Affirmed and Memorandum Opinion filed May 16, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00344-CR

CARLOS SALINAS–BEAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 1991378

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

A jury found appellant Carlos Salinas–Beas guilty of driving while intoxicated (DWI). In three issues, appellant contends that the evidence is legally insufficient and that the trial court denied appellant's right to confrontation. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

In his second and third issues, appellant contends the evidence is legally insufficient to prove (1) his identity as the driver of the motor vehicle and (2) that he was intoxicated.

A. Standard of Review and Elements of DWI

When a defendant challenges the sufficiency of the evidence, we must determine 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. *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011). "[T]he state may prove the defendant's identity and criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence." *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). Circumstantial evidence is as probative as direct evidence to establish the guilt of a defendant, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

The elements of misdemeanor DWI, as charged here, are: "(a) a person (b) is intoxicated (c) while operating (d) a motor vehicle (e) in a public place." *Gray v. State*, 152 S.W.3d 125, 131 (Tex. Crim. App. 2004) (citing Tex. Penal Code § 49.04(a)). "Unquestionably, the State must prove beyond a reasonable doubt that the accused is the person who committed the crime charged." *Smith v. State*, 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Under the "impairment theory" of intoxication, as the State alleged here, the State was required to prove that appellant did not have the normal use of mental or physical faculties by reason of the introduction of alcohol into the body. *See Navarro v. State*, 469 S.W.3d 687, 694 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (citing Tex. Penal Code § 49.01(2)).

B. Evidence

Two witnesses, both Houston Police Department officers, testified at trial. One officer, Sean Ratcliff, testified that he was off-duty and driving home on Interstate 45 between 11:00 p.m. and midnight when he saw a pickup truck. The truck was swerving in its lane and then swerving into other lanes. The truck almost hit some other vehicles, which had to move out of their lanes to avoid being hit. Ratcliff was driving an unmarked car, so he radioed dispatch to report a possible DWI.

Ratcliff followed the truck for five to ten minutes until another officer, Andrew Carroll, arrived in a marked patrol unit and initiated a traffic stop. Carroll testified that he stopped the pickup truck, and "the defendant" pulled over reasonably soon.[1] The State asked Carroll to make an in-court identification of appellant as follows:

Q.	And are you able to identify the driver today?
A.	Yes, ma'am.
Q.	Is he in the courtroom today?
A.	Yes, ma'am.
Q.	Can you please point him out by identifying maybe an article of clothing or some sort of distinguishing factor?
A.	Yes, ma'am. It's the gentleman sitting there in the purple shirt.
[The State]:	And can the record please reflect that Officer Carroll has identified the defendant?
The Court:	I can't hear you.

[1] On cross, Carroll was asked, "Do you recall that as soon as Ratcliff moved out of the way and you fell in behind my client, my client pulled immediately off—onto the shoulder?" Carroll testified that "your client pulled over immediately."

[The State]: Can the record—can the record—I apologize, Your Honor. Can the record please reflect that Officer Carroll has identified the defendant, Carlos Salinas–Beas?

The Court: It will indicate that the witness has identify—indicated to the person seated next to counsel.

[The State]: Thank you, Your Honor.

Q. And so do you know the name of the defendant?

A. I don't remember, ma'am.

Ratcliff pulled over about fifty feet behind Carroll and watched the stop. Ratcliff testified that he saw Carroll begin to interact with "the defendant." Carroll testified that appellant had red, bloodshot eyes, and his movements were slow. Carroll could smell the odor of an alcoholic beverage coming from inside the truck. Carroll spoke with appellant in English and a little Spanish. Carroll believed that appellant understood what Carroll was saying. Carroll asked appellant if he had been drinking, and appellant said, "Yes."

Ratcliff testified that he saw "the defendant" step out of the car. Carroll testified that he performed an HGN test on appellant and saw four clues of intoxication. Carroll wanted to do other field sobriety tests, but for safety reasons, he did not want to do them on the side of the freeway. Ratcliff testified that he saw Carroll "detain the defendant" by placing him in the back of the patrol car. Carroll and Ratcliff drove to a nearby parking lot.

