NUMBER 13-18-00370-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ISAAC DAVID SANCHEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 107th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

Appellant Isaac David Sanchez appeals his conviction of driving while intoxicated, third offense or more, a third-degree felony with a habitual felony enhancement.[1] *See*

[1] Sanchez's two enhancement priors were each convictions for driving while intoxicated, third or more. *See* TEX. PENAL CODE ANN. §§ 12.42(d); 49.04, 09(b)(2).

TEX. PENAL CODE ANN. §§ 12.42(d); 49.04, .09(b)(2). On appeal, Sanchez argues that the trial court abused its discretion in denying his: (1) motion to suppress evidence obtained pursuant to his warrantless arrest, (2) objection to the admission of a search warrant affidavit into evidence at trial, (3) requested jury charge instructions under article 38.23 of the Code of Criminal Procedure, and (4) request for a *Franks*[2] determination. We affirm.

I. BACKGROUND

On March 8, 2015, Sanchez was arrested for driving while intoxicated following a two-vehicle collision that left Sanchez and his passenger hospitalized.

A. Motion to Suppress

Following indictment, Sanchez filed a motion to suppress the "laboratory reports purporting to analyze and interpret [his] blood alcohol content." At a hearing on Sanchez's motion, he exclusively argued that the arresting officer, Texas Department of Public Safety State Trooper Veronica Casas, lacked probable cause to arrest him.

Casas testified that she was dispatched in response to reports of a two-vehicle collision with resulting injuries. Casas immediately made contact with the driver of one of the two vehicles, who explained that she was traveling southbound when she was struck by a black vehicle headed east. The black vehicle failed to yield the right-of-way to her, and both vehicles "ended up in a ditch."

Casas identified Sanchez as the driver of the black vehicle and observed that Sanchez smelled of alcohol. According to Casas, Sanchez and his passenger "were still

[2] *Franks v. Delaware*, 438 U.S. 154, 171 (1978) (holding that where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by an affiant in a search warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment to the U.S. Constitution requires that a hearing be held at the defendant's request).

trapped inside the vehicle" when she arrived on the scene. Casas said she attempted to speak with the passenger "while EMS was working on getting [Sanchez] out," but the passenger was nonresponsive. Sanchez and his passenger were transported to a nearby hospital.

While speaking with Sanchez at the hospital, Casas noted that she "could still smell the strong odor of alcohol coming from his breath." "I asked [Sanchez] to explain to me what happened and what caused the accident. He stated that he did not remember," testified Casas. Sanchez later denied drinking and driving the vehicle. Casas then interviewed the passenger, who admitted the two men "had a few [drinks]" together and claimed Sanchez had been driving. Sanchez was placed under arrest. After he refused to provide a breath sample, Casas contacted dispatch and was advised that Sanchez had eleven prior arrests and nine prior convictions for driving while intoxicated. Casas thereafter obtained a search warrant for a blood draw.

The trial court denied Sanchez's motion to suppress, and the case proceeded to trial where Casas provided substantially similar testimony.

B. Trial

At trial, Casas was questioned for the first time regarding an alleged discrepancy between her testimony and her affidavit application for the blood draw warrant, wherein Casas checked off a box indicating that she had "observed the suspect" "operating a motor vehicle." The State sought to admit Casas's affidavit in support of the search warrant for the blood draw, and Sanchez objected to a specific paragraph, arguing that it contained hearsay. The trial court overruled Sanchez's objection.

Casas maintained that she had not seen Sanchez "driving" and reiterated her prior testimony. Casas additionally stated: (1) upon her arrival, she observed Sanchez unconscious in the driver seat still wearing his seatbelt and noted a "strong odor of alcohol . . . emitting from his breath"; (2) she confiscated beer cans from inside the vehicle; (3) she interviewed Sanchez at the hospital where he presented "slurred speech," was "uncooperativ[e]," and denied drinking and driving—after initially admitting to having "drank a six-pack" and driven; (4) the vehicle was registered to Sanchez; and (5) he was identified as the driver by three witnesses, including a bystander who called 9-1-1.[3]

The State presented several other witnesses at trial and admitted Sanchez's blood alcohol laboratory results, which indicated an alcohol concentration of "0.265 grams per 100 milliliters of blood"—more than three times the state's legal limit. *See* TEX. PENAL CODE ANN. § 49.01 (defining intoxication as "having an alcohol concentration of 0.08 or more").

