TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00252-CR

John Joseph Foster, Appellant

v.

The State of Texas, Appellee

**FROM THE COUNTY COURT AT LAW NO. 2 OF WILLIAMSON COUNTY
NO. 13-05449-2, HONORABLE WILFORD FLOWERS, JUDGE PRESIDING**

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

A jury convicted appellant John Joseph Foster of the misdemeanor offense of driving while intoxicated.[1] The trial court rendered judgment on the verdict and sentenced Foster to 72 hours' confinement in the Williamson County Jail. In five points of error on appeal, Foster asserts that the prosecutor improperly elicited testimony that violated Foster's right to remain silent, challenges the sufficiency of the evidence supporting his conviction, contends that the trial court abused its discretion in admitting audio recordings of a witness's phone calls to the police, and claims that Foster suffered egregious harm from the failure of the trial court to include a limiting instruction in the court's charge. We will affirm the judgment of conviction.

[1] *See* Tex. Penal Code § 49.04.

BACKGROUND

The jury heard evidence that on the night of June 29, 2013, following a traffic stop, Foster was arrested for driving while intoxicated. Evidence considered by the jury during trial included the testimony of Deputy Grayson Kennedy of the Williamson County Sheriff's Office, who, while off-duty, claimed to have observed Foster's vehicle commit multiple traffic violations; Trooper Joseph Stuart of the Texas Department of Public Safety (DPS), who had initiated the traffic stop, conducted field sobriety tests on Foster, and subsequently arrested him; Lieutenant Dwayne Williams of the Williamson County Sheriff's Office, who had booked Foster into jail; and Zack Kilborn, a "breath-testing technical supervisor" with DPS, who testified that, according to the results of a breath test administered to Foster following his arrival at the jail, Foster's blood-alcohol concentration was .090 and .092, above the legal limit of .080. Based on this and other evidence, which we discuss in more detail below, the jury convicted Foster of driving while intoxicated and the trial court rendered judgment on the verdict, sentencing Foster to 72 hours' confinement in county jail as noted above. This appeal followed.

ANALYSIS

Right to remain silent

During the State's direct examination of Lieutenant Williams, the officer who had booked Foster into jail, the prosecutor asked Williams if Foster had ever told Williams that "the trooper was wrong, they arrested the wrong guy, he's not guilty of anything; did he ever say[] anything like that to you?" Williams answered, "No, sir." In his first point of error, Foster asserts

that this testimony violated his post-arrest right to remain silent.[2] However, Foster did not object to this testimony during trial. Accordingly, Foster has failed to preserve this issue for review.[3]

We overrule Foster's first point of error.

Evidentiary sufficiency

In his second point of error, Foster challenges the sufficiency of the evidence supporting his conviction. Specifically, Foster asserts that the evidence is insufficient to prove that he was intoxicated at the time he was driving.

When reviewing the sufficiency of the evidence supporting a conviction, "the standard of review we apply is '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 reasonable doubt.'"[4] "This standard tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts."[5] "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence

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[2] *See* U.S. Const. amend. V; *Doyle v. Ohio*, 426 U.S. 610, 617-20 (1976); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

[3] *See* Tex. R. App. P. 33.1; *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014); *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *Saldano v. State*, 70 S.W.3d 873, 889-90 (Tex. Crim. App. 2002); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995); *Wheatfall v. State*, 882 S.W.2d 829, 836 (Tex. Crim. App. 1994).

[4] *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[5] *Id*.

from them."[6] "On appeal, reviewing courts '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.'"[7] "Thus, '[a]ppellate courts are not permitted to use a 'divide and conquer' strategy for evaluating sufficiency of the evidence' because that approach does not consider the cumulative force of all the evidence."[8] "When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination."[9] Moreover, "[o]ur review of 'all of the evidence' includes evidence that was properly and improperly admitted."[10] Finally, "the same standard of review is used for both circumstantial and direct evidence cases."[11] "Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient" to support a conviction.[12]

A person commits the offense of driving while intoxicated if he is intoxicated while operating a motor vehicle in a public place.[13] "Intoxicated" is defined in the Penal Code as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a

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[6] *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

[7] *Murray*, 457 S.W.3d at 448 (quoting *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

[8] *Id*. (quoting *Hacker v. State*, 389 S.W.3d 860, 873 (Tex. Crim. App. 2013)).