Ratcliff testified that he saw "the defendant" get out of the car in the parking lot, and Carroll had appellant perform the walk-and-turn test, the one-legged-stand test, and another HGN test. Carroll testified that there are eight clues of intoxication for the walk-and-turn test. Carroll could not remember the specific clues that appellant showed on this test, but Carroll knew it was more than two, which is the failing number. Carroll testified that there are four clues for the one-

legged stand test, and appellant showed three of the clues. Thus, appellant failed all three field sobriety tests. Carroll concluded that appellant was intoxicated. Carroll "detained" appellant and brought him to "Central Intox" for further investigation.[2]

C. Identity

In his second issue, appellant contends that there is legally insufficient evidence to prove appellant's identity as the person whom Carroll detained. Appellant focuses on Carroll's inability to recall the person's name, and appellant contends that the trial court "demurred" in response to the State's request that the record reflect Carroll identified appellant in court.

"The lack of a formal, in-court identification does not necessarily render the evidence insufficient to establish identity." *Adams v. State*, 418 S.W.3d 803, 810 (Tex. App.—Texarkana 2013, pet. ref'd); *accord Johnson v. State*, No. 14-98-01079-CR, 2000 WL 257821, at *3 (Tex. App.—Houston [14th Dist.] Mar. 9, 2000, pet. ref'd) (not designated for publication) (observing that "[s]everal courts, including this court, have recognized there is no requirement that witnesses formally identify the defendant in court"). The test for determining whether there is sufficient evidence of the appellant's identity as the perpetrator of the charged offense has been described as whether the appellate court can conclude from a totality of the circumstances that the jury was adequately apprised that the witnesses were referring to the appellant. *See Purkey v. State*, 656 S.W.2d 519, 520 (Tex. App.—Beaumont 1983, pet. ref'd); *see also Johnson*, 2000 WL 257821, at *3.

The *Rohlfing v. State* decision is the modern genesis for this analysis. *See* 612 S.W.2d 598, 601 (Tex. Crim. App. [Panel Op.] 1981). In *Rohlfing*, the

[2] As discussed below, neither party submitted evidence about what occurred during the additional investigation.

defendant challenged on appeal the sufficiency of the evidence to prove his identity as the perpetrator of an aggravated robbery. *Id.* at 599–600. Multiple witnesses identified the robber in court and described him by an article of clothing. *See id.* at 600–01. The State did not request that the record reflect that the person identified in the courtroom was the appellant. *Id.* at 601. Nonetheless, the Court of Criminal Appeals concluded "from a totality of the circumstances the jury was adequately apprised that the witnesses were referring to appellant." *Id.*

The Court of Criminal Appeals found the following circumstances important:

- The appellant did not contend in his brief on appeal that some other person, and not he, was identified by the witnesses.
- The appellant did not object to the identification procedure or offer a bill of exception to detail the circumstances that would reflect any possible confusion or misidentification in the in-court identification process.
- The record showed that the appellant, and no other person, was on trial in the cause.
- The jury verdict indicated that the jury found "the defendant, MICHAEL HENRY ROHLFING, 'Guilty'" of the crime charged in the indictment.
- There was no indication in the record that the jury may have been misled by the in-court identification procedure.

See id. The court would not presume that some person other than the appellant was identified and the jury nonetheless chose to convict the appellant. *Id.*

Appellant does not contend that Carroll identified some person other than appellant when Carroll identified the person wearing the purple shirt sitting next to counsel. Appellant did not object to the identification or make a bill concerning any possible confusion or misidentification. The record shows that appellant, and no other, was on trial in the cause. The jury verdict indicates that the jury found

"the defendant" guilty. The witnesses repeatedly referred to "the defendant" when discussing the actions of the driver of the pickup truck, and trial counsel asked a question about "my client." Thus, nothing in the record indicates that the jury may have been misled by the in-court identification. *See id.* Under these circumstances, we will not presume that Carroll identified some person other than appellant. *See id.* Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that appellant was the operator of the motor vehicle.

Appellant's second issue is overruled.

