NUMBER 13-16-00140-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

SALUSTIANO VALENTE ARISMENDI, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of Victoria County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Justice Longoria

Appellant Salustiano Valente Arismendi was charged with driving while intoxicated (DWI), third offense or more, a third-degree felony. *See* TEX. PENAL CODE ANN. § 49.09(b) (West, Westlaw through 2015 R.S.). The jury convicted Arismendi of the sole count of felony DWI, and the trial judge sentenced him to ninety-nine years in the

Institutional Division of the Texas Department of Criminal Justice. In one issue, Arismendi asserts that the State failed to prove that the blood draw in this case was performed according to recognized medical procedures. We conclude that the issue of whether the blood draw was performed according to proper medical procedures is outside of the scope of a sufficiency review. We affirm.

I. BACKGROUND

On March 13, 2015, Officer Robert Nichols of the Victoria Police Department was on patrol. He testified that he observed a white Silverado proceed "very slowly" through a yellow light and cross over into the oncoming lane of traffic. He also observed that the driver was having difficulty staying in a single lane and that the vehicle made several lane changes without using a turn signal. When Nichols attempted to initiate a traffic stop, the white Silverado initially failed to pull over. Nichols testified that the vehicle eventually pulled over but did not come to a complete stop; instead, the vehicle pulled over but then continued to roll forward several times. At trial, Nichols identified Arismendi as the driver of the vehicle that night.

Nichols testified that after he initiated the traffic stop, Arismendi did not immediately respond to Nichols's questions or orders. Nichols located an open container of alcohol on the floorboard of the passenger side of the vehicle. Nichols further testified that Arismendi had to lean on the car because he had difficulty standing normally, had slurred speech, and smelled of alcohol. Another police officer conversed with Arismendi in Spanish and received Arismendi's consent to provide a blood sample.

Nichols testified that he took Arismendi to phlebotomist Sherry Ficklen in the medical ward at the Victoria County Sheriff's Office for the blood draw. According to

Nichols, the medical ward "looked like a hospital room," and the blood draw was performed in a clean and sanitary location. However, Ficklen did not wipe the injection site with alcohol prior to the blood draw. Ficklen later testified that nothing improper occurred with this particular blood draw and that it was performed in a clean and sanitary environment. Ficklen further asserted that she drew the blood properly.

During cross-examination, Nichols was questioned about one of the forms he used to document the blood draw. The form lists ten different steps of the blood-draw procedure, but Nichols only checked off one. When asked why only one of the ten points on the checklist was checked, Nichols responded that he did not know why only one was checked because he always makes sure to follow each step. The blood draw was performed approximately fifty-seven minutes after the traffic stop.

Maegan Dodson, a forensic scientist with the Texas Department of Public Safety Crime Laboratory, testified that the results of Arismendi's blood test showed an alcohol concentration of 0.206. Dodson opined that given this result, Arismendi was likely intoxicated at the time of his blood draw. Dodson also testified that wiping an injection point with alcohol would not affect the alcohol concentration in the blood sample. She testified that the blood draw was performed normally and that nothing regarding the procedure would affect the results.

At the charge conference, Arismendi requested an Article 38.23 instruction as to whether the blood draw was performed in a sanitary location. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23 (West, Westlaw through 2015 R.S.) (stating that the jury should be instructed to disregard evidence if it believes that the evidence was obtained in violation

of Texas or U.S. law). He also requested an instruction as to whether the blood draw was taken in accordance with "recognized medical procedures."

Arismendi later dropped his request regarding the sanitary-location instruction but again requested an instruction regarding whether the blood draw was taken in accordance with recognized medical procedures. The trial court granted Arismendi's request. The trial court's charge instructed the jury that it could not consider the blood specimen evidence unless the jurors were convinced beyond a reasonable doubt that the "blood specimen was taken according to recognized medical procedures." The charge also established that intoxication could be proven by showing that Arismendi either: (1) lacked normal use of mental faculties by the reason of the introduction of alcohol into the body; (2) lacked normal use of physical faculties by the reason of the introduction of alcohol into the body; or (3) had an alcohol concentration of .08 or more.