During the jury charge conference, Sanchez requested a "38.23" instruction. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a). Sanchez claimed that Casas obtained a search warrant based on a falsified affidavit, indicating she had observed him "driving" when that was "clearly not true." The trial court summarily denied Sanchez's request without response from the State.

Following a guilty verdict, Sanchez was sentenced by the trial court to forty years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice.

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[3] Crystal Angel Rodriguez, a registered nurse, testified she witnessed the collision and rendered aid. Rodriguez said two men were unconscious in one vehicle, and she "noticed a strong odor of alcohol [f]rom the driver." Rodriguez waited for the ambulance to arrive and testified that at no point did she see the driver or passenger exit the vehicle or attempt to make any movements. Rodriguez could not recall the color of the vehicle occupied by the two unconscious men but noted that the occupants of the other vehicle involved in the collision were mobile.

This appeal followed.

II. MOTION TO SUPPRESS

Sanchez first challenges the trial court's denial of his motion to suppress. On appeal, Sanchez argues that (1) Casas lacked probable cause to execute a warrantless arrest because there was no evidence that he was driving the vehicle; and (2) the magistrate lacked probable cause to execute the search warrant because the affidavit in support of the search warrant contained a false statement.

However, the latter assertion is noticeably absent from the suppression hearing. Sanchez made no allegations in his written motion to suppress or during the suppression hearing to, directly or indirectly, challenge the legitimacy of the search warrant affidavit on the basis of a falsely made statement. *See Hyland v. State*, 574 S.W.3d 904, 911 (Tex. Crim. App. 2019) (discussing the procedure for challenging the validity of a magistrate's search warrant affected by the presence of false statements in the search warrant affidavit); *see also Franks v. Delaware*, 438 U.S. 154, 171 (1978). Therefore, such claim has not been preserved for review, and we proceed only with a review and analysis of the preceding preserved issue. *See* TEX. R. APP. P. 33.1; *State v. Esparza*, 413 S.W.3d 81, 85 (Tex. Crim. App. 2013) (holding that where the defendant argues a theory of law applicable to the case on appeal not first raised during his motion to suppress, such argument has been waived for appellate review); *Resendez v. State*, 306 S.W.3d 308, 316 (Tex. Crim. App. 2009); *see also Ortiz v. State*, No. 13-10-00118-CR, 2010 WL 2784034, at *2 (Tex. App.—Corpus Christi–Edinburg July 15, 2010, no pet.) (mem. op., not designated for publication).

A. 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. *State v. Ruiz*, 581 S.W.3d 782, 785 (Tex. Crim. App. 2019). "Although we give almost total deference to the trial court's determination of historical facts, we conduct a de novo review of the trial court's application of the law to those facts." *Love v. State*, 543 S.W.3d 835, 840 (Tex. Crim. App. 2016) (internal quotation marks omitted). The record[4] is reviewed in the light most favorable to the trial court's determination, and the trial court's ruling must be affirmed if "it is correct under any theory of law applicable to the case, even if the trial court did not rely on that theory." *Leming v. State*, 493 S.W.3d 552, 562 (Tex. Crim. App. 2016).

