TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00483-CR

Terry Lynn Stevens, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BURNET COUNTY, 424TH JUDICIAL DISTRICT
NO. 41839, THE HONORABLE DANIEL H. MILLS, JUDGE PRESIDING

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

A jury convicted appellant Terry Lynn Stevens of felony driving while intoxicated, *see* Tex. Penal Code §§ 49.04(a) (defining offense of driving while intoxicated), 49.09(b) (enhancing offense to third degree felony if defendant has twice been previously convicted of offense relating to operation of motor vehicle while intoxicated), and assessed his punishment, enhanced pursuant to the habitual offender provision of the Penal Code, at confinement for life in the Texas Department of Criminal Justice, *see id.* § 12.42(d) (providing that at trial of felony offense other than unaggravated state jail felony, defendant shall be punished by imprisonment for life or any term not more than 99 years or less than 25 years upon proof of two previous sequential felony convictions).[1] In three points of error, appellant complains about the denial of his motion to suppress, the

[1] The record reflects that appellant had six prior convictions for DWI, two misdemeanors, which were used to enhance the instant DWI offense to a felony, and four felonies, two of which were used for the habitual offender enhancement.

sufficiency of the evidence, and the admission of audio recordings. We find no reversible error. However, through our own review of the record, we have found non-reversible error in the written judgment of conviction. We modify the judgment to correct the clerical error and affirm the judgment of conviction as modified.

BACKGROUND[2]

Police responded to a gated apartment community after one of the residents, Socorro McCrum, called 911 after observing a white pickup truck pull into the property, stop at the code box for the security gate attempting to gain access to the secured area of the property, and then reverse backwards into a fence. The officer dispatched on the call, Justin Boucher, responded to the location and encountered appellant in his white pickup truck. When appellant emerged from the truck, the officer noted signs of intoxication and conducted an investigation for driving while intoxicated. At the conclusion of his investigation, the officer arrested appellant for DWI. After appellant refused to voluntarily provide a blood sample at the jail, Officer Boucher obtained a search warrant for a blood draw from appellant.

[2] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

DISCUSSION

Denial of Motion to Suppress

During trial, appellant objected to the admission of the blood kit containing his blood sample, which was obtained pursuant to a search warrant, asserting that the affidavit in support of the search warrant failed to establish probable cause.[3] The search warrant had not been offered into evidence, nor did appellant provide it (or the supporting probable cause affidavit) to the trial judge at the time of his objection. The judge overruled appellant's objection. Later in the trial, during the cross examination of Officer Boucher, appellant offered the officer's search warrant affidavit, which was admitted into evidence without objection. After the officer's testimony concluded, the trial court revisited the issue of the admissibility of the blood draw evidence because the affidavit had been admitted into evidence, treating appellant's objection as "a suppression motion." The court then found that "under the totality of the circumstances . . . the search warrant affidavit [was] sufficient" and overruled appellant's objection. In his first point of error, appellant argues that the trial court erred in denying his motion to suppress.

The Fourth Amendment establishes a constitutional preference that a search be conducted pursuant to a warrant. *Jones v. State*, 364 S.W.3d 854, 856–57 (Tex. Crim. App. 2012) (citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)); *see* U.S. Const. amend. IV. Police officers may obtain a search warrant for a suspect's blood as part of a driving-while-intoxicated investigation, *see*

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[3] Appellant subsequently raised the same objection to the admission of the blood vial itself as well as the lab report of the DPS analyst from the toxicology section of the DPS crime lab who analyzed appellant's blood. He did not, however, object to the analyst's testimony that she determined that appellant's blood alcohol concentration was 0.250 grams per 100 milliliters, three times the legal limit of 0.08.

Beeman v. State, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002); Tex. Code Crim. Proc. art. 18.01(j), as blood constitutes an item which may be searched under the authority of article 18.02(10) of the Texas Code of Criminal Procedure, *see Clay v. State*, 391 S.W.3d 94, 97 n.7 (Tex. Crim. App. 2013); Tex. Code Crim. Proc. art. 18.02(10).

