Affirmed and Memorandum Opinion filed January 26, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00730-CR
NO. 14-15-00739-CR

AUTUMN MULLEN-BRIAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 1994917

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

Appellant Autumn Mullen-Briand appeals her conviction for driving while intoxicated (DWI). *See* Tex. Penal Code Ann. § 49.04(a), (b) (Vernon Supp. 2016). After the trial court denied appellant's motion to suppress, she pleaded guilty to DWI in exchange for a plea bargain agreement of confinement for 180 days, probated for one year, and a $200 fine. In two issues, appellant contends that

the trial court erred by (1) denying her motion to suppress because there was no probable cause to arrest her for DWI; and (2) failing to suppress a search warrant for her blood sample because the warrant was issued before field sobriety tests were conducted and thus there was "insufficient probable cause to issue the search warrant for blood." We affirm.

BACKGROUND

Appellant was charged with DWI. Appellant filed a motion to suppress which provided in pertinent part as follows:

> NOW COMES, AUTUMN MULLEN-BRIAND, defendant in the above-entitled and numbered cause, and for such would show unto this Honorable Court the following.
>
> I.
>
> NO PROBABLE CAUSE FOR ARREST
>
> At the time of the arrest for driving while intoxicated, the police department did not have sufficient probable cause to arrest the defendant.
>
> II.
>
> The defendant, AUTUMN MULLEN-BRIAND was under arrest for driving while intoxicated at the time she was put in handcuffs at the scene until she went to the Webster City Jail.
>
> III.
>
> The police department either arrested the defendant not having sufficient probable cause for the arrest or arrested the defendant with probable cause but continued to determine if they believed she was intoxicated AFTER taking her to jail.

The trial court held a hearing on appellant's motion to suppress. At the hearing, Police Officer Rachel Mireles of the Webster Police Department testified that she responded to an accident call at about 10:50 p.m. on November 16, 2014. Officer Mireles testified that she was at the scene with her Field Training Officer Nicholas Santos and Police Officer Russell Sanford. She stated that she "spoke with the

victim who stated that he had been rear-ended by [appellant] who was driving at a high rate of speed" on the feeder road of Highway 45. Officer Mireles stated: "I went over and spoke with [appellant], and I determined as soon as I talked to her that she was intoxicated." Officer Mireles determined that appellant was intoxicated because appellant had "red, watery eyes, an odor of alcoholic beverage emitting from her and her person and breath; and she was up, able to make a complete sentence and was slurring everything that she said." Appellant admitted only to drinking one glass of red wine but Officer Mireles testified that she smelled a very strong odor of alcohol on appellant.

Officer Mireles asked appellant to exit her car and perform field sobriety tests in a strip center parking lot to which the parties and vehicles involved in the accident had moved. Officer Mireles stated that she asked appellant to "come over to the line on the ground so that we could perform the field sobriety tests, and she was very intoxicated. . . . She was swaying. She could not keep her balance. Shifting back and forth was — kept moving around. Wouldn't do what I asked her to do." Appellant tried to perform the horizontal gaze nystagmus test but "[s]he was unable to perform it at the time" because "her level of intoxication was so high at the moment, along with the weather conditions."

Officer Mireles testified that she observed all the signs of intoxication she was trained to look for on appellant, including red, watery eyes; slurred speech; staggered stance; inability to follow a simple instruction; and a strong smell of alcohol. According to Officer Mireles, appellant could not comprehend what she was asked to do during the field sobriety test. Officer Mireles stated that appellant "would ask me the same thing over and over. I had to explain to her and she would ask me again. I told her not to do something. She would do it again. It just — it was to the point to where I could tell that it was — it wasn't going to happen at that

point." Officer Mireles also testified that it was windy and cold and that she observed appellant shivering. After consulting with her field officer, Officer Mireles decided to take appellant to "a controlled environment" — the "Intox room" — at the Webster Police Department to "finish the tests."

