MODIFY and AFFIRM; and Opinion Filed November 29, 2018.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01194-CR

JEFFREY ARRINGTON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F15-12657-Q

MEMORANDUM OPINION

Before Justices Fillmore, Evans, and Schenck
Opinion by Justice Schenck

Appellant Jeffrey Thomas Arrington appeals his conviction for driving while intoxicated, third offense or more. In a single issue, appellant challenges the sufficiency of the evidence to support a deadly weapon finding. We affirm the judgment as modified herein. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Appellant was charged by indictment with driving while intoxicated, third offense or more. TEX. PENAL CODE ANN. § 49.09(b). The indictment alleged that appellant used or exhibited a deadly weapon, namely a motor vehicle, during the commission of the offense. The indictment also included an enhancement paragraph, alleging appellant had two prior felony DWI convictions. Appellant pleaded guilty to the offense and entered a plea of not true to the deadly-weapon

allegation and a plea of true to the DWI enhancement paragraph, which by the time of trial had been limited to one prior felony DWI conviction. Appellant elected to have a jury assess punishment.

The State called five witnesses to testify during the punishment phase of trial. Andrew Collins testified that on November 8, 2015, he and his girlfriend, Briana Eubank, were out on a dinner date. As they drove home, appellant almost hit their vehicle as appellant exited Highway 35 onto the access road traveling in the same direction as Collins. Collins elaborated that appellant swerved into the lane in which Collins was traveling, without using a turn signal, forcing Collins to switch lanes to avoid a collision with appellant. Collins further testified the he observed appellant regularly swerving back and forth between lanes. He further observed appellant's vehicle almost hit a concrete wall on a single lane bridge and then saw appellant actually collide with a concrete wall in a construction zone. Collins explained the front right side of appellant's vehicle hit the wall with such force that it came up off the ground in the front, bounced up, and bounced back down. Collins directed his passenger to call the police. Collins testified that because of the way appellant was driving he feared for their safety, and for the safety of others on the access road. He indicated had he not driven ahead to get away from appellant and that, had appellant hit the concrete wall on the single-lane bridge, he would have collided with appellant's vehicle and sustained injuries. Collins explained that although appellant was driving at a slower speed than he was traveling, the speed at which appellant was traveling was fast enough that, had there been a collision, he and Eubank could have been hurt.

Briana Eubank testified that on November 8, 2015, she and Collins were driving on the access road to Highway 35 when they noticed a car coming off the Highway 121 ramp, causing them to slow. The car almost hit the driver's side of Collins's car and Collins had to swerve to avoid a collision. Collins then drove ahead of the car, and Eubank noticed it was swerving in and

out of lanes. Then she saw the car hit a construction wall. Collins and Eubank decided to call 9-1-1, but did not stop. She was concerned for her safety that night. She explained appellant swerved in and out of lanes without regard for other cars and could have readily caused injury to others.

Tyler Eberhart testified that he is employed as a police officer for the City of Carrollton. On November 8, 2015, he was dispatched to the scene of a minor accident. He located a vehicle stopped on the service road off of Highway 35. He positioned his patrol car behind the vehicle. Appellant exited the vehicle and he called to appellant to come back towards him. Appellant appeared unsteady and Officer Eberhart detected the odor of alcohol on appellant's breath. Appellant admitted to consuming alcohol and indicated he had stopped on the side of the road because he felt unsafe driving. Appellant refused to perform the standardized field sobriety tests. Officer Eberhart concluded appellant had operated a vehicle while intoxicated, and arrested him. Appellant also refused to provide a blood sample. Officer Eberhart applied for and obtained a blood warrant to seize a sample. At the conclusion of Officer Eberhart's testimony, the trial judge realized she had not previously administered the third and final oath to the jury. She did so at that time, without objection.[1]

The State then called Officer Cesar Gallegos to testify about the blood draw. The State ended its case-in-chief by calling Nirav Kumar, a forensic scientist for the Texas Department of Public Safety, to testify about blood sample testing. Kumar testified he tested appellant's blood sample, which was obtained five hours after appellant spoke with Officer Eberhart. The test revealed the presence of 0.254 grams of alcohol per 100 milliliters of blood. He explained that in Texas, for driving purposes, the legal limit of alcohol in one's blood is .08 grams per 100 milliliters. Appellant's blood-alcohol content was therefore three times that limit. Kumar opined