Under Texas law, no search warrant may issue without a sworn affidavit that sets forth facts sufficient to establish probable cause. Tex. Code Crim. Proc. arts. 1.06, 18.01(b), (c); *see* Tex. Const. art. I, § 9. Probable cause is demonstrated when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location at the time the warrant is issued. *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013); *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012). Probable cause is a flexible and non-demanding standard. *Bonds*, 403 S.W.3d at 873; *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007). The test for finding probable cause is "whether a reasonable reading by the magistrate would lead to the conclusion that the affidavit provided a substantial basis for the issuance of the warrant, thus, the magistrate's sole concern should be probability." *Rodriguez*, 232 S.W.3d at 60.

Because of the constitutional preference for searches to be conducted pursuant to a warrant, we apply a highly deferential standard of review when we review the magistrate's decision to issue a search warrant. *Bonds*, 403 S.W.3d at 873; *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). Under this highly deferential standard, we review the affidavit in a commonsensical and realistic manner, and we defer to all reasonable inferences that the magistrate could have made. *McLain*, 337 S.W.3d at 271; *Rodriguez*, 232 S.W.3d at 61; *see Bonds*,

403 S.W.3d at 873. The magistrate may interpret the affidavit in a non-technical, common-sense manner and may draw reasonable inferences from the facts and circumstances contained within the affidavit's four corners. *Bonds*, 403 S.W.3d at 873; *State v. Jordan*, 342 S.W.3d 565, 569 (Tex. Crim. App. 2011). Thus, "[a]ppellate courts should not invalidate a warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner." *Bonds*, 403 S.W.3d at 873; *McLain*, 337 S.W.3d at 272.

In our review, we consider the totality of the circumstances and determine whether there are sufficient facts stated within the four corners of the affidavit, coupled with inferences from those facts, to establish a fair probability or substantial chance that evidence of a particular crime would likely be found at a specified location. *Rodriguez*, 232 S.W.3d at 62; *see Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010). "[Our] focus is not on what other facts could or should have been included in the affidavit" but rather "on the combined logical force of facts that are in the affidavit." *Duarte*, 389 S.W.3d at 354–55 (citing *Rodriguez*, 232 S.W.3d at 62). As long as the magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate's probable cause determination. *Bonds*, 403 S.W.3d at 873; *McLain*, 337 S.W.3d at 271; *see Gates*, 462 U.S. at 238–39. Further, although the reviewing court is not a "rubber stamp," "the magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review." *Jones*, 364 S.W.3d at 856–57 (quoting *Flores*, 319 S.W.3d at 702).

In support of his request for a search warrant to obtain a sample of appellant's blood, Officer Boucher averred in his affidavit (in relevant part):

1. There is in Burnet County, Texas, a suspected person described and located as follows:

   Name of individual: STEVENS, TERRY LYNN

   . . . (personal identifiers omitted)

   Said individual shall hereafter be called "Suspected Party."

. . .

3. It is the belief of Affiant that said Suspected Party has possession of and is concealing the following property: human blood. Said property constitutes evidence that the offense described in paragraph 4 below was committed and that said Suspected Party committed the offense described.

4. It is the belief of Affiant, and Affiant hereby charges and accuses that on or about the 9th day of May, 2013 Suspected Party did then and there operate a motor vehicle in a public place while intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, controlled substance, drug, or a dangerous drug into the body.

5. On the 09th day of May, 2013, at approximately 9:39 o'clock PM, Officer Boucher made contact with STEVENS, TERRY LYNN in Burnet County, Texas. The reason for the contact was as follows: I responded to 92 Gateway North in reference to a vehicle that was stopped at a gate code entry point trying to enter a gate code to enter the proprty [sic]. The complainant advised that the vehicle then slowly rolled backwards and struck a fence.

Appellant contends that the probable cause affidavit "is merely conclusory" and is "insufficient" in several aspects. First, concerning appellant's operation of the truck, he asserts that "the affidavit does not contain any facts, from personal observation or from the statements of others to the affiant, to support the belief [that appellant was operating a motor vehicle in a public place]." Second, concerning the operation of a vehicle in a public place, appellant complains that "there are no facts to support whether the vehicle in question was in a public [place] rather than a private drive."