The jury found Arismendi guilty of the offense of DWI, third offense or more.[1] The trial court then entered judgment on the jury verdict and sentenced Arismendi to ninety-nine years' imprisonment. This appeal ensued.

II. Sufficiency of the Evidence Review

In his sole issue, Arismendi argues that the State failed to prove that the blood draw was performed according to recognized medical procedures.

A. Standard of Review

[1] On May 14, 1990, Arismendi was convicted of a DWI-related offense in cause number 1-53,321. On November 17, 1986, Arismendi was convicted of a DWI-related offense in cause number 2-46,436. On November 1, 2002, Arismendi was convicted of a DWI-related offense in cause number 97-7-16989-D.

There is "only one standard to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency." *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). In this review, we consider all the evidence in the light most favorable to the verdict to determine whether the jury could have found each of the essential elements of the offense beyond a reasonable doubt. *See id.* When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict. *See id.*

B. Felony DWI

Arismendi claims that to prove intoxication by blood alcohol concentration, the State must show that the blood test results "came from a blood draw performed in accordance with proper procedure," and he asserts that the State failed to do so. However, this argument is wholly without merit.

Arismendi cites no statute or case law to support the proposition that the State must prove beyond a reasonable doubt that the blood draw was performed in accordance with recognizable medical procedures. The State is only required to prove the essential elements of the offense beyond a reasonable doubt. *See id.* Under Texas law, a person commits the offense of DWI "if the person is intoxicated while operating a motor vehicle in a public place." *Brown v. State*, 290 S.W.3d 247, 249 (Tex. App.—Fort Worth 2009, pet. ref'd); *see* TEX. PENAL CODE ANN. § 49.04 (West, Westlaw through 2015 R.S.). These are the only elements the State must prove beyond a reasonable doubt to obtain a DWI conviction. *See Brown*, 290 S.W.3d at 249; *Cooper v. State*, 828 S.W.2d 565, 566 (Tex. App.—Houston [14th Dist.] 1992, no pet.) ("[T]he elements of the offense of DWI are: (1) a person (2) drives or operates (3) a motor vehicle (4) in a public place

(5) while intoxicated."). For a felony DWI, the only additional element the State must prove beyond a reasonable doubt is that the defendant has been convicted of two prior offenses of DWI. *See Martin v. State*, 200 S.W.3d 635, 640 (Tex. Crim. App. 2006). Thus, whether the blood draw was performed according to proper medical procedures is not an element of the offense of felony DWI. *See Cooper*, 828 S.W.2d at 566; *see also* TEX. PENAL CODE ANN. § 49.09(b).

Arismendi further argues that the State could only prove he was intoxicated by using blood-alcohol-level evidence. However, a conviction for the offense of DWI can be supported solely by circumstantial evidence. *See Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010). The State introduced ample circumstantial evidence establishing that Arismendi was intoxicated at the time of the traffic stop because of the loss of normal use of mental and physical faculties. The officer testified that: (1) Arismendi was having difficulty staying in a single lane; (2) Arismendi smelled of alcohol; (3) he found an open container of alcohol on the floorboard of the vehicle; and (4) Arismendi had to lean on the vehicle to stay upright.

Furthermore, blood-alcohol concentration evidence was only one of three ways the jury could have found that Arismendi was intoxicated. *See* TEX. PENAL CODE ANN. § 49.01 (West, Westlaw through 2015 R.S.). As stated previously, the charge instructed the jury that it could find that Arismendi was intoxicated if the jurors believed beyond a reasonable doubt that he lacked normal use of mental faculties due to alcohol, lacked normal use of physical faculties due to alcohol, or had an alcohol concentration of 0.08 or more. *See id*. Thus, we conclude that even without considering the blood-alcohol

evidence, there was sufficient evidence for a rational fact finder to find Arismendi guilty of felony DWI beyond a reasonable doubt. *See id*.; *Temple*, 390 S.W.3d at 360.

For the above reasons, we overrule Arismendi's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

NORA LONGORIA,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
22nd day of September, 2016.