Officer Mireles stated that she patted appellant down, handcuffed her, placed her in the back of a police car, and "detained her to take her to the Intox room" because she believed appellant had committed the crime of DWI. When they arrived at the Webster Police Department Intox room, Officer Mireles read appellant "her rights and performed the field sobriety tests on her." Appellant was unable to follow directions and perform the field sobriety tests. She refused to consent to a breath test or blood draw, and Officer Mireles requested a search warrant for a blood draw.

A patrol car videotape of the scene after the accident and a jail videotape of appellant at the Intox room performing field sobriety tests were admitted at the suppression hearing. The trial court denied appellant's motion to suppress after the hearing on June 18, 2015. Appellant pleaded guilty to a misdemeanor offense of DWI. Appellant filed "Defendant's Motion for New Trial, or, in the Alternative, Motion Granting Defendant's Motion to Suppress" on July 17, 2015. The trial court denied appellant's motion on August 7, 2015. Appellant filed a timely appeal.

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress under a bifurcated standard. *Vasquez v. State*, 324 S.W.3d 912, 918 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). We give "almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact

findings are based on an evaluation of credibility and demeanor." *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We review *de novo* questions of law and "mixed questions of law and fact" that do not depend upon credibility and demeanor. *Donjuan v. State*, 461 S.W.3d 611, 615 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see also Guzman*, 955 S.W.2d at 89. When, as here, there are no explicit findings of historical fact, we review the evidence in the light most favorable to the trial court's ruling assuming that the trial court made implicit findings of fact supported in the record that buttress its ruling. *Donjuan*, 461 S.W.3d at 615.

ANALYSIS

I. Probable Cause for Arrest

Appellant argues in her first issue that "the trial court erred in denying Appellant's Motion to Suppress the fact the Appellant was under arrest without probable cause to believe she was intoxicated at the time she was taken to the station." She argues "there was insufficient probable cause to arrest her for DWI" at the scene and "the police did not have sufficient probable cause to arrest her until AFTER the field sobriety and blood test was conducted."

Probable cause for a warrantless arrest exists if, at the moment the arrest is made, the facts and circumstances within the arresting officer's personal knowledge or of which he has reasonably trustworthy information are sufficient to warrant a reasonable belief that the person arrested had committed or was committing an offense. *See Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009); *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005). The test for probable cause is an objective one; it is 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. An

unarticulated hunch or the good faith of an arresting officer is insufficient to support probable cause to justify a warrantless arrest. *Torres*, 182 S.W.3d at 902. A finding of probable cause necessitates more than bare suspicion but less than would justify a conviction. *Amador*, 275 S.W.3d at 878.

Here, the evidence showed that appellant was driving at a high rate of speed at night on the feeder road of Highway 45 and rear-ended another vehicle. When Officer Mireles talked to appellant, she smelled a very strong odor of alcohol on appellant who admitted to drinking a glass of wine. Officer Mireles observed all of the signs of intoxication she was trained to look for, including red, watery eyes; slurred speech; staggered stance; inability to follow instructions; and a strong smell of alcohol. Officer Mireles testified that appellant's intoxication level was so high that appellant was unable to perform the horizontal gaze nystagmus test; and appellant was also swaying, shifting back and forth, and could not keep her balance.

Considering the totality of circumstances surrounding appellant's arrest, we conclude that the arresting officer had sufficient knowledge and trustworthy information at the scene to form a reasonable belief that appellant committed the offense of DWI; and thus, contrary to appellant's assertion, there was probable cause to arrest appellant for DWI even before she was taken to the police station to perform further field-sobriety tests and submit to a blood test. *See LeCourias v. State*, 341 S.W.3d 483, 489 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (probable cause existed that defendant drove while intoxicated where witness informed 911 dispatcher that defendant drove erratically and defendant performed "dismal[ly] during the field-sobriety tests"); *Banda v. State*, 317 S.W.3d 903, 907, 910-11 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (officer had probable cause based on information provided by a witness who observed defendant's