Finally, he claims that there are "no facts to establish *when* exactly the incident in question happened" and suggests that "[t]he affiant, from the facts in the affidavit, could have been dispatched to take a report about an incident that happened at some point much earlier in time."

Appellant apparently believes that in the absence of direct factual statements in the affidavit that establish each element of the offense, probable cause could not exist to issue the warrant. However, such direct statements are unnecessary where, as here, there are sufficient facts in the affidavit for the magistrate to make reasonable inferences. Moreover, the relevant issue here is probable cause for a blood draw. Probable cause requires the affiant to demonstrate that there is a *probability* that the accused committed an offense, not that the evidence proves the suspect's guilt beyond a reasonable doubt. *See Rodriguez*, 232 S.W.3d at 60 ("[A] 'magistrate is not bound by such finely tuned standards as proof beyond a reasonable doubt or by a preponderance of the evidence; rather his sole concern should be probability.'") (quoting *Bower v. State*, 769 S.W.2d 887, 902 (Tex. Crim. App. 1989).

To justify the issuance of a search warrant, the affidavit must set forth facts sufficient to establish probable cause that (1) a specific offense has been committed; (2) the specifically described property or items to be searched for or seized constitute evidence of that offense; and (3) the property or items constituting such evidence are located at the particular place to be searched. Tex. Code Crim. Proc. art. 18.01(c). Taken as a whole, Officer Boucher's affidavit satisfies these requirements. From the affidavit, the magistrate could discern that the specific offense alleged to have been committed was driving while intoxicated, that appellant's blood constituted possible evidence of that offense, and that the evidence sought was in appellant's possession. While Officer

Boucher's affidavit could have perhaps provided greater detail, in according appropriate deference to the magistrate's determination, we cannot agree with appellant that it failed to establish a substantial basis for the magistrate's probable cause determination that appellant committed the offense of driving while intoxicated and that his blood could provide evidence of that offense. Considering the totality of the circumstances in the present case, the affidavit sufficiently established probable cause to justify the issuance of the search warrant.

The magistrate could reasonably infer from the statements in the affidavit that appellant was driving the truck reported in the complaint. The affidavit indicates that Officer Boucher made contact with appellant because he was called to a location where a truck was being operated in a concerning manner (stopping at the gated entry point of the property trying to enter, then going backwards and striking a fence). The common-sense reasonable inference is that appellant was the operator of that truck and that is why the officer made contact with him. Also, given that the truck was reported as being at the entry point of the gated property, an additional reasonable inference can be made that the truck, having yet to enter private property, was still in a public place. Further, the affidavit indicates that the officer made contact with appellant at approximately 9:39 p.m. because he responded to the location in reference to a report from a complainant about a vehicle "stopped" at the entry point of the property "trying" to enter the property that had rolled backwards and struck a fence. Given the mobile nature of vehicles, the magistrate could reasonably infer, using common sense, that the officer's response was to an current situation as opposed to a dispatch for a routine report taking for an already occurred incident. Collectively, the averments in the affidavit—and reasonable inferences from them—set forth the offense and

appellant's connection to it. *See, e.g.*, *State v. Castro*, No. 07-13-00146-CR, 2014 WL 4808738, at *4–6 (Tex. App.—Amarillo Sept. 23, 2014, no pet.) (mem. op., not designated for publication) ("The affidavit indicates Appellee was, at the least, in the presence of a vehicle that had been operated in a public place when the investigation was undertaken."). The affidavit further indicates that appellant had a strong odor of an alcoholic beverage, his clothing was disorderly, his speech was slurred and incoherent, his eyes were bloodshot, and he swayed and staggered. In addition, the affidavit reflects that appellant performed poorly on those field sobriety tests that he agreed to participate in, and after he was arrested and transported to jail, he refused to give a blood sample.

Viewing the four corners of Officer Boucher's affidavit in a common sense, non-technical manner, we conclude that, considering the totality of the circumstances, the magistrate had a substantial basis to find, either directly or through reasonable inference, that there was a fair probability or substantial chance that evidence of a crime would be found in appellant's blood. Thus, we hold that the affidavit sufficiently established probable cause justifying the issuance of the search warrant. The trial court did not err in denying appellant's motion to suppress the blood draw evidence. We overrule appellant's first point of error.

