreserved charge error is reversible only if it caused egregious harm. TEX.CODE CRIM.PROC.ANN. art. 36.19 ("Review of charge on appeal"); *Jordan*, 593 S.W.3d at 346. Thus, if the defendant failed to request a jury instruction, we review the omission of the instruction under *Almanza's* egregious harm standard. *Oursbourn v. State*, 259 S.W.3d 159, 182 (Tex.Crim.App.

2008); *see Almanza*, 686 S.W.2d at 171. Preserved charge error is reversible if it caused "some harm." TEX.CODE CRIM.PROC.ANN. art. 36.19; *Jordan*, 593 S.W.3d at 346. If the trial court erred, we assess the actual degree of harm of the charge error, whether preserved or unpreserved, considering the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. *Almanza*, 686 S.W.2d at 171. The "some harm" standard still requires that the record reveal "actual" and not merely "theoretical" harm. *French v. State*, 563 S.W.3d 228, 235 (Tex.Crim.App. 2018).

1. Failure to Instruct Under Article 38.23

In his first issue, Roubert claims the trial court erred when it denied his request to instruct the jury as required under Article 38.23 of the Texas Code of Criminal Procedure. "Article 38.23 is 'the law applicable' to any case in which a specific, disputed issue of fact is raised concerning the constitutional voluntariness of the making of the defendant's statements." *Oursbourn*, 259 S.W.3d at 181. When a fact question arises at trial regarding how evidence was obtained, Article 38.23 requires the trial court to instruct the jury to disregard the evidence if the jury believes that the evidence was obtained in violation of the constitution or laws of the United States or Texas. TEX.CODE CRIM.PROC.ANN. art. 38.23. To trigger an Article 38.23 instruction, "[t]he defendant must offer evidence that, if credited, would create a reasonable doubt as to a specific factual matter essential to the voluntariness of the statement." *Oursbourn*, 259 S.W.3d at 177. The factual dispute cannot be raised by mere cross-examination questions or the arguments of counsel. *Id.* Rather, there must be some affirmative evidence in the record before there can be a disputed fact issue. *Id.; Madden v. State*, 242 S.W.3d 504, 514 (Tex.Crim.App. 2007). The trial judge alone determines

the legality of the conduct as a question of law when there is no factual dispute. *Oursbourn,* 259 S.W.3d at 178.

Roubert does not identify on appeal which evidence introduced against him at trial was illegally obtained. His request to the trial court for an Article 38.23 instruction, though vague, appears to be referencing his motion to suppress: "On our *motion to suppress* to the jury. They heard at least part of the evidence. The issue was raised." [Emphasis added]. He focused his questioning of Officer Menser during the motion to suppress hearing on whether Roubert was in custody for purposes of *Miranda* when he gave incriminating statements. As a result, it appears that Roubert is arguing the trial court should have instructed the jury that if it believed, or had reasonable doubt, that his statements to Officer Menser were obtained in violation of his *Miranda* rights it should disregard his statements.

The trial court also interpreted Roubert's request for an Article 38.23 instruction in this manner. In denying Roubert's request, the trial court indicated that whether police conduct is constitutionally permissible is a question for the court, not the jury. It was right. Determining whether a person is in custody and entitled to *Miranda* warnings is an issue of law, not a factual issue for the jury to resolve. *Mendoza v. State*, No. 04-11-00357-CR, 2011 WL 6209178, at *3 (Tex.App.—San Antonio Dec.14, 2011, no pet.)(mem. op., not designated for publication). And Roubert did not present any other affirmative evidence that would raise a factual dispute regarding whether police used improper tactics in their encounter with Roubert that would require the trial court to instruct the jury under Article 38.23. The requirements that would mandate an instruction under Article 38.23 have not been satisfied. Consequently, the trial court did not err when it denied the requested instruction.

We overrule Roubert's first issue.

2. Failure to Instruct Under Article 38.22

In the first part of his second issue, Roubert complains that the trial court erred when it declined to instruct the jury under Article 38.22 of the Texas Code of Criminal Procedure. Article 38.22 includes several independent provisions regarding the admissibility of statements given by the accused. *See generally* TEX.CODE CRIM.PROC.ANN. art. 38.22. While Roubert did not request an instruction under Article 38.22 at trial, on appeal, he quotes extensively from Section 6 of Article 38.22. He does not explain how Section 6 applies to his case, but he does assert that the "trial court should have, at a minimum, provided a jury instruction in the charge regarding the *voluntariness* of [Roubert's] statements to law enforcement." [Emphasis added]. He also claims on appeal that there was sufficient evidence raised "in the presence of the jury and outside the presence of the jury" for him to "receive an instruction regarding the *voluntariness* of his statements to law enforcement." [Emphasis added]. Consequently, though not clear, it appears Roubert is arguing that he should have received a jury instruction under Section 6 of Article 38.22.