[9] *Id*. at 448-49 (citing *Hooper*, 214 S.W.3d at 12).

[10] *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016) (citing *Clayton*, 235 S.W.3d at 778).

[11] *Id*. (citing *Hooper*, 214 S.W.3d at 13).

[12] *Id*. (citing *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)).

[13] Tex. Penal Code § 49.04(a).

controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or having an alcohol concentration of 0.08 or more."[14] In this case, the jury was instructed that it could find Foster guilty under either definition.

The jury considered the following evidence on the issue of intoxication. Deputy Kennedy testified that on the night of June 29, 2013, he was driving east on FM 1431 in Cedar Park when he noticed "bright lights coming up behind [him] while [he] was sitting at a red light." Kennedy testified that he then observed a black BMW "run [the] red light," almost striking Kennedy's vehicle as it did so. At that point, Kennedy recounted, he decided to call the Cedar Park Police Department and report what he had seen. Kennedy further testified that he had proceeded to follow the vehicle and had, thereafter, observed the vehicle run another red light, briefly cross the yellow dividing line separating the eastbound and westbound lanes of traffic, and exceed the posted speed limit of 60 or 65 miles per hour. According to Kennedy, the vehicle was traveling approximately 75 miles per hour at one point and 90 miles per hour at another.[15] As the vehicle continued traveling east, Kennedy called the Williamson County Sheriff's Office to report the traffic violations, later explaining that the Cedar Park Police Department would lose jurisdiction to stop the vehicle once it passed the city limits. Based on what he had observed, Kennedy asserted that if he had been on duty and in his patrol vehicle at the time, he "absolutely" would have stopped the vehicle himself.

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[14] *Id.* § 49.01(2).

[15] Kennedy testified that he had estimated the speeds at which the vehicle was traveling based on his own speeds while he was following the vehicle. Kennedy acknowledged that he did not know the precise speeds at which the vehicle was traveling.

Kennedy further testified that the vehicle eventually turned left onto the access road of I-35, entered the highway at a speed of approximately 80 to 85 miles per hour, proceeded to "straddle" two lanes of the highway as the vehicle traveled northbound at speeds of approximately 82 to 90 miles per hour, failed to signal a lane change as it entered the middle lane of traffic, and eventually reached a speed that Kennedy estimated was approximately 100 miles per hour. According to Kennedy, the vehicle almost collided with another vehicle as it proceed to "blow[] around" other traffic on the highway. Shortly thereafter, Kennedy continued, a state trooper arrived and initiated a traffic stop on the vehicle.

DPS Trooper Joseph Stuart initiated the traffic stop at approximately 11:26 p.m. Stuart testified that as he approached the vehicle and made contact with the driver, "[t]he vehicle smelled of alcohol." Stuart identified the driver as Foster, a lieutenant with the Williamson County Sheriff's Office. According to Stuart, when Foster "handed me his wallet he was shaking so badly that he couldn't get the little felt off the badge to show it to me, [so] I had to take it from it and actually look at it myself." Upon learning that Foster was a police officer, Stuart explained, he became "very nervous" because "when police officers get arrested it's always a big deal." Stuart testified that he asked Foster if he had been drinking and that Foster initially responded that he had not. However, according to Stuart, Foster later admitted that he had been drinking earlier in the evening, at approximately 7:00 p.m., and that he had a "beer and a vodka drink."

Stuart further testified that he then proceeded to administer the standardized field sobriety tests to Foster. According to Stuart, Foster had exhibited four out of six possible "clues" of intoxication on the horizontal gaze nystagmus (HGN) test, which is, Stuart explained, the minimum

number of clues that would indicate intoxication.[16] Stuart added that Foster exhibited additional signs of intoxication on the walk-and-turn and one-leg-stand tests. Specifically, Stuart explained, on the walk-and-turn test, Foster "stopped" while he was walking and "stumbled when he was trying to turn," and, on the one-leg-stand test, Foster "put his foot down and used his arms for balance." After observing Foster's performance on the field sobriety tests, Stuart arrested Foster for driving while intoxicated.

A video recording of the traffic stop and field sobriety tests, taken from Stuart's dash-board camera, was admitted into evidence. As reflected on the recording, at one point during the stop, Stuart turned off his body microphone and proceeded to have a conversation with another officer, Trooper Nathaniel Head, who had arrived to assist Stuart. Stuart testified that he did not remember what he had said to Head during the time when his microphone was turned off. After the microphone had been turned back on, Stuart can be heard telling Head that "the clues weren't solid." When asked to explain what he meant by that, Stuart testified that he had observed only the "minimum" number of clues suggesting intoxication. However, Stuart added that he had "no doubts at all" regarding his decision to arrest Foster for driving while intoxicated.