Sufficiency of the Evidence

In his second point of error, appellant asserts that the evidence is insufficient to support his DWI conviction.

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). When reviewing the sufficiency of the evidence to support a

conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). In our sufficiency review we must consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense. *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.); *see Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *Finley v. State*, 449 S.W.3d 145, 147 (Tex. App.—Austin 2014), *aff'd*, 484 S.W.3d 926 (Tex. Crim. App. 2016). We review all the evidence in the light most favorable to the verdict and assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318; *see Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We consider only whether the factfinder reached a rational decision. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) ("Our role on appeal is restricted to guarding against the rare occurrence when a factfinder does not act rationally.").

To determine whether the State has met its evidentiary burden of proving a defendant guilty beyond a reasonable doubt, we compare the elements of the offense as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)); *Felder v. State*, No. 03-13-00707-CR, 2014 WL 7475237, at *2 (Tex. App.—Austin Dec. 19, 2014, no pet.) (mem. op., not designated for publication). A hypothetically correct jury charge is one that

"accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Thomas*, 444 S.W.3d at 8 (quoting *Malik*, 953 S.W.2d at 240); *Roberson v. State*, 420 S.W.3d 832, 840 (Tex. Crim. App. 2013). The law as authorized by the indictment consists of the statutory elements of the charged offense as modified by the factual details and legal theories contained in the indictment. *Patel v. State*, No. 03-14-00238-CR, 2016 WL 2732230, at *2 (Tex. App.—Austin May 4, 2016, no pet.) (mem. op., not designated for publication); *see Thomas*, 444 S.W.3d at 8 ("The 'law as authorized by the indictment' consists of the statutory elements of the offense and those elements as modified by the indictment."); *Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013) ("The law as 'authorized by the indictment' includes the statutory elements of the offense 'as modified by the charging instrument.'").

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. art. 38.04; *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we "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." *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015) (quoting *Clayton*, 235 S.W.3d at 778). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and

defer to that resolution. *Id.* at 448–49. The standard of review is the same for direct and circumstantial evidence cases—circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

To establish that appellant committed the DWI offense charged here, the State had to prove that appellant operated a motor vehicle in a public place while intoxicated and that he had twice before been previously convicted of a DWI offense. *See* Tex. Penal Code §§ 49.04(a), 49.09(b). Appellant restricts his sufficiency challenge solely to the element of operating a motor vehicle, maintaining that the evidence was insufficient to support his DWI conviction because the State failed to prove that he operated the truck that he emerged from.

The term "operating," as used in the DWI statute, is not defined. *Kirsch v. State*, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012); *see* Tex. Penal Code §§ 49.01, 49.04. 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. *Kirsch*, 357 S.W.3d at 651. Those circumstances must "'demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use.'" *Id.* at 650–51 (quoting *Denton v. State*, 911 S.W.2d 388, 390 (Tex. Crim. App. 1995)); *see Priego v. State*, 457 S.W.3d 565, 569 (Tex. App.—Texarkana 2015, pet. ref'd).

In the present case, the jury heard the testimony of Socorro McCrum, a resident of a gated apartment community in Marble Falls, who called 911 after observing appellant's truck as it entered the property. In her testimony, McCrum described the entrance of the apartment complex,

explaining that the entrance of the community had a circular drive with several parking spaces near the leasing office, which was in front of the "code box" to open the security gate. The public has access to this parking area, which is outside the gated portion of the community. McCrum testified that on the night in question, she was on her patio, which faces the entrance of the community. She saw a white pickup truck pull in from the public roadway and come onto the property. The truck stopped by the code box for an unusually long time,[4] then the headlights turned off and the truck went into reverse. The truck backed toward one of the parking spaces, stopped, then continued in reverse and backed into the fence. At that point, McCrum went inside her apartment and called 911 on her cell phone. She continued to observe the truck from inside her apartment until the police arrived and she "saw the police take the gentleman out" of the truck. McCrum testified that from the moment she first saw the white truck until the police arrived she never saw anyone else walking around the area, never saw anyone get out of the truck, and never saw anyone get into the truck. She indicated that the truck that was sitting in the parking space when the police arrived was the same truck she saw pull in from the roadway onto the property, attempt to open the gate, and back into the fence.