Section 6 of Article 38.22 pertains to the admissibility of an accused's custodial and non-custodial statements and provides that only voluntary statements are admissible at trial. If there is evidence raising the issue of voluntariness of an accused's statement, the trial court must give a general voluntariness instruction to the jury under Section 6, even if an instruction is not explicitly requested. *Oursbourn*, 259 S.W.3d at 175–76. A complaint under Article 38.22, Section 6 proceeds as follows: (1) a party notifies the trial court about the issue of voluntariness of the statement or the trial court raises it *sue sponte;* (2) a hearing is held outside the presence of the jury; (3) the trial court determines whether the confession was voluntary and issues written findings of fact and conclusions of law supporting the ruling; (4) if the confession is found to be voluntary, it is

admissible, and a party can offer evidence contesting voluntariness, and (5) if such evidence is offered before the jury, the trial court must give a voluntariness instruction to the jury. *Id.* at 175.

The defense must introduce evidence at trial from which a reasonable jury could conclude that the statement was not voluntary. *Vasquez v. State*, 225 S.W.3d 541, 545 (Tex.Crim.App. 2007) ("Some evidence must have been presented to the jury that the defendant's confession was not given voluntarily."). When the defense introduces evidence at trial from which a reasonable jury could find that a statement was not made voluntarily, an instruction under Article 38.22 is proper. *Id.* at 546. However, there is no error in refusing to include a jury instruction under Article 38.22 where there is no evidence before the jury to raise the issue. *Id.* at 545. A jury instruction on voluntariness is required only if the evidence produced at trial would allow a reasonable jury to conclude that the statement was not voluntary. *Id.* at 544; *see also Oursbourn*, 259 S.W.3d at 174 (explaining that no error occurs if a trial court refuses to include a jury instruction on the voluntariness under 38.22 when there is no evidence that raises the issue of voluntariness).

Here, Roubert does not identify which statements he made to Officer Menser that he claims were not voluntary. But the record shows several of his statements to Officer Menser were introduced into evidence. First, Roubert identified himself as the driver of the vehicle and that he thought the fire started in the engine block. In response to a question, he also told Officer Menser that he had drank about five beers that day from noon to 9:00 p.m. Further, after he failed the SFSTs, he again told Officer Menser that he had drank beer from noon to 9:00 p.m. and thought that on a scale of zero to ten, he was at a level two of intoxication.

The record does not indicate that Roubert produced any evidence from which a reasonable jury could find that any of these statements were coerced or not made voluntarily. The only evidence presented before the jury regarding the propriety of Roubert's statements to Officer

Menser was testimony from Officer Garcia that Roubert was temporarily detained until he could take the SFSTs. As we have already discussed, the question of whether a person is in custody and entitled to *Miranda* warnings is an issue of law, not a factual issue for the jury to resolve. *Mendoza,* 2011 WL 6209178, at *3. And Roubert does not point to any other relevant evidence here on appeal. Therefore, no jury instruction was required. *See Oursbourn*, 259 S.W.3d at 175; *Vasquez*, 225 S.W.3d at 545-46. Accordingly, we hold that the trial court did not err in failing to instruct the jury on the voluntariness of Roubert's statements under Section 6 of Article 38.22.

We overrule the first part of Roubert's second issue.