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[1] That oath is "[y]ou and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God." TEX. CODE CRIM. PROC. ANN. art. 35.22.

that at this level, appellant would be intoxicated. He admitted that he could not say with scientific certainty that appellant's blood alcohol level was greater than .08 at the time of the accident, but he did indicate that if someone had not been eating or drinking anything for five hours, that at some point within that five hours, a person would have reached a peak and would have then begun eliminating. Kumar further indicated that for someone of appellant's size to go from a blood alcohol level below .08 grams to .254 grams five hours later, there would have had to have been 15 to 16 standard drinks in the stomach five hours earlier that had not been absorbed.

After the State rested, appellant called four witnesses to testify for mitigation purposes. Appellant also testified and admitted that he had consumed 12 or 13 beers on November 8, 2015.

The jury found appellant used or exhibited a deadly weapon during the offense and sentenced him to fifteen years' confinement.

STANDARD OF REVIEW

We review the evidence to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution. *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). To hold evidence legally sufficient to sustain a deadly weapon finding, the evidence must demonstrate that: (1) the object meets the statutory definition of a dangerous weapon; (2) the deadly weapon was used or exhibited "during the transaction from which" the felony conviction was obtained; and (3) that other people were put in actual danger. TEX. PENAL CODE ANN. § 1.07(a)(17)(B); *Ex parte Jones*, 957 S.W.2d 849, 851 (Tex. Crim. App. 1997); *Cates*, 102 S.W.3d at 738. An "actual danger means one that is not merely hypothetical." *Drichas v. State*, 175 S.W.3d 795, 797–98 (Tex. Crim. App. 2005). To justify a deadly weapon finding under section 1.07(a)(17)(B), the State need not establish that the use or intended use of an implement, including a motor vehicle, actually *caused* death or serious bodily

injury; only that "the manner" in which it was either used or intended to be used was *capable* of causing death or serious bodily injury. *Tucker v. State*, 274 S.W.3d 688, 691 (Tex. Crim. App. 2008); *see also Ex parte McKithan*, 838 S.W.2d 560, 561 (Tex. Crim. App. 1992). Specific intent to use a motor vehicle as a deadly weapon is not required. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000).

DISCUSSION

Appellant contends that in determining whether the evidence is legally sufficient to support a deadly weapon finding, this Court cannot consider the testimony of Collins, Eubank, and Eberhart because they testified before the trial court administered the final oath to the jury. In support of this argument appellant relies on the decisions in *Woodkins v. State* and *Patterson v. State*. *Woodkins v. State*, 542 S.W.2d 855, 861 (Tex. Crim. App. 1976); *Patterson v. State*, 416 S.W.2d 816, 820–21 (Tex. Crim. App. 1967). But the issue in those cases was whether the trial court abused its discretion in allowing the State to re-open after it was discovered that the jury had not been sworn. *See Woodkins*, 542 S.W.2d at 861; *Patterson*, 416 S.W.2d at 820–21. Those cases do not hold that testimony admitted prior to the swearing of the jury is a nullity for evidentiary sufficiency purposes. *See Woodkins*, 542 S.W.2d at 861; *Patterson*, 416 S.W.2d at 820–21. They do not require the reintroduction of the evidence after the jury is sworn in order to be considered evidence in the case for purposes of subsequent sufficiency analysis. *See Woodkins*, 542 S.W.2d at 861; *Patterson*, 416 S.W.2d at 820–21.

In this case, the proper jury oath was administered; though it was not administered timely. Appellant made no objection to the timing of the oath. Consequently, he may not raise this complaint for the first time on appeal. *White v. State*, 629 S.W.2d 701, 704 (Tex. Crim. App. 1981). Moreover, it is well-settled that in conducting a sufficiency analysis, a reviewing court must consider all evidence the jury was rightly or wrongly permitted to consider. *Johnson v. State*,

871 S.W.2d 183, 186 (Tex. Crim. App. 1993). Accordingly, we will consider all of the evidence admitted at trial to determine whether there is sufficient evidence to support the jury's deadly weapon finding.