Officer Justin Boucher with the Marble Falls police department testified that he was dispatched at 9:34 p.m. in response to a 911 call reporting that a white pickup truck had parked at

[4] McCrum testified that while the truck was stopped at the code box, a car pulled up behind the truck. After a few minutes, the driver of that car (whom McCrum identified as "a lady" by her voice) yelled at the truck to enter the code. After a few more minutes, the lady actually yelled out the code. The car then backed up so that it could go around the truck. McCrum heard the gate open—possibly because the driver had a remote to access the gate—and the car drove around the truck and came into the secured area of the property. The truck remained outside the gate at the code box.

the security gate code box of a gated apartment community and then backed into a fence. He arrived at the location at 9:39 p.m. As he was pulling up to the complex, the officer saw a truck matching the description of the dispatch call—the only white pickup truck in the area—with its brake lights on. When he pulled up to the truck, he noted that the truck had attempted to park in a handicapped parking space but was not parked in between the lines of the space. Officer Boucher testified that when he first arrived, appellant was still seated in the truck in the driver's seat. He then saw appellant exit the truck from the driver's side of the truck. Appellant had the keys in his possession. The officer immediately noticed that appellant was "unstable on his feet" and was "staggering." He also noted that "the alcohol odor was so strong that [he] was able to detect it from a pretty good distance away." An investigation for driving while intoxicated ensued.[5]

During that investigation, appellant admitted consuming alcohol: at one point he said he had "a couple of beers" and then later said he had "three beers." After conducting the investigation (which included field sobriety tests), Officer Boucher decided to arrest appellant. Upon being informed that he was going to be arrested for DWI, appellant told Officer Boucher that he was not inside the truck and that he (the officer) never saw him inside the truck, which contradicted what the officer had observed on his arrival. Appellant also asserted that the officer had not seen him driving, but never claimed that he was not driving. Nor did appellant claim that someone else was with him or that someone else was driving. After appellant was arrested and placed in the officer's patrol car, Officer Boucher found an open 18-ounce beer can in the front seat of appellant's truck.

[5] Because appellant does not challenge the intoxication element of the offense in this appeal, we do not detail all the evidence relating to appellant's intoxication.

He also noted damage to the trailer hitch on appellant's truck that was consistent with backing into the fence. During his testimony, Officer Boucher identified appellant in open court as the man who exited the white pickup truck.

Focusing on the fact that McCrum was unable to identify appellant as the driver in her call to 911 and the fact that Officer Boucher never personally observed appellant driving the truck,[6] appellant contends that the evidence at trial "was not sufficient such that a rational trier of fact could find beyond a reasonable doubt that appellant operated a motor vehicle in a public place." We disagree. Contrary to appellant's suggestion, such direct evidence of appellant driving is not required. *See Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015) (citing *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)) ("Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.").

The evidence detailed above demonstrates that appellant was the only person who emerged from the parked white pickup truck immediately after McCrum observed that pickup truck back into the parking spot—after having watched the truck pull in from the public roadway, "park" at the code box, reverse into the parking space, and hit the fence. The damage on appellant's truck noted by Officer Boucher, which was consistent with McCrum's account of the truck backing into the fence, corroborates McCrum's testimony that the truck she observed driving onto the property

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[6] On cross examination, McCrum admitted that she was not able to identify the driver in her 911 call because she could not see who was driving. During his cross examination, Officer Boucher conceded that although he saw the brake lights on, he did not see appellant driving the truck.