B. Issue Two (Part 2) — Article 38.22 Procedure

In his second issue, Roubert claims that the trial court erred by failing to follow Article 38.22 by not issuing written findings of fact and conclusions of law when it denied his motion to suppress. Indeed, Section 6 of Article 38.22 requires the trial court to "enter an order" containing its factual findings and conclusions of law if it decides a statement was voluntarily made. *State v. Terrazas*, 4 S.W.3d 720, 727–28 (Tex.Crim.App. 1999). Whether a party can waive such right to an order containing factual findings and conclusions of law has shifted over the past two decades. In *Terrazas*, the Court of Criminal Appeals held that "[t]he 'right' to findings and conclusions is a statutory 'right' which is forfeited by a party's failure to insist upon its implementation." *Id.* at 728. More recently, however, the Court of Criminal Appeals held that the trial court must enter a written order in all cases invoking Article 38.22, even if neither party requests it. *Vasquez v. State*, 411 S.W.3d 918, 920 (Tex.Crim.App. 2013)("Here, neither party requested written findings at any level of the proceedings, and the issue was not considered by the lower court. Nonetheless, section 6 of article 38.22 clearly requires that the trial court make such findings. We hold that written findings are required in all cases concerning voluntariness. The statute has no exceptions.").

While a trial court is required to enter findings of fact and conclusions of law anytime a question arises under Section 6 of Article 38.22, there is support for the position that an appellate court need not abate and remand a case if the issue of voluntariness of a statement is not presented on appeal. For example, in *Brooks v. State*, 567 S.W.2d 2, 4 (Tex.Crim.App. [Panel Op.] 1978), the Court of Criminal Appeals held that a case did not need to be abated and remanded when the "appellant does not challenge the sufficiency of the evidence pertaining to the voluntariness of his confession." In *Wicker v. State*, 740 S.W.2d 779, 784 (Tex.Crim.App. 1987), the Court of Criminal Appeals held that the proper procedure when a trial court fails to enter an adequate order under Article 38.22 is to abate the appeal and "the trial judge will be directed to reduce to writing his findings on the disputed issues . . . ." However, the *Wicker* court went on to hold that abatement was unnecessary when the appellate court could dispose of the appeal without the trial court's order: "Ordinarily we would be compelled to remand this cause to the court of appeals with instructions to abate the appeal pending compliance by the trial court with the mandate of Article 38.22 . . . . However, in light of our disposition of appellant's remaining ground for review, remand and abatement of the cause are unnecessary." *Id.* We have previously followed *Wicker's* lead. *See Thomas v. State*, No. 08-99-00462-CR, 2001 WL 459067, at *3 (Tex.App.—El Paso May 2, 2001, no pet.)(not designated for publication)("It is not necessary that we abate the appeal so that the trial court can enter written findings on the voluntariness issue because Appellant has not raised any appellate complaint regarding voluntariness."). Despite the evolution in the law regarding Article 38.22, Section 6 orders seen in *Terrazas* and *Vasquez*, *Brooks* and *Wicker* remain good law. Indeed, the Court of Criminal Appeals cited *Wicker* favorably when it decided *Vasquez*. *Vasquez*, 411 S.W.3d at 920 n.13. As a result, we find that we are not required to abate an appeal so that a

trial court can enter written findings on the voluntariness of a statement when the appellant has not raised an issue of voluntariness on appeal.

Such is the case with this appeal. Roubert does not challenge the trial court's denial of his motion to suppress. Instead, his ground of error is based on the portion of Article 38.22, Section 6 requiring that once evidence is introduced during the trial on the merits raising an issue as to the voluntariness of a statement that the trial court instruct the jury on the matter. TEX.CODE CRIM.PROC.ANN. art. 38.22(6). This issue is distinct from whether Roubert's statements were voluntary. *Brooks*, 567 S.W.2d at 3 ("It should be noted at the outset that the appellant does not question the sufficiency of the evidence adduced at the *Jackson v. Denno* hearing pertaining to the issue of the voluntariness of the confession. The appellant's ground of error is based on the rule that once evidence is introduced during the trial on the merits raising an issue as to the voluntariness of the confession, Art. 38.22 . . . required the trial court to instruct the jury on the matter."). We have already held that the trial court did not error by refusing to instruct the jury on voluntariness. Abating this matter to allow the trial court to enter written findings of fact and conclusions of law on an issue not present on appeal would be a waste of judicial resources.

We overrule the second half of Roubert's second issue.

C. Issue Three — Sufficiency of the Evidence

In his third issue, Roubert challenges the legal sufficiency of his conviction for DWI with two or more previous DWI convictions. Specifically, Roubert contends there was no evidence presented to the jury establishing that he "operated" his vehicle while he was intoxicated. We disagree.