Stuart subsequently transported Foster to the Williamson County Jail, where Foster's breath was tested for the presence of alcohol. Stuart testified that he had personally administered the test to Foster and that Foster had provided two separate breath samples for testing. The test results were admitted into evidence, and they showed Foster's blood-alcohol level at the time of

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[16] Stuart testified that the other two "clues" were missing because he had failed to administer the entire test to Foster. Stuart explained that he was "simply nervous and didn't do it."

the test to be .090 and .092. Zack Kilborn, the breath-testing technical supervisor for DPS, later testified that the results were above the legal limit of .080. Additionally, Lieutenant Williams, who had booked Foster into the jail that night, testified that he had smelled "the odor of alcohol on his person" and specifically coming from Foster's breath. When asked to explain how he knew it was coming from Foster's breath and not from his clothing, Williams testified that he had experience with "a whole bunch of alcohol-related" arrests and that alcohol from a person's breath has a "distinct odor." However, Williams also acknowledged that when he had spoken with Foster, he did not notice Foster slurring his words or losing his balance at any time.

Foster also presented evidence at trial. This evidence included testimony by: Allen Keirn, a private investigator who had traveled and timed the route along which Deputy Kennedy had followed Foster on the night of the arrest and who disputed Kennedy's account of the speed at which Foster had been driving; Charles Foster, a retired police officer, who claimed that Stuart had administered the field sobriety tests improperly and that the tests should be discounted for that reason; and Mary McMurray, a chemist and breath-test technician who had reviewed the breath-test results in this case and who claimed that the test results could have been inaccurate for a number of different reasons, including the possibility of "radio-frequency interference" from electronic devices such as cell phones. Pointing to this and other evidence, including Stuart's testimony acknowledging that he had made multiple mistakes during his interaction with Foster due to Stuart's "nervousness" in arresting a police officer, Foster insists that no rational jury could have concluded that Foster had been intoxicated.

Given the limitations of the governing standard of review, we must disagree. Although there is conflicting evidence in the record on the issue of whether Foster was intoxicated,

we are not at liberty to weigh the evidence and decide as we see fit—rather, we are to presume that the jury resolved evidentiary conflicts in favor of the verdict and defer to that determination.[17] As discussed above, the evidence supporting the jury's finding that Foster was intoxicated included the following: (1) Kennedy's testimony that he had observed Foster driving recklessly, including exceeding the posted speed limit, running red lights, almost striking his and another vehicle, and failing to maintain a single lane of traffic; (2) Stuart's testimony that Foster had exhibited four out of six possible "clues" of intoxication during the HGN test and had exhibited other signs of intoxication during the other field sobriety tests; (3) Stuart's testimony that Foster's vehicle had "smelled of alcohol" and Lieutenant Williams's testimony that he had smelled "the odor of alcohol on [Foster's] person" when booking him into jail; (4) Stuart's testimony that Foster was "shaking [] badly" when he handed Stuart his wallet; (5) Foster's admission to Stuart that he had been drinking "a beer and a vodka drink" earlier in the evening; and (6) breath-test results tending to show that Foster's blood-alcohol level exceeded the legal limit. The combined and cumulative force of this and other evidence and all reasonable inferences therefrom, when viewed in the light most favorable to the verdict, supports the jury's finding that Foster had lost "the normal use of mental or physical faculties by reason of the introduction of alcohol into [his] body."[18] Accordingly, the evidence is sufficient to support Foster's conviction for the offense of driving while intoxicated.[19]

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[17] *See Clayton*, 235 S.W.3d at 778.

[18] *See* Tex. Penal Code § 49.01(2).

[19] *See Murray*, 457 S.W.3d at 449; *Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010); *Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979); *Whisenant v. State*, 557 S.W.2d 102, 105 (Tex. Crim. App. 1977); *Zill v. State*, 355 S.W.3d 778, 785-88 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Compton v. State*, 120 S.W.3d 375, 379 (Tex. App.—Texarkana 2003,

We overrule Foster's second point of error.