Appellant argues that the evidence is legally insufficient to prove beyond a reasonable doubt that his vehicle was driven in a manner that placed others in actual danger of death or serious bodily injury. Regarding the manner in which an appellant used a motor vehicle, courts examine whether the appellant's driving was reckless or dangerous. *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009). Such an examination includes several factors: 1) intoxication; 2) speeding; 3) disregarding traffic signs and signals; 4) driving erratically; and 5) failing to control the vehicle. *Cook v. State*, 328 S.W.3d 95, 100 (Tex. App.—Fort Worth 2010, pet. ref'd) (citing *Tyra v. State*, 897 S.W.2d 796, 798–99 (Tex. Crim. App. 1995)).

It is undisputed that appellant operated his vehicle while intoxicated. He pleaded guilty to this offense and admitted through his testimony and his judicial confession that he drove while intoxicated. At trial, he indicated he drank 12 or 13 beers on the day of the accident. Further, Officer Eberhart observed appellant at the scene of his single vehicle accident and, based on his training and observations, concluded appellant was intoxicated. Five hours after the accident, appellant's blood sample still revealed a blood-alcohol level three times the legal limit. And while Kumar could not scientifically say appellant's blood alcohol exceeded .08 five hours earlier, his testimony supports a finding that appellant's blood alcohol in fact exceeded .08 at the time of the accident. In addition, appellant's girlfriend testified at trial. She was shown Officer Eberhart's dash-cam recording of his interaction with appellant. She testified his behavior towards the officer indicated that he was intoxicated. An inference may be made that appellant was intoxicated from the fact that he was involved in a single-vehicle accident with a concrete construction wall. *See Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010).

The record reflects that appellant's speed varied as he drove his vehicle on the access road. Eubanks testified appellant's speed noticeably changed as his vehicle swerved between lanes. The record further reflects that appellant disregarded traffic signs or directives while he drove on the access road. In particular, the evidence established appellant failed to yield to Collins's vehicle as he merged onto the access road and he nearly collided with Collins's vehicle as a result. A collision would have occurred had Collins not taken evasive measures. The evidence also established appellant drove erratically. He was swerving between lanes and almost hit a concrete wall on a single lane bridge before colliding with the construction wall. The fact that appellant ran into a concrete wall establishes he failed to control his vehicle.

Considering the relevant factors and the evidence presented at trial, we conclude a rational fact finder could have determined appellant drove his vehicle in a reckless or dangerous manner.

Next, we turn to the second inquiry of whether a rational jury could conclude appellant's vehicle was *capable* of causing death or serious bodily injury at the time of the accident. *Sierra*, 280 S.W.3d at 256. Appellant contends that he only placed Collins and Eubanks in a hypothetical danger and not actual danger. The evidence shows otherwise.

The testimony of Collins and Eubanks established appellant almost hit Collins's vehicle when he entered the access road and that the reason a collision did not occur was because Collins took evasive action. Near collision suffices to establish more than a merely hypothetical danger of death or serious bodily injury to another. *Drichas*, 175 S.W.3d at 797 (concluding the appellant drove his vehicle in a manner that posed an actual danger to other motorists where he failed to yield to oncoming traffic, disregarded traffic signs, wove between lanes, turned abruptly into a construction zone, and crashed his truck); *Mann v. State*, 13 S.W.3d 89, 92 (Tex. Crim. App. 2002) (upholding a deadly weapon finding in a case where no one was injured but the defendant's car nearly hit another vehicle head-on and a collision was avoided only because the other driver took

evasive action); *Ochoa v. State*, 119 S.W.3d 825, 827–28 (Tex. App.—San Antonio 2003, no pet.) (concluding appellant's vehicle posed an actual danger to other drivers on the road where the appellant's vehicle came close to striking and hitting another vehicle on the road). Moreover, the evidence showed appellant was driving in a construction area with concrete walls that could propel his vehicle into other vehicles upon impact. The jury could have reasonably inferred from this evidence that such a propulsion would be capable of causing death or serious bodily injury. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Furthermore, a rational fact-finder could infer from appellant's blood alcohol level being three times the legal limit five hours after the accident, that he used his vehicle as a deadly weapon, in a manner capable of causing death or serious bodily injury. *See Moore v. State*, 520 S.W.3d 906, 912–13 (Tex. Crim. App. 2017).

