COURT OF APPEALS

SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00110-CR

THE STATE OF TEXAS STATE

V.

STEPHANIE FLEMMONS APPELLEE

FROM THE 158TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F-2012-1183-B

MEMORANDUM OPINION[1]

The State of Texas appeals from the trial court's ruling suppressing evidence obtained as a result of a police officer's traffic stop of Stephanie Flemmons. The State's issues concern whether, in reconsidering a prior judge's ruling on the motion to suppress, the presiding judge was required to merely engage in an appellate review of the prior judge's findings of fact and conclusions

[1] *See* Tex. R. App. P. 47.4.

of law rather than conduct a de novo review and whether the presiding judge abused his discretion in suppressing the evidence. We affirm.

Factual and Procedural Background

Around midnight on February 8, 2012, Officer Brent Brown with The Colony police department was finishing assisting another officer with a stop on Windhaven in the Austin Ranch apartment complex. The Austin Ranch area at that time of night has a lot of foot traffic, and the police have trouble with intoxicated persons and drivers. As he was facing eastbound, Officer Brown saw a dark-colored car headed westbound on the opposite side of the street bounce off a curb. Officer Brown made a U-turn on Windhaven, at which point he could not see the car. There were no other cars on Windhaven at the time.

At the next intersection, Officer Brown saw two pedestrians at the crosswalk who pointed westbound and said “the vehicle is that way.” They also told him the car was a dark Infiniti and it was “driving crazy.” Officer Brown could see taillights about two tenths of a mile ahead where the pedestrians had pointed, so he activated his overhead lights and tried to catch up. He saw the car turn left about 900 to 1200 feet past the intersection he had left and lost sight of it.

After Officer Brown turned left at the same street where he saw the car had turned, he “pretty quickly” saw a car with its brake lights on parked behind an apartment that faced Windhaven. He pulled in behind the car, a black Infiniti, and sat behind it in his car for ten to fifteen seconds. Officer Brown then got out

of his car, and the driver of the vehicle turned left into a garage. While this was happening, Officer Brown was shining his flashlight through the window into the driver's face, but the driver did nothing to indicate that she saw him. After the driver pulled into the garage, she attempted to shut the door, but Officer Brown stepped inside, which caused the door to stop closing. Officer Brown identified the driver as Flemmons and arrested her for driving while intoxicated (DWI).

A grand jury indicted Flemmons for felony DWI. *See* Tex. Penal Code Ann. §§ 49.04, 49.09(b)(1) (West Supp. 2017). The 362nd District Court transferred the case to the 158th District Court, which in turn transferred the case to Denton County Criminal Court Number Five. *See* Tex. Gov't Code Ann. § 25.0634 (West 2004). At that time, the Honorable Richard Podgorski was the presiding judge of County Criminal Court Number Five. Flemmons filed a motion to suppress in the county court, alleging that Officer Brown did not have reasonable suspicion to stop her car and that his warrantless entry of her garage was not justified. After a hearing, Judge Podgorski denied the motion to suppress and signed findings of fact and conclusions of law.

The case was not tried before Judge Podgorski left the county court bench. Flemmons filed a motion to disqualify his successor, the Honorable Coby Waddill, because Judge Waddill had consulted with Flemmons about the case when in private practice. Judge Waddill granted the motion, and the case was transferred back to the 158th District Court. After the transfer, Flemmons filed a motion to reconsider her motion to suppress. At a hearing on the motion, the

presiding judge of the 158th District Court—the Honorable Steve Burgess—noted that the State and Flemmons had agreed "that the best evidence . . . would be the record from the prior hearing [before Judge Podgorski], along with the findings of fact and conclusions of law that are file-marked May 16th, 2013." At the conclusion of the hearing, Judge Burgess suppressed the evidence from the traffic stop, and the State filed a timely notice of appeal. Judge Burgess also signed new findings of fact and conclusions of law.