Audio recordings

During Deputy Kennedy's testimony, the trial court admitted into evidence State's Exhibits 1 and 2, audio recordings of Kennedy's phone calls to the Cedar Park Police Department and the Williamson County Sheriff's Office in which he had reported his observations of Foster's driving. After the recordings were played for the jury, the State questioned Kennedy extensively regarding the statements that he had made during the calls, asking him to explain and elaborate in more detail what he had seen. In his third point of error, Foster asserts that the recordings were more prejudicial than probative because, in Foster's view, the recordings were "a needless presentation of cumulative evidence" that "only served to inflame the jury and scare them into believing [Foster] was a dangerous driver."[20] In his fourth point of error, Foster claims that the recordings "improperly bolstered" Kennedy's trial testimony.

We review the trial court's evidentiary rulings for abuse of discretion.[21] We are to view the record "in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'"[22]

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pet. ref'd); *Kimball v. State*, 24 S.W.3d 555, 560 (Tex. App.—Waco 2000, no pet.); *see also Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *Cotton v. State*, 686 S.W.2d 140, 142 n.3 (Tex. Crim. App. 1985); *Dorsche v. State*, 514 S.W.2d 755 (Tex. Crim. App.1974).

[20] *See* Tex. R. Evid. 403.

[21] *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)); *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

[22] *Story*, 445 S.W.3d at 732 (quoting *Dixon*, 206 S.W.3d at 590); *see Montgomery v. State*, 810 S.W.2d 372, 391-92 (Tex. Crim. App. 1991) (op. on reh'g).

We consider the ruling in light of what was before the trial court at the time the ruling was made.[23] "We will sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case."[24]

Rule 403 provides that "[t]he 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."[25] Thus, "Rule 403 does not require exclusion of evidence simply because it creates prejudice; the prejudice must be 'unfair.'"[26] "The danger of unfair prejudice exists only when the evidence has the 'potential to impress the jury in an irrational way.'"[27] Moreover, "Rule 403 favors the admission of relevant evidence, and carries a presumption that relevant evidence will be more probative than prejudicial."[28]

Audio recordings of calls reporting criminal activity to authorities are generally admissible over a Rule 403 objection because the recordings serve "to 'provide a framework within which the particulars of the State's evidence could be developed,' even though the evidence '[does]

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[23] *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009).

[24] *Dixon*, 206 S.W.3d at 590 (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)); *see Valtierra v. State*, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010).

[25] Tex. R. Evid. 403.

[26] *Martinez v. State*, 327 S.W.3d 727, 737 (Tex. Crim. App. 2010) (citing *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005)).

[27] *Id*. (quoting *Mechler*, 153 S.W.3d at 440-41).

[28] *Young v. State*, 283 S.W.3d 854, 876 (Tex. Crim. App. 2009) (per curiam).

not of itself establish any material fact not otherwise proven in the balance of the State's case.'"[29] Here, the trial court would not have abused its discretion in concluding that Kennedy's calls provided a necessary framework for the State's case, in that they revealed the circumstances surrounding how authorities became aware of Foster's reckless driving, provided context for the decision to conduct a traffic stop on Foster's vehicle, and helped to establish the timeline of events prior to the traffic stop, which was a contested issue during trial. Nor would the trial court have abused its discretion in finding that Kennedy's statements on the recordings, which merely summarized his observations of Foster's driving, were not particularly inflammatory or emotional so as to "suggest a decision on an improper basis."[30] Moreover, even if the recordings were more prejudicial than probative and should not have been admitted, it is well established that the erroneous admission of evidence that is cumulative of other properly admitted evidence pertaining to the same facts is harmless.[31]

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[29] *Estrada v. State*, 313 S.W.3d 274, 300 (Tex. Crim. App. 2010) (quoting *Webb v. State*, 760 S.W.2d 263, 276 (Tex. Crim. App. 1988)); *see Sierra v. State*, 157 S.W.3d 52, 63 (Tex. App.—Fort Worth 2004), *aff'd*, 218 S.W.3d 85 (Tex. Crim. App. 2007); *Munoz v. State*, 932 S.W.2d 242, 244 (Tex. App.—Texarkana 1996, no pet.); *Brooks v. State*, 833 S.W.2d 302, 304 (Tex. App.—Fort Worth 1992, pet. ref'd); *see also Escobar v. State*, No. 01-14-00593-CR, 2015 Tex. App. LEXIS 11145, at *21-22 (Tex. App.—Houston [1st Dist.] Oct. 29, 2015, pet. ref'd) (mem. op., not designated for publication); *Seibel v. State*, No. 02-12-00622-CR, 2014 Tex. App. LEXIS 781, at *14-17 (Tex. App.—Fort Worth Jan. 23, 2014, pet. ref'd) (mem. op., not designated for publication); *Mendoza v. State*, No. 04-11-00707-CR, 2013 Tex. App. LEXIS 11728, at *4 (Tex. App.—San Antonio Sept. 18, 2013, no pet.) (mem. op., not designated for publication).