(and backing into the fence) was the same truck the police encountered and from which appellant emerged. McCrum testified that after she called 911, she observed the truck from inside her apartment until the police arrived, approximately five minutes after she called. She indicated that no one else was in the area and no one else got into or out of appellant's truck. The record also shows that when Officer Boucher arrived, appellant was in the driver's seat and the brakes were engaged. Appellant was the only person in the vehicle, and appellant's truck was the only white pickup truck in the area. Collectively, the testimony of these two witnesses showed that appellant was the sole occupant of the truck, the same truck that drove onto the property and backed into a fence and from which appellant emerged after the police arrived. Because appellant was the only person in the only white pickup truck found in the area, a factfinder could have reasonably inferred that appellant drove his truck to the parking spot outside the gated portion of the apartment complex. *See, e.g.*, *Murray*, 457 S.W.3d at 449. Furthermore, appellant admitted to consuming several beers, but there was only one can of partially consumed beer in the truck. Based on appellant's admission of how much he had been drinking, and the fact that less than that amount was found in the truck, a factfinder could have reasonably inferred that appellant consumed alcoholic beverages to the point of intoxication somewhere other than the parking spot where he was found. *See id.*

Moreover, appellant's argument focuses on a limited portion of the evidence—selected parts of the testimony of McCrum and Officer Boucher, which is contrary to the well-established procedure for conducting a legal sufficiency review. *See Clayton*, 235 S.W.3d at 778 (in conducting legal sufficiency review, courts assess "all of the evidence"); *Boston v. State*, 373 S.W.3d 832, 836 (Tex. App.—Austin 2012), *aff'd*, 410 S.W.3d 321 (Tex. Crim. App. 2013) ("In

determining the legal sufficiency of the evidence, we must consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense.") (citations omitted). The record also contains evidence of admissions by appellant about operating his truck. Appellant made incriminating statements during phone conversations he made from the jail. In an excerpt of one phone call, appellant can be heard saying, "I couldn't get the gate open, and I thought 'Hell, I'll just park it here,' and get you to come get it." In an excerpt from another call, appellant says that he told "her" that "I pulled in . . . I pulled my truck in," and that "I couldn't get the gate open . . . I got pissed off, I backed it up, parked it."

Evidence is sufficient to support a conviction when, based on the evidence and reasonable inferences therefrom, any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013). Reviewing all of the evidence in the light most favorable to the verdict, as we must, we conclude that any rational trier of fact could have found beyond a reasonable doubt—from the evidence and reasonable inferences from it—that appellant operated the truck from which he emerged. Thus, the evidence is sufficient to support the conviction. We overrule appellant's second point of error.

Admission of Audio Recordings

In his third point of error, appellant challenges the trial court's admission of two audio recordings over his Rule 403 objection.

Rule 403 of the Texas Rules of Evidence allows for the exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Tex. R. Evid. 403.[7] At trial, the State offered audio recordings of phone calls appellant made from the jail. Appellant objected to the admission of the recorded conversations under Rule 403:

> DEFENSE: . . . It's a 403 objection, Judge, that they're -- and cumulative. I believe it's things that he's already talked about or come out in the previous video. It's cumulative and it's highly prejudicial because they are jail calls and so it shows that he's in custody, and, therefore, the prejudicial value substantially outweighs the probative value since we already have that evidence in the Court's -- in the record.
>
> COURT: So a 403 cumulative objection is what you're making, [counsel]?
>
> DEFENSE: Yes, sir.

After discussion with both parties regarding what evidence the audio recordings contained (possible admissions by appellant about operating the truck) and the potential cumulative nature of that evidence, the trial court ruled:

> Because the Court thinks it is an issue that's been made as to whether he was driving the vehicle, the Court is going to overrule your objection and I find that it's not cumulative for that reason because that has become an issue as to whether he was the driver in this matter, so your objection is overruled.

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[7] Rule 403 was amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015. The amendments, effective April 1, 2015, did not change the substance of the rule but simply rephrased the wording: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." The prior version of Rule 403 was in effect at the time of appellant's trial.

In his third point of error, appellant argues that the trial court erred by admitting the recordings into evidence without conducting the required balancing test.