D. Intoxication

In his third issue, appellant contends that the evidence is legally insufficient to prove he was intoxicated. Appellant agrees that there is "more than a 'modicum' of evidence" to prove intoxication. But appellant contends that the evidence is undermined because Carroll testified that he merely detained appellant and did not arrest appellant, and because there was a "language barrier" between appellant and Carroll.

Generally, evidence is sufficient to prove intoxication if the investigating police officer opines that a person was intoxicated based on observed clues of intoxication. *See Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. [Panel Op.] 1979) (sufficient evidence based on arresting officer's opinion testimony after having observed the defendant's conduct and demeanor); *Kiffe v. State*, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist] 2011, pet. ref'd) ("Also, as a general rule, the testimony of an officer that a person is intoxicated provides sufficient evidence to establish the element of intoxication for the offense of DW[I.]"); *see also, e.g.*, *Lovett v. State*, No. 14–12–00556–CR, 2013 WL 3243363,

at *3 (Tex. App.—Houston [14th Dist.] June 25, 2013, no pet.) (mem. op., not designated for publication).

Officer Carroll testified that he believed appellant was intoxicated after appellant failed the sobriety tests. And, as appellant acknowledges, the following evidence collectively tends to prove intoxication: (1) appellant was driving poorly and repeatedly weaving outside his lane; (2) he smelled of alcohol; (3) he had bloodshot eyes; (4) he had slow movements; (5) he admitted to drinking; and (6) he failed several standardized field sobriety tests. *See Annis*, 578 S.W.2d at 407 (sufficient evidence when the defendant's vehicle swerved across the lane-dividing stripe several times, and the defendant appeared disorderly, had "mush-mouthed" speech, had red eyes, and had breath that smelled of alcohol).

Although Carroll testified that he had detained appellant for further investigation, rather than arrested appellant for DWI, it was the jury's duty to weigh the evidence and determine whether appellant was intoxicated. *See Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (noting that the jury is the sole judge of the weight to be given the witnesses' testimony). Similarly, Carroll testified that appellant spoke English; Carroll gave instructions for the field sobriety tests in English and a little Spanish; and Carroll believed that appellant understood Carroll. This evidence does not undermine the rationality of the jury's finding that appellant was intoxicated. *See Kiffe*, 361 S.W.3d at 109 (holding the evidence was legally sufficient even though there was evidence of other reasons for the defendant's symptoms of intoxication because it is the jury's responsibility to resolve conflicts and weigh the evidence). An appellate court's duty is not to reweigh the evidence from reading a cold record, but to act as a due process safeguard to ensure the rationality of the jury. *See Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996).

From all of the admitted evidence, a rational jury could have found beyond a reasonable doubt that appellant was intoxicated—that he did not have the normal use of mental or physical faculties by reason of the introduction of alcohol into the body.

Appellant's third issue is overruled.

II. MOTION IN LIMINE

In his first issue, appellant contends that "the trial court denied appellant the Sixth Amendment right to confrontation by erroneously granting the State's motion in limine to exclude any mention of the primary investigating officer's involvement in the case." Appellant contends that the trial court prevented appellant from cross-examining witnesses about certain evidence related to a non-testifying police officer. The State contends that appellant has not preserved error.

We conclude that the trial court's ruling on the motion in limine did not exclude any evidence. And, appellant did not preserve error for any exclusion of evidence because at trial he did not identify, as he does on appeal, the specific evidence sought to be admitted and the rationale for admission.

A. Arguments at Trial and on Appeal

Before the State presented evidence, the parties told the trial court that an officer who performed a breath test on appellant, J. Quezada, was arrested on federal charges stemming from the robbery of an armored car. The State made an oral motion in limine regarding the officer:

> Your Honor, we have a motion in limine. Officer Quezada did not perform the SFSTs. Officer Quezada was not the arresting officer. The only time Officer Quezada became involved was after the SFSTs were performed. The defendant was transported to the nearest police station where Officer Quezada performed the Intoxilizer test. We are not using the Intoxilizer test. We are not discussing any part of the

> defendant's actions, behavior, et cetera, within the police station nor are we including anything mentioning Officer Quezada. With that, we would like to submit a motion in limine barring any mention of Officer Quezada, the breath test, lack thereof.