[30] *See Casey v. State*, 215 S.W.3d 870, 883 (Tex. Crim. App. 2007) ("'Unfair prejudice' refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

[31] *See Estrada*, 313 S.W.3d at 302 n.29; *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999); *Leday v. State*, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998); *Burks v. State*, 876 S.W.2d 877, 898 (Tex. Crim. App. 1994); *Anderson v. State*, 717 S.W.2d 622, 628 (Tex. Crim. App. 1986); *see also Land v. State*, 291 S.W.3d 23, 28-31 (Tex. App.—Texarkana 2009, pet. ref'd); *Jensen v. State*, 66 S.W.3d 528, 535 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (op. on reh'g);

Kennedy testified without objection to the same statements that were contained within the recordings, thus rendering the error, if any, in admitting the recordings harmless.[32]

As for Foster's contention that the recordings served only to "improperly bolster" Kennedy's trial testimony, we first observe that Foster failed to explain to the trial court how, specifically, the recordings "bolstered" Kennedy's testimony. Therefore, he failed to preserve error on this point in the court below.[33] Moreover, even if error had been preserved, we could not conclude on this record that the trial court abused its discretion in failing to conclude that the recordings constituted improper bolstering. Bolstering is defined as "any evidence the *sole* purpose of which is to convince the factfinder that a particular witness or source of evidence is worthy of credit, without substantively contributing 'to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'"[34]

Matz v. State, 21 S.W.3d 911, 912-13 (Tex. App.—Fort Worth 2000, pet. ref'd).

[32] *See* Tex. R. App. P. 44.2(b); *Casey*, 215 S.W.3d at 885; *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

[33] *See* Tex. R. App. P. 33.1; *Rivas v. State*, 275 S.W.3d 880, 886 (Tex. Crim. App. 2009) (explaining that "[a] fundamental problem with an objection to 'bolstering' is its inherent ambiguity," as it existed prior to adoption of Rules of Evidence and "appears to have roots in several evidentiary rules"); *In re J.G.*, 195 S.W.3d 161, 183 (Tex. App.—San Antonio 2006, no pet.); *Montoya v. State*, 43 S.W.3d 568, 573 (Tex. App.—Waco 2001, no pet.); *see also Cohn v. State*, 849 S.W.2d 817, 821 (Tex. Crim. App. 1993) (Campbell, J., concurring) (stating that bolstering objection should no longer be recognized because "an objection that certain evidence is 'bolstering' in no way invokes the Rules or informs the trial court of the basis for exclusion under the Rules"). *Cf. Rivas*, 275 S.W.3d at 887 (concluding that appellant had preserved error when he informed the trial court of the specific nature of his bolstering objections, "[t]he issues were discussed by both attorneys" and "rulings were made by the judge several times"). We also observe that the district court, in its ruling on the admissibility of the recordings, specifically stated that it was overruling "[t]he objections based upon the prejudicial impact made and the probative effect," but said nothing in response to Foster's "bolstering" objection, and Foster did not seek clarification on the ruling.

[34] *Cohn*, 849 S.W.2d at 819-20 (citing Tex. R. Evid. 401) (emphasis in original).

"Accordingly, evidence that corroborates another witness's story or enhances inferences to be drawn from another source of evidence, in the sense that it has an incrementally *further* tendency to establish a fact of consequence, should not be considered 'bolstering.'"[35] The trial court would not have abused its discretion in finding that the recordings were not admitted for the sole purpose of convincing the jury that Deputy Kennedy's testimony was credible but were also admitted as additional substantive evidence of Foster's reckless driving, to further support the State's theory that Foster had been driving while intoxicated prior to the traffic stop. Additionally, the recordings contained not only Kennedy's statements but also statements made by the dispatchers during the calls, which the trial court could have reasonably concluded had an incrementally further tendency to establish a fact of consequence to the case, specifically, how Trooper Stuart came to be dispatched to the area and why he had conducted the traffic stop on Foster's vehicle even though Stuart had not observed Foster commit any traffic violations. On this record, we cannot conclude that the trial court abused its discretion in admitting the audio recordings.