When reviewing whether there is legally sufficient evidence to support a conviction, the standard of review we apply is "whether, after viewing the evidence in the light most favorable to

the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Murray v. State*, 457 S.W.3d 446, 448 (Tex.Crim.App. 2015) [Emphasis in orig.](quoting *Jackson v. Virginia*, 443 U.S. 307, 310 (1979)). This standard requires the fact finder to resolve any conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts. *Murray*, 457 S.W.3d at 448. On appeal, reviewing courts "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007). "Thus, appellate courts are not permitted to use a 'divide and conquer' strategy for evaluating sufficiency of the evidence because that approach does not consider the cumulative force of all the evidence." *Murray*, 457 S.W.3d at 448 (quoting *Hacker v. State*, 389 S.W.3d 860, 873 (Tex.Crim.App. 2013)). "When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination." *Murray*, 457 S.W.3d at 448–49.

Under Texas law, a person is guilty of DWI, third offense, if the person (1) having been two times previously convicted of an offense related to the operation of a motor vehicle while intoxicated, (2) is intoxicated, (3) while operating a motor vehicle, (4) in a public place. *See* TEX.PENAL CODE ANN. §§ 49.04, 49.09(b); *Priego v. State*, 457 S.W.3d 565, 569 (Tex.Crim.App. 2015). While the Penal Code does not define the term "operating," the Court of Criminal Appeals has found that the State must "demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." *Kirsch v. State*, 357 S.W.3d 645, 651 (Tex.Crim.App. 2012); *Priego*, 457 S.W.3d at 569. "In assessing the sufficiency of the evidence to prove that a defendant was 'operating' a vehicle as contemplated by the statute, we look to the totality of the circumstances." *Priego*, 457 S.W.3d at 569.

Roubert stipulated at trial that he had two previous DWI convictions before July 2, 2018. Additionally, he admitted at trial that he drove his vehicle from the Comal River to where his vehicle caught on fire. Roubert also does not contest that he was legally intoxicated when he encountered Officer Menser. Consequently, we need only address the sufficiency of the evidence regarding Roubert operating a vehicle *while* he was intoxicated. *See Murray*, 457 S.W.3d at 448 n.1 ("We solely address the sufficiency of the evidence as it pertains to the element of 'operating' in the DWI statute because Appellant challenged only that element of the statute.").

Roubert contends that there is no evidence to contradict his testimony that he did not become intoxicated until *after* he parked his vehicle on the side of I-35. Specifically, he claims that "the only evidence before the jury was that he had finished the beers that he had after he stopped driving." Presumably, Roubert is referring to his own testimony that he drank several beers as he sat in his car on the side of the road from 7:00 p.m. to 10:00 p.m. But the jury was free to disbelieve this testimony. *See White v. State*, 412 S.W.3d 125, 129 (Tex.App.—Eastland 2013, no pet.)("[T]he jury was free to reject Appellant's self[-]serving testimony at trial that he was not operating the vehicle, particularly in light of his admission that he could not recall what transpired at the scene."). This is particularly true here where Roubert's testimony regarding how many beers he drank on the side of the road ranged from four beers to "nine to ten" beers.

Further, while there was no evidence that anybody witnessed Roubert driving immediately before his vehicle caught on fire, Roubert admitted at trial that he had drunk at least five beers on the river before driving. The State also introduced testimony from Officers Garcia and Menser that there was no alcohol or empty alcohol containers in or around Roubert's vehicle. Roubert testified that the empty beer cans were "probably thrown away at the gas station[.]" But the jury was responsible for weighing the credibility of the witnesses and resolving conflicts in testimony.

Murray, 457 S.W.3d at 448–49; *see also Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). And we must presume it decided any conflicts in favor of its guilty verdict. *Murray*, 457 S.W.3d at 448–49. Consequently, the totality of the circumstances, including the absence of evidence of alcohol on the scene, Roubert's high level of intoxication, and his admission that he drank before driving his vehicle from the Comal River, could allow a fact finder to reasonably find that Roubert consumed alcoholic beverages somewhere other than on the side of the road. *See Murray*, 457 S.W.3d at 449 ("Based on Appellant's admission that he had been drinking, [the Sherriff's deputy's] observation that Appellant appeared 'very intoxicated,' and the fact that no alcoholic beverages were found in the vicinity, a fact-finder could have reasonably inferred that Appellant consumed alcoholic beverages to the point of intoxication somewhere other than where he was found.").

We overrule Roubert's third issue.

IV. CONCLUSION

For the foregoing reasons, we affirm Roubert's conviction.

June 10, 2022

GINA M. PALAFOX, Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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