Defense counsel responded with the following argument:

> Officer Quezada is the one who did all the reports. He's the one that did the DIC-23. He's the one that did the DIC-24. He's the one that did the DIC-25. He's the one that did the arrest report. He's the one who did the secondary report. Officer Quezada did everything that has to be done report-wise in this case.
>
> To say—to leave the jury in the dark that Officer Quezada doesn't have an opinion about whether my client may or may not have been intoxicated, I think you're deceiving the jury to do that.
>
> And I think to say, "Oh, here's what we're going to do. He's a bad guy. He's been charged with lying, he's been charged with stealing, and he's been charged with aiding and abetting the enemy; but you're not going to be able to go into that.
>
> And furthermore, you're not going to be able to go into the facts that when they took him down and turned him over for the interview and the video, even though the law requires that Harris County do that, "We're not going to introduce the video, so you can't go into it."
>
> And they gave him a breath test. They had an opinion about what his level of intoxication was. They had an opinion about whether he understood English because they specifically got Quezada, who spoke to him in Spanish.

In a lengthy discussion between the trial court, defense counsel, and the State, the court suggested that defense counsel's raising the issue of Quezada would require "some thought on tactics," and that if cross-examination of the testifying officers revealed that they relied on Quezada's report, it might open the door to other evidence:

> THE COURT: . . . I think it's something that you need to do some thought on tactics, because if you want—if you're making an issue of [Quezada's] opinion, then you're basically putting him in play, so to

> speak; and the State has agreed not to put him in play for any reason whatsoever.
>
> . . . .
>
> Well, first, A, it's not admissible, the report. B, at some point I'm going to have to figure out how, and it would be strictly through cross-examination of these witnesses, how much they're relying on a report that a third party made.
>
> And if they're relying on specific facts in that report, then you may have some areas that you can go into; but right now I'm not going to let it in.
>
> . . . .
>
> I can't wait for some—for one of them to open the door to where you can say that the information that they had been studying to testify here today is based of—is flawed and based upon a discredited individual. You know, I'd love for that to happen.
>
> I'm not going to let it happen until they've opened it.

The trial court never expressly excluded any specific or global evidence concerning Quezada. Appellant did not mention his right to confrontation or the Sixth Amendment.

On appeal, appellant contends his cross-examination of the testifying witnesses was improperly limited, thus violating his Sixth Amendment right to confrontation. Specifically, appellant contends he was precluded from mentioning: (1) appellant's willingness to submit to a breath test; (2) appellant's station video recording of standardized field sobriety tests; (3) Quezada's completion of the offense report, which both State's witnesses used to refresh their memory prior to testifying; (4) the timeline of Quezada's arrest determination in relation to the traffic stop; and (5) that Quezada was asked to complete the investigation because he was bilingual and could properly communicate with appellant in his first language.

B. Legal Principles Regarding Preservation of Error

To preserve error for appellate review, the trial court must have ruled on the motion or request, either expressly or implicitly. *See* Tex. R. App. P. 33.1(a)(2). A trial court's granting of a motion in limine, however, is a preliminary ruling that normally preserves nothing for appellate review. *Geuder v. State*, 115 S.W.3d 11, 14–15 (Tex. Crim. App. 2003). Ordinarily, the granting of a motion in limine is not an adverse ruling on the admissibility of evidence; there must be a tender of specific evidence to preserve error. *See Draughon v. State*, 831 S.W.2d 331, 333 n.1 (Tex. Crim. App. 1992); *see also Norman v. State*, 523 S.W.2d 669, 671 (Tex. Crim. App. 1975) (holding that the mere granting of a motion in limine does not enable a reviewing court to know what, if any, specific evidence has been excluded, so "it is not the granting of a motion in limine which constitutes the basis for complaint on appeal").