Once a Rule 403 objection is asserted, the trial court must engage in the balancing test required by that rule. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997). "However, a trial judge is not required to sua sponte place any findings he makes or conclusions he draws when engaging in this test into the record." *Id.* "Rather, a judge is presumed to engage in the required balancing test once Rule 403 is invoked," and the trial court's failure to conduct the balancing test on the record does not imply otherwise. *Id.* at 195–96; *see Simmang v. State*, No. 03-11-00455-CR, 2013 WL 5272919, at *7 n.17 (Tex. App.—Austin Sept. 11, 2013, pet. ref'd) (mem. op., not designated for publication) ("[T] he trial court is not required to perform the Rule 403 balancing test on the record, and when the record is silent, appellate courts must presume that the trial court performed the required balancing test.").

Here, appellant raised a specific 403 objection based on the cumulative nature of the evidence. The trial court clarified the precise nature of appellant's objection and then addressed the concern appellant raised, making its ruling after hearing the arguments of the parties and evaluating the evidence. *See Hinojosa v. State*, 995 S.W.2d 955, 957 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("Because appellant objected on specific grounds and the trial court overruled the objection, we assume that the trial court applied Rule 403 and determined that the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice."). Although the trial judge did not orally run through a list of factors on either side of the 403 issue, such recitations are not required. *See Reyes v. State*, 480 S.W.3d 70, 77 (Tex. App.—Fort Worth 2015, pet. ref'd)

("There is no requirement that the trial court place on the record that it has conducted and completed the balancing test in its own mind."); *Kappel v. State*, 402 S.W.3d 490, 494 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("[T]he trial court is not required to perform the balancing test on the record, and when the record is silent, appellate courts must presume that the trial court performed the appropriate balancing test."). The record reflects that the judge clearly entertained appellant's objection and made his ruling, so we assume he properly performed a balancing test even in the absence of a recitation on the record. *See Williams*, 958 S.W.2d at 195 ("[A] judge is presumed to engage in the required balancing test once Rule 403 is invoked and we refuse to hold that the silence of the record implies otherwise."); *Santellan v. State*, 939 S.W.2d 155, 173 (Tex. Crim. App. 1997) ("Although appellant asserts that the trial court did not perform the balancing test, the trial court did not explicitly refuse to do the test, it simply overruled appellant's Rule 403 objections. We find nothing in the record to indicate that the trial court did not perform a balancing test, albeit a cursory one."); *Reyes*, 480 S.W.3d at 77 ("Although the record does not contain a discussion by the court before it overruled Appellant's objection, we presume it performed the mandatory test."); *Hung Phuoc Le v. State*, 479 S.W.3d 462, 469 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("The judge clearly entertained the objection and made her ruling, so we assume she properly performed a balancing test."); *Hitt v. State*, 53 S.W.3d 697, 706 (Tex. App.—Austin 2001, pet. ref'd) ("In overruling a Rule 403 objection, the trial court is assumed to have applied a Rule 403 balancing test and determined the evidence was admissible.").

Appellant has not overcome the presumption that the trial court conducted the requisite Rule 403 balancing test. *See Distefano v. State*, — S.W.3d —, No. 14-14-00375-CR,

2016 WL 514232, at *3 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.); *Hitt*, 53 S.W.3d at 706. Accordingly, we overrule appellant's third point of error.

Error in Written Judgment

On review of the record, we observe that the written judgment of conviction in this case contains non-reversible clerical error. The judgment of conviction states that the "Statute for Offense" is "49.09(b) Penal Code." This statutory provision enhances a misdemeanor DWI offense to a third degree felony if a defendant has two prior DWI convictions, which appellant does so this provision applies. However, the applicable statutory provisions for the offense as alleged in the indictment here also include section 49.04(a) of the Penal Code, the statutory provision that defines the offense of driving while intoxicated. This Court has authority to modify incorrect judgments when the necessary information is available to do so. *See* Tex. R. App. P. 46.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993). Accordingly, we modify the judgment to reflect that the "Statute for Offense" is "49.04(a), 49.09(b) Penal Code."

CONCLUSION

Having concluded that the trial court did not err in denying appellant's motion to suppress, the evidence is sufficient to support the conviction, and the trial court did not err in admitting the audio recordings of the jail phone calls, we modify the trial court's judgment of conviction as noted above and affirm the judgment as modified.

Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Bourland

Modified and, as Modified, Affirmed

Filed: July 7, 2016

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