We overrule Foster's third and fourth points of error.

Charge error

In his fifth point of error, Foster asserts that he was egregiously harmed by error in the trial court's charge to the jury. Specifically, Foster contends that the traffic violations observed by Deputy Kennedy constituted extraneous offenses, and, in Foster's view, the trial court should

[35] *Id*. at 820 (emphasis in original).

have included in its charge a limiting instruction that prohibited the jury from considering evidence of those offenses for character-conformity purposes.[36]

We review claims of jury-charge error under the two-pronged test set out in *Almanza v. State*.[37] "Our first inquiry is whether the jury charge contained error."[38] "If error exists, we then analyze the harm resulting from the error."[39] "If the error was preserved by objection, any error that is not harmless will constitute reversible error."[40] "If the error was not preserved by objection, the error will not result in reversal of the conviction without a showing of egregious harm."[41] "Egregious harm is harm that deprives a defendant of a 'fair and impartial trial.'"[42] "In both situations the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole."[43]

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[36] *See* Tex. R. Evid. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

[37] 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see Swearingen v. State*, 270 S.W.3d 804, 808 (Tex. App.—Austin 2008, pet. ref'd).

[38] *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015).

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*. (quoting *Almanza*, 686 S.W.2d at 171).

[43] *Almanza*, 686 S.W.2d at 171.

In this case, we find no error in the charge. The trial court is required to deliver to the jury "a written charge distinctly setting forth the law applicable to the case,"[44] which, in some cases, includes a limiting instruction on the use of extraneous offenses.[45] However, "a defendant is entitled to limiting instructions on the use of extraneous offenses during the guilt phase only if he timely requests those instructions when the evidence is first introduced."[46] "A failure to request a limiting instruction at the time evidence is presented renders the evidence admissible for all purposes and relieves the trial judge of any obligation to include a limiting instruction in the jury charge."[47]

Here, Foster did not request a limiting instruction at the time the evidence pertaining to the traffic violations was admitted, either during Deputy Kennedy's testimony or when the audio recordings of Kennedy's calls to the police were played for the jury. Accordingly, to the extent the traffic violations might have constituted extraneous offenses,[48] "the evidence in question was admitted

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[44] Tex. Code Crim. Proc. art. 36.14.

[45] *See* Tex. R. Evid. 105(a).

[46] *Delgado v. State*, 235 S.W.3d 244, 253 (Tex. Crim. App. 2007).

[47] *Williams v. State*, 273 S.W.3d 200, 230 (Tex. Crim. App. 2008) (citing *Hammock v. State*, 46 S.W.3d 889, 892-95 (Tex. Crim. App. 2001)).

[48] As the State observes in its brief, the traffic violations, rather than being extraneous offenses, instead might have been "same transaction contextual evidence," which is evidence that "imparts to the trier of fact information essential to understanding the context and circumstances of events which, although legally separate offenses, are blended or interwoven" such that the evidence is admissible "to illuminate the nature of the crime alleged." *Camacho v. State*, 864 S.W.2d 524, 532 (Tex. Crim. App. 1993). Stated another way, "'[s]ame transaction contextual evidence' refers to those events and circumstances that are intertwined, inseparable parts of an event that, if viewed in isolation, would make no sense at all." *Delgado*, 235 S.W.3d at 253. "When evidence is admitted on this basis, Rule 404(b) is not implicated and the defendant is not entitled to any limiting instruction concerning the use of that evidence." *Id*. At any rate, regardless of how the evidence is characterized, Foster was not entitled to a limiting instruction in the charge. *See id*. at 254;

for all purposes, a limiting instruction on the evidence was not 'within the law applicable to the case,' and the trial court was not required to include a limiting instruction in the charge to the jury."[49]

We overrule Foster's fifth point of error.

CONCLUSION

We affirm the judgment of the trial court.

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Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: January 19, 2017

Do Not Publish

Hammock, 46 S.W.3d at 894-95; *Wesbrook v. State*, 29 S.W.3d 103, 114-15 (Tex. Crim. App. 2000).

[49] *Hammock*, 46 S.W.3d at 895.