erratic driving; the police officer's observation of defendant's slurred speech, glassy eyes, and strong odor of alcohol; and defendant's performance on field-sobriety tests); *Layland v. State*, 144 S.W.3d 647, 649-50 (Tex. App.—Beaumont 2004, no pet.) (per curiam) (probable cause existed that defendant drove while intoxicated where officer arrived at the scene of a single car accident; defendant's car had left the road and landed in a ditch; officer noticed signs of intoxication after talking to defendant; defendant poorly performed field-sobriety tests; and defendant admitted she had been driving); *see also Nottingham v. State*, 908 S.W.2d 585, 588-89 (Tex. App.—Austin 1995, no pet.) (per curiam) (probable cause to arrest for driving while intoxicated existed where defendant had rear-ended another vehicle, smelled like alcohol, failed the horizontal gaze nystagmus test, and admitted to drinking "one beer and one shot").

Accordingly, we overrule appellant's first issue

II. Warrant for Blood Sample

Appellant argues in her second issue that "the trial court erred in denying [her] motion to suppress based on . . . insufficient probable cause to get a search warrant for [a]ppellant's blood." Appellant argues that the search warrant for her blood "was issued without sufficient probable cause to believe Appellant was driving while intoxicated" because the warrant was obtained before the field sobriety tests were conducted and thus "the search warrant for the blood and the blood test results should not have been admitted."

The State responds that appellant failed to preserve her second issue for appellate review. We agree.

In her motion to suppress, appellant asserted only that, "[a]t the time of the arrest for driving while intoxicated, the police department did not have sufficient

probable cause to arrest the defendant." During the suppression hearing closing argument, appellant asked the trial court to grant her motion to suppress because "there was no probable cause for the arrest." Appellant then stated, "And, Judge, we would ask the Court suppress the blood test, because the blood test is based upon [appellant] refusing everything. Again, [appellant] was already under arrest."

As the State presented its closing argument, the trial court interrupted the State's argument and the following exchange occurred:

> THE COURT: As far as the arrest for D.W.I., the Motion to Suppress on that ground is denied. The officer testified that she smelled an odor of alcohol; the defendant was unable to follow instructions or to do anything else and in fact asked to be taken to another location for the purposes of doing any further testing which — I have to give the police department credit for doing that. If it was cold and windy. They proceeded to her request to do that.
>
> I find that there was reasonable probable cause to arrest the defendant for intoxication. There was an accident, a rear-end accident, the whole nine yards. Now the question becomes, then, whether or not the results of the blood test are admissible or not. I will hear arguments on that point.
>
> [THE STATE]: I would object, Your Honor. At this point the Motion to Suppress that we were served with solely limits to whether or not the arrest was proper, was my understanding.
>
> THE COURT: Well, the arrest is, in my judgment, is proper.
>
> [THE STATE]: And so I don't think that we would get the facts on whether or not the blood is admissible at this time. If Your Honor would like to, then we would like to call the officer back to develop that record based on whether or not the blood is relevant.
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> THE COURT: The defendant's motion did address whether or not the police department had probable cause to arrest the defendant, and I find that they did. And that is the basis of the motion.
>
> [THE STATE]: Thank you, Judge.
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> [APPELLANT'S TRIAL COUNSEL]: Thank you, Judge.

Appellant did not challenge the search warrant at the motion to suppress hearing as

being "issued without sufficient probable cause" and therefore as being "inadmissible" as she does now on appeal. Appellant also did not present any argument challenging the propriety or admissibility of the warrant for appellant's blood sample in her motion for new trial. Thus, appellant has failed to preserve her appellate complaint. *See Buchanan v. State*, 207 S.W.3d 772, 774-78 (Tex. Crim. App. 2006) (trial court motion based on constitutional arguments did not preserve error for statutory claims on appeal); *Foster v. State*, 874 S.W.2d 286, 289 (Tex. App.—Fort Worth 1994, pet. ref'd) (claim on appeal of deficiencies in affidavit and warrant did not comport with motion to suppress claiming arrest was without probable cause and argument that affidavit failed to show informant was reliable); *see also* Tex. R. App. P. 33.1(a)(1) (requiring party to raise specific ground in trial court as prerequisite for appellate complaint).

Accordingly, we overrule appellant's second issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Christopher, and Brown.
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