Judge Burgess Did Not Abuse His Discretion by Making His Own Findings of Fact

In its first issue, the State contends that Judge Burgess abused his discretion by making his own findings of fact "based on the cold record" and, in doing so, disregarding Judge Podgorski's factual determinations. According to the State, Judge Burgess was sitting as a reviewing court and therefore was bound to defer to Judge Podgorski's findings of fact under the prescribed appellate standard of review. *See Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) ("In reviewing a trial court's ruling on a motion to suppress evidence and its determination of the reasonableness of either a temporary investigative detention or an arrest, appellate courts . . . must 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.'").

But nothing in the record indicates that Judge Burgess was engaging in an appellate review of the prior motion to suppress hearing. Instead, he stated on the record that the State and Flemmons had agreed that the reporter's record of the prior hearing and Judge Podgorski's findings of fact and conclusions of law were the "best evidence" to be presented in the reconsideration hearing. Neither party objected to his understanding of the agreement, nor did the State urge that Judge Burgess was limited to the appellate standard of review. The State cannot agree to the trial court's consideration of the prior record as "evidence" and then complain on appeal about the trial court's doing so. *See Druery v. State*, 225 S.W.3d 491, 506 (Tex. Crim. App.), *cert. denied*, 522 U.S. 1028 (2007); *Degadillo v. State*, 262 S.W.3d 371, 377 (Tex. App.—Fort Worth 2008, pet. ref'd); *Mann v. State*, 850 S.W.2d 740, 742 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

The State contends that Judge Burgess made credibility and factual determinations in conflict with Judge Podgorski's credibility and factual findings, running afoul of the holding in *Garcia v. State*, 15 S.W.3d 533, 535 (Tex. Crim. App. 2000). *Garcia* is inapposite because it did not involve a pretrial reconsideration of a suppression issue by a different judge; instead, it involved whether a court of appeals abating an appeal for findings of fact on the voluntariness of a confession, as required by article 38.22 of the code of criminal procedure, could order a new trial judge—who had not heard the evidence and had not made the suppression ruling being appealed—to make the required findings of fact and conclusions of law from the "cold record" of the prior judge's

hearing. *Id.* at 534–35. The court of criminal appeals determined that the language of article 38.22 suggests that the legislature did not intend for a trial court to hold a paper hearing under that statute and thus held that Garcia was entitled to a new suppression hearing on voluntariness before the then-presiding trial judge. *Id.* at 536; *see also Velez v. State*, No. AP-76,051, 2012 WL 2130890, at *12–14 (Tex. Crim. App. June 13, 2012) (not designated for publication) (holding that exception to *Garcia*'s holding exists when trial judge who originally held voluntariness hearing was unavailable and new presiding judge refrained from making explicit credibility determination and limited review to record and prior trial judge's ruling), *cert. denied*, 569 U.S. 968 (2013); *Jimenez v. State*, Nos. 01-15-00501-CR, 01-15-00506-CR, 2016 WL 5799138, at *6 (Tex. App.—Houston [1st Dist.] Oct. 4, 2016, no pet.) (mem. op., not designated for publication) (citing *Garcia* as prescribing the proper procedure of abating appeal so that the same trial judge who heard article 38.22 suppression issue could make findings of fact and conclusions of law). Thus, Judge Burgess's new findings of fact and conclusions of law were not prohibited by *Garcia*.

Additionally, despite the State's assertion otherwise, Judge Burgess's credibility determination and subsequent factual findings do not contradict Judge Podgorski's. Judge Burgess stated on the record at the new suppression hearing, "I'm accepting what's in the transcript." And while it is true that each set of findings of fact and conclusions of law—the first prepared by the State and the second prepared by Flemmons—includes and omits different facts testified to by

Officer Brown, all of those facts are supported by his testimony.[2] *See Tucker v. State*, 369 S.W.3d 179, 184 (Tex. Crim. App. 2012) ("In reviewing a trial court's ruling on a motion to suppress, appellate courts must afford great deference to the trial court's findings of historical facts as long as the record supports those findings."). And the facts that are relevant to the ultimate legal conclusions are the same in both sets of findings of fact and conclusions of law:

- Officer Brown saw a dark-colored car that was traveling westbound on Windhaven hit the curb;

- Officer Brown made a U-turn on Windhaven and began driving westbound. At that point, he did not see the car anymore;

- at the intersection of Windhaven and Saintsbury, Officer Brown saw two unidentified persons in the crosswalk, who pointed and said, "The vehicle is that way." He asked what the car was doing, and they said it was "driving crazy." They also said "that's the car" and "there it goes, a dark Infinit[i]";

- Officer Brown activated his overhead lights at that time and saw taillights ahead of him on Windhaven;

- Officer Brown lost sight of the taillights when the car ahead of him turned;

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[2]For instance, the State takes issue with Judge Burgess's finding that Officer Brown did not know that Flemmons's car was the same as the one he saw hit the curb even though Judge Podgorski had determined that it was the same vehicle "because Officer Brown was able to corroborate the vehicle description and direction of travel he was given by the pedestrians." But Officer Brown testified that he did not know that Flemmons's car was the same one he saw hit the curb; therefore, Judge Podgorski's finding simply went further and stated that it would have been reasonable for Officer Brown to infer that it was the same car. Moreover, Judge Burgess also concluded that even if it was the same car, Officer Brown nevertheless did not have reasonable suspicion to stop Flemmons.

- Officer Brown turned left on Arbor Hills and saw a dark Infiniti parked by a garage, and he pulled in behind it;

- Officer Brown sat in his car behind the dark Infiniti for ten to fifteen seconds;

- when Officer Brown got out of his car, the driver of the Infiniti turned left into a garage, and he flashed his light into the driver's side window;

- the driver attempted to close the garage, but Officer Brown stepped in, preventing the door from closing;

- Officer Brown did not have a warrant to enter the garage; and

- Officer Brown made contact with Flemmons inside the garage.

A careful examination of both documents shows that where Judge Burgess substantively differed from Judge Podgorski was in his legal conclusions based on the operative facts.

Although it is true that a trial judge in a live hearing is "[u]niquely situated to observe the demeanor of witnesses first-hand" and is therefore "in the best position to assess the[ir] credibility," *see Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008), in this instance, the State agreed with Flemmons to present the evidence in this manner. We therefore overrule the State's first issue.

Officer Brown Did Not Have Reasonable Suspicion to Detain Flemmons

In its second issue, the State argues that Judge Burgess erred by concluding that Officer Brown did not have reasonable suspicion to stop and detain Flemmons to investigate an offense.

Standard of Review and Applicable Law

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Amador*, 221 S.W.3d at 673; *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We give almost total deference to a trial court's rulings on questions of historical fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor, but we review de novo application-of-law-to-fact questions that do not turn on credibility and demeanor. *Amador*, 221 S.W.3d at 673; *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005); *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002). We must uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case even if the trial court gave the wrong reason for its ruling. *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003), *cert. denied*, 541 U.S. 974 (2004).

A detention, as opposed to an arrest, may be justified on less than probable cause if a person is reasonably suspected of criminal activity based on specific, articulable facts. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000). An officer conducts a lawful temporary detention when he or she has reasonable suspicion to believe that an individual is violating the law. *Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Reasonable suspicion exists when, based on the totality of the

circumstances, the officer has specific, articulable facts that when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person is, has been, or soon will be engaged in criminal activity. *Ford*, 158 S.W.3d at 492. This is an objective standard that disregards any subjective intent of the officer making the stop, looking solely to whether an objective basis for the stop exists, and requiring only some minimal level of justification. *Brodnex v. State*, 485 S.W.3d 432, 437 (Tex. Crim. App. 2016); *Foster v. State*, 326 S.W.3d 609, 614 (Tex. Crim. App. 2010).