We conclude that a rational fact-finder could find appellant was using his motor vehicle in a manner that was capable of causing death or serious bodily injury, even though it did not do so, and regardless of whether he intended it to. It does not amount to speculation for us to conclude that there was more than "a hypothetical potential for danger if others had been present." *Mann*, 13 S.W.3d at 92; *see also Sierra*, 280 S.W.3d at 254. Here, others *were* present, including Collins and Eubanks, and the manner in which appellant used his motor vehicle placed them in substantial danger of death or serious bodily injury, even if neither of them was actually hurt.

We overrule appellant's sole issue.

The State requests that this Court modify the judgment to correctly reflect that appellant pleaded true to the first enhancement paragraph and that the second enhancement paragraph is not applicable. Initially, the indictment alleged three enhancement paragraphs under two enhancement headings. The first alleged that appellant used or exhibited a deadly weapon during the offense. The second alleged two prior DWI convictions in cause numbers F97-02386 and F91-39683. At

the State's request during appellant's plea hearing, the trial court struck the State's enhancement paragraph involving cause number F91-39683.

At trial, the State offered an amended judicial confession, which the court admitted. As amended, the State alleged in the first enhancement paragraph that appellant used a deadly weapon and, in the second paragraph, that he was previously convicted of felony DWI in cause number F97-02386. The trial court instructed the jurors to answer a special issue as to whether appellant exhibited a deadly weapon, to wit: a motor vehicle, during the commission of the offense alleged in the indictment. In addition, the verdict form reads, in part: "We the jury unanimously find the Defendant, Jeffrey Arrington, guilty of the offense of driving while intoxicated third and the second enhancement paragraph true as charged in the indictment."

The judgment reflects that the jury made an affirmative deadly-weapon finding and that appellant pleaded not true to the State's first enhancement paragraph, but the jury found it true. Because the issue of the deadly weapon was submitted as a special issue rather than an enhancement, the jury's affirmative deadly weapon finding should be reflected on the judgment solely through the separate notation titled "Findings on Deadly Weapon"—it should not also be listed as the first enhancement paragraph. TEX. CODE CRIM. PROC. ANN. art. 42.01(1)(21), 42A.054(c); TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd) (holding that a jury's deadly-weapon finding is an affirmative finding affecting parole eligibility and involving punishment).

Because the question of whether appellant exhibited a deadly weapon during the offense was presented as a special issue, appellant's plea of true to the previous conviction of felony DWI in cause number F97-02386 became a plea to the sole enhancement paragraph at the time of judgment. We have the authority to modify the trial court's judgment to make the record speak

the truth. TEX. R. APP. P.43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). Thus, we modify the judgment to reflect appellant entered a plea of true to the State's first enhancement paragraph and to reflect that appellant's plea and the finding on the State's second enhancement paragraph are not applicable.

CONCLUSION

We modify the trial court's judgment to reflect that appellant entered a plea of true to the first enhancement paragraph, and that appellant's plea and the finding on the State's second enhancement paragraph is not applicable. We affirm the trial court's judgment as modified.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JEFFREY ARRINGTON, Appellant	On Appeal from the 204th Judicial District Court, Dallas County, Texas
No. 05-17-01194-CR V.	Trial Court Cause No. F-1512657-Q. Opinion delivered by Justice Schenck.
THE STATE OF TEXAS, Appellee	Justices Lang and Fillmore participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> To reflect that appellant entered a plea of true to the first enhancement paragraph and that appellant's plea and the finding on the State's second enhancement paragraph is not applicable.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of November, 2018.