Even if the trial court excludes evidence, to preserve error for appellate review the complaining party must make an offer of proof under Rule 103 of the Texas Rules of Evidence. *See Mays v. State*, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009) (citing Tex. R. Evid. 103). The party must set forth the substance of the excluded evidence. *Id.* If the offer is in the form of a statement from counsel, counsel must provide a reasonably specific summary of the evidence and state the relevance of the evidence unless the relevance is apparent. *See id.* at 889–90; *see also* Tex. R. Evid. 103 (requiring the party to inform the court of the substance of the evidence "unless the substance was apparent from the context"). It is not enough to tell the trial court that the evidence is admissible. *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). "The proponent, if he is the losing party on appeal, must have told the judge why the evidence was admissible." *Id.*

Whether a particular complaint made at trial is preserved depends on whether the complaint on appeal comports with the complaint at trial. *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). The complaining party on appeal must have brought to the trial court's attention the very complaint that the party is now making on appeal. *Reyna*, 168 S.W.3d at 177 (citing *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002)).

C. No Error Preserved

Appellant did not inform the trial court that the exclusion of any evidence violated appellant's right to confront the witnesses against him. Nor was this complaint apparent from the context of the proceedings.[3] Thus, his complaint on appeal does not comport with any complaint at trial. By failing to inform the trial court why the evidence was admissible, appellant has not preserved error. *See id.* at 179 (no error preserved regarding the right to confrontation when the defendant argued that evidence should have been admitted for "credibility" purposes, because the defendant did not clearly articulate that the Confrontation Clause demanded

[3] Appellant contends that the trial court "realized Appellant's constitutional right to confrontation was implicated by its ruling." The ruling appellant cites in his brief, however, is not the trial court's ruling on the motion in limine. Rather, appellant had been cross-examining Ratcliff about the contents of Quezada's report and what time appellant was formally arrested. The court sua sponte excused the jury to express concerns about how much time the parties were spending on the topic:

> I'm addressing this to both sides. We've spent a good 9 minutes on one question, and that's just not an effective—or excuse me, cancel that word effective. That's not a judicious use of the jury's time. Now, I'm not—I'm addressing this to both of you, whether it's the same question being asked 100 different ways, or whether it's objections not being made, I expect this case to move along; and, actually we've been over an hour with this witness who didn't see anything except the driving facts without hampering confrontation. Counsel, I understand your right to confront. Bring in the jury. . . . And I'm sustaining the objection on the basis of 403. There's no probative value on what time, unless Counsel can show it.

This exchange is the only time "confrontation" was mentioned at trial.

admission of the evidence, and the trial court never had the opportunity to rule on this rationale).

Furthermore, to the extent the State's motion could be understood as one seeking the exclusion of evidence,[4] the trial court never granted it. Instead, the court granted a motion in limine. The court told appellant that "putting [Quezada] in play" was a matter of "tactics." And the court told appellant that "right now" the court was not going to admit evidence about Quezada. But the court said "at some point," it would need to determine the extent to which the testifying witnesses were relying on Quezada's report. The court said that appellant "may have some areas that you can go into" depending on "how much they're relying on a report that a third party made." The court told appellant this evidence could be adduced "strictly through cross-examination of these witnesses." By this ruling, the trial court did not exclude any evidence; the court made a preliminary ruling to prevent appellant from mentioning Quezada until a later determination of admissibility could be made. *See Geuder*, 115 S.W.3d at 14–15. As a ruling on a motion in limine, no error was preserved. *See id.*

Finally, we note that appellant was permitted to cross-examine the witnesses about whether (1) they wrote any offense reports that they might have used to refresh their memory; (2) appellant was formally arrested at a later time, after 4:00 a.m.; and (3) appellant spoke English. Appellant never attempted to adduce other evidence that he now contends the trial court excluded. For example, appellant did not seek to introduce the video recording of sobriety tests, nor any evidence about his willingness to submit to a breath test. With no tender of the specific evidence,

[4] *See Geuder*, 115 S.W.3d at 14–15 (holding that the appellant preserved error by making a "specific motion to exclude evidence" at trial, distinguished from his pretrial motion in limine on the same topic).

no error was preserved. *See Draughon*, 831 S.W.2d at 333 n.1; *Norman*, 523 S.W.2d at 671.

Appellant's third issue is overruled.

III. CONCLUSION

Having overruled each of appellant's issues, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Boyce, Busby, and Wise.
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