Analysis

The question, then, is whether an officer has reasonable suspicion to detain a driver based on the following: (1) around midnight in a high-DWI area with no other cars on the road, he sees a dark car driving on the opposite side of the street bounce off a curb; (2) after turning around and following the direction the car went, he encounters on the same street unidentified pedestrians who point toward a car whose taillights he can see, tell him the car is a dark Infiniti, and opine that it was "driving crazy"; and (3) after turning on the street onto which he saw the car turn, he quickly spots a dark Infiniti parked behind an apartment with its lights on. *See State v. Gray*, 158 S.W.3d 465, 469 (Tex. Crim. App. 2005) (explaining that trial court's conclusion that officer lacked probable cause to arrest despite finding officer's testimony credible was reviewable de novo as an application of law to facts).

Reasonable suspicion is dependent on both the content of information known to the police and its degree of reliability. *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990). Judge Podgorski's and Judge Burgess's findings show that they believed Officer Brown's observations. Judge Podgorski concluded that the pedestrians' information was reliable while Judge Burgess concluded that it was not reliable. But we need not decide whether the pedestrians' information was reliable. *See Taflinger v. State*, 414 S.W.3d 881, 885 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (op. on reh'g) ("The most reliable form of a citizen tip is information given to the officer by a "face-to-face informant who has no other contact with the police beyond witnessing a criminal act.") (quoting *State v. Griffey*, 241 S.W.3d 700, 704–05 (Tex. App.—Austin 2007, pet. ref'd)). Even a reliable tip will not justify an investigative stop if it does not create reasonable suspicion that "criminal activity may be afoot." *Navarette v. California*, 134 S. Ct. 1683, 1690 (2014) (quoting *Terry*, 392 U.S. at 30, 88 S. Ct. at 1868); *Florida v. J.L.*, 529 U.S. 266, 272, 120 S. Ct. 1375, 1379 (2000) (noting that anonymous tip must be reliable as to both tendency to identify a determinate person and in its assertion of illegality); *U.S. v. Wheat*, 278 F.3d 722, 732 n.8 (8th Cir. 2001) ("In all cases, however, the more extensive the description of the alleged offense, the greater the likelihood that the tip will give rise to reasonable suspicion."), *cert. denied*, 537 U.S. 850 (2002). Thus, a reliable tip that makes only a conclusory allegation that a driver is intoxicated—without evidence of specific driving behaviors that are indicia of drunk driving or

some other offense—does not provide the type of specific, articulable facts needed to supply reasonable suspicion. *See Navarette,* 134 S. Ct. at 1690–91; *Castro v. State*, 227 S.W.3d 737, 742 (Tex. Crim. App. 2007); *Taflinger*, 414 S.W.3d at 888; *Nacu v. State*, 373 S.W.3d 691, 696 (Tex. App.—San Antonio 2012, no pet.). *But see State v. Stolte*, 991 S.W.2d 336, 339–43 (Tex. App.—Fort Worth 1999, no pet.) (a pre-*Navarette* case). "[D]riving crazy" is too vague and conclusory to describe driving behavior that would justify reasonable suspicion. *See Ford*, 158 S.W.3d at 493 ("Mere opinions are ineffective substitutes for specific, articulable facts in a reasonable-suspicion analysis.").

The State contends that Judge Burgess's conclusion that "driving crazy" did not provide specific, articulable facts is incorrect because he evaluated that driving fact apart from the context and circumstances under which it was made. But even when considered with Officer Brown's observation that a dark car hit the curb, his general experience,[3] his knowledge of the area, and the reasonable inference that the car he saw was the same one that he saw hit the curb, it is not

[3]Although Officer Brown said that in his training and experience, a person's "driving habits," i.e., the way a person drives, can indicate intoxication and be a consideration in stopping that person and that he suspected the driver of DWI because he saw her hit a curb, he never explained why hitting a curb once could be considered, in his experience, evidence of intoxication. *Cf. Navarette*, 134 S. Ct. at 1690 (noting that "the accumulated experience of thousands of officers" links certain erratic behaviors, not hitting a curb, with drunk driving and stating that "not all traffic infractions imply intoxication. . . . [and] are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect"). Additionally, while Officer Brown testified that he had performed "several" DWI stops, he did not "do a lot of DWIs" because he did not enjoy them.

enough to supply reasonable suspicion. *See, e.g.*, *Peters v. Texas Dep't of Pub. Safety*, 404 S.W.3d 1, 5 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Here, the only relevant evidence in the record is that Peters was observed driving slowly on the Sam Houston Tollway at 1:40 in the morning. Without more, we cannot say that Deputy Kerr articulated facts, that when combined with rational inferences from those facts, lead him to reasonably conclude that Peters was intoxicated before he detained her."); *Davis v. State*, 989 S.W.2d 859, 861, 865 (Tex. App.—Austin 1999, pet. ref'd); *cf. Navarette*, 134 S. Ct. at 1690 (explaining that reasonable suspicion employs a common-sense approach under which officers can appropriately recognize certain behaviors—such as weaving, driving "all over" the road, crossing the center line, and almost causing a collision—as "sound indicia" of drunk driving). "Driving crazy" could have meant that the pedestrians saw the car hit the curb just as Officer Brown did. Although a reasonable inference can be made that eyewitness pedestrians noticed something unusual enough about the car that they thought an officer would be justified in following it, that still is not sufficient to give Officer Brown reasonable suspicion considering the totality of the circumstances in this case. *See Derichsweiler v. State*, 348 S.W.3d 906, 917 (Tex. Crim. App. 2011) (holding that to support a reasonable suspicion, the articulable facts must not only show "that some activity out of the ordinary has occurred [and] some suggestion to connect the detainee to the unusual activity" but also "some indication that the unusual activity is related to crime"), *cert. denied*, 565 U.S. 840; *see also Castro*, 227

S.W.3d at 742 ("We agree with *Ford* that opinions are not an effective substitute for specific, articulable facts in a reasonable-suspicion analysis when the nature of the offense requires an officer to make a subjective determination.").

The specific, articulable facts known to Officer Brown are not as indicative of drunk driving as those facts known to officers in the cases the State cites. *See Barnes v. Tex. Dep't of Pub. Safety*, No. 02-13-00020-CV, 2013 WL 3325101, at *1, *3 (Tex. App.—Fort Worth June 27, 2013, no pet.) (mem. op.) (holding that officer had reasonable suspicion to stop driver he witnessed driving seventeen miles under the speed limit, fluctuating speed, and swerving within the center lane and slightly into the left- and right-hand lanes multiple times); *Martinez v. State*, No. 05-09-00147-CR, 2010 WL 188734, at *1, *3 (Tex. App.—Dallas Jan. 21, 2010, no pet.) (not designated for publication) (concluding that officer who had performed over one hundred DWI stops in the past had reasonable suspicion to detain Martinez when, while driving behind her at 2:49 a.m. on a flat, well-lit, clearly marked road, he saw and heard her vehicle strike the curb hard enough to push the car back into the lane in which she had been driving); *Medrano v. State*, Nos. 01-07-00428-CR, 01-07-00429-CR, 2009 WL 276620, at *1–2 (Tex. App.—Houston [1st Dist.] Feb. 5, 2009, no pet.) (mem. op., not designated for publication) (upholding denial of motion to suppress when officer saw Medrano driving with his blinker on for an extended time and weaving in and out of the lane by about a "quarter of his vehicle" in an area and at a time when the police knew an increased number of intoxicated drivers are on the road);

Crager v. State, Nos. 10-06-00150-CR, 10-06-00151-CR, 2007 WL 1112948, at *1–3 (Tex. App.—Waco Apr. 11, 2007, no pet.) (mem. op., not designated for publication) (affirming denial of motion to suppress when at 3:00 a.m. officer who had arrested or dealt with hundreds of intoxicated drivers and persons saw a car "drive up and over the curb" while turning into an apartment complex and then accelerate rapidly through two tight, ninety-degree turns); *Stoerner v. State*, No. 01-99-00186-CR, 2000 WL 5058, at *1–3 (Tex. App.—Houston [1st Dist.] Jan. 6, 2000, pet. ref'd) (not designated for publication) (affirming denial of motion to suppress when DWI task force patrolman saw Stoerner's tires strike the curb of the turn lane twice as she was turning in front of him); *State v. Sailo*, 910 S.W.2d 184, 186–87, 189 (Tex. App.—Fort Worth 1995, pet. ref'd) (reversing grant of motion to suppress when officers working traffic stop at 2:00 a.m. in high-DWI area located near sexually-oriented businesses were flagged down by driver who told officer he had seen a vehicle being driven "all over the road," which had almost run into a ditch, and vehicle of same description approached the location); *Fox v. State*, 900 S.W.2d 345, 347 (Tex. App.—Fort Worth 1995) (holding that trial court did not err by denying motion to suppress when officer followed driver whose speed fluctuated between fifty-five and forty mph on I-30 at least four times over four miles, after which driver began weaving within his lane, without any indication of something on the road that would warrant such frequent changes in speed or weaving), *pet. dism'd improvidently granted*, 930 S.W.2d 607 (Tex. Crim. App. 1996).

Additionally, the difference in articulable driving facts that bear the indicia of drunk driving also distinguishes other similar cases. *See*, *e.g.*, *Bilyeu v. State*, 136 S.W.3d 691, 694, 698 (Tex. App.—Texarkana 2004, no pet.) (affirming denial of motion to suppress when unidentified man approached officer in parking lot and told him a person was asleep behind the wheel at a nearby green light and pointed out to the officer the same car going past the parking lot at 10 mph in a 35 mph zone); *State v. Fudge*, 42 S.W.3d 226, 228, 230–31 (Tex. App.—Austin 2001, no pet.) (reversing grant of motion to suppress when cab driver pulled up to officer in gas station, told him a white pickup truck was driving "all over the road," that the truck "couldn't stay on the road," and that he "believed [the driver] was drunk"); *Stewart v. State*, 22 S.W.3d 646, 648 (Tex. App.—Austin 2000, pet. ref'd) (affirming denial of motion to suppress when police received an anonymous telephone tip that the driver of a Camaro with a passenger parked at convenience store gas pumps, appeared to be highly intoxicated, and fell down trying to get into the vehicle and the officer saw a green Camaro with two occupants leaving the gas pumps when he arrived at store two minutes later); *State v. Adkins*, 829 S.W.2d 900, 900–01 (Tex. App.—Fort Worth 1992, pet. ref'd) (reversing grant of motion to suppress when unidentified citizen approached officer in parking lot at 3 a.m., pointed out a brown Ford Mustang on an adjacent street, said the driver appeared to be extremely intoxicated, and the officer pulled over the driver after observing "a flat tire that was badly damaged on the right rear wheel"). Accordingly, we hold that

Judge Burgess correctly concluded that Officer Brown did not have reasonable suspicion to detain Flemmons.

Because Judge Burgess did not err by concluding that Officer Brown did not have reasonable suspicion to enable him to detain Flemmons for investigation of DWI, we overrule the State's second issue.

Conclusion

Having overruled the State's dispositive issues,[4] we affirm the trial court's judgment.

/s/ Charles Bleil
CHARLES BLEIL
JUSTICE

PANEL: WALKER and PITTMAN, JJ.; CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

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Tex. R. App. P. 47.2(b)

DELIVERED: December 21, 2017

[4]Because we have determined that Officer Brown did not have reasonable suspicion to detain Flemmons, we need not review the State's third issue, in which it contends that Officer Brown was authorized to enter Flemmons's garage. *See* Tex. R. App. P. 47.1.