Where a defendant challenges his warrantless arrest in a pretrial hearing to suppress evidence, "the State has the burden of showing that there was probable cause for a warrantless arrest." *White v. State*, 549 S.W.3d 146, 155–56 (Tex. Crim. App. 2018) (quoting *Roberts v. State,* 545 S.W.2d 157, 158–59 (Tex. Crim. App. 1977)). The test for probable cause is an objective one, unrelated to the subjective beliefs of the arresting officer, and it requires a consideration of the totality of the circumstances facing the arresting officer. *State v. Woodard*, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011). Probable cause for a warrantless arrest exists if, at the moment the arrest is made, the facts and circumstances within the arresting officer's knowledge, and of which the officer has reasonably trustworthy information, are sufficient to justify a prudent person in

[4] The trial court did not make explicit findings of fact; therefore, "we will assume that the trial court made implicit findings of fact supported in the record that buttress its conclusion." *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000); *see State v. Kelly,* 204 S.W.3d 808, 819 (Tex. Crim. App. 2006) (implying the "necessary fact findings that would support the trial court's ruling if the evidence (viewed in the light most favorable to the trial court's ruling) supports these implied fact findings").

believing that the person arrested had committed or was committing a specific offense. *State v. Martinez*, 569 S.W.3d 621, 628 (Tex. Crim. App. 2019); *Woodard*, 341 S.W.3d at 412.

The offense at-issue here is driving while intoxicated. *See* TEX. PENAL CODE ANN. § 49.04(a). A person commits the offense of driving while intoxicated if he "is intoxicated while operating a motor vehicle in a public place." *Id*. While "operating" is not defined under the statute, *see id.* § 49.01 (providing for definitions), the Texas Court of Criminal Appeals, our sister courts, and this Court have routinely held that the two terms are not mutually exchangeable and "operation does not necessarily involve driving." *Denton v. State*, 911 S.W.2d 388, 389 (Tex. Crim. App. 1995); *see Oliva v. State*, 525 S.W.3d 286, 295 (Tex. App.—Houston [14th Dist.] 2017) (finding evidence of operation under the DWI statue because, among other things, the defendant was found in the driver's seat of a parked, running car in a lane of moving traffic), *rev'd on other grounds*, 548 S.W.3d 518 (Tex. Crim. App. 2018); *Priego v. State*, 457 S.W.3d 565, 570 (Tex. App.—Texarkana 2015, pet. ref'd) (finding evidence of operation where an officer found the defendant unconscious in her vehicle with the truck engine still running and her seatbelt still on); *Abraham v. State*, 330 S.W.3d 326, 331 (Tex. App.—Dallas 2009, pet. ref'd) (holding that the "only reasonable inference is that [the defendant was] driving and operati[ng] his vehicle" while he was intoxicated, because "the evidence shows he remained passed out in the vehicle at least as long as it took a passerby to report his presence to [police], for [police] to find him, and for [police] to rouse him"); *Dornbusch v. State*, 262 S.W.3d 432, 437 (Tex. App.—Fort Worth 2008, no pet.) (providing that "operation" occurred where the defendant was found asleep, "hunched over the steering wheel" in a parking lot). A person

"'operates' a vehicle when 'the totality of the circumstances . . . demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use.'" *Kirsch v. State*, 357 S.W.3d 645, 650–51 (Tex. Crim. App. 2012) (quoting *Denton*, 911 S.W.2d at 390).

B. Analysis

It is undisputed that Sanchez was arrested without a warrant. However, at the suppression hearing, Sanchez narrowly argued that the evidence was insufficient to support the probable cause threshold because the State failed to prove one specific element of the offense: operation. Thus, as the remaining elements went unchallenged, the State had the burden to show that there was sufficient evidence of operation. *See White*, 549 S.W.3d at 155–56.

Casas opined that Sanchez was operating the vehicle, and she based her finding on the following: the driver of the vehicle struck by Sanchez identified Sanchez as the driver; the passenger of Sanchez's vehicle identified Sanchez as the driver; and, perhaps most importantly, Casas testified she observed Sanchez and his passenger, both unconscious and still wearing their seatbelts, with Sanchez "trapped" in the driver's seat of his vehicle, which was stuck in a ditch. *See Woodward*, 341 S.W.3d at 412 ("[T]he information to support probable cause does not have to be within an officer's personal knowledge."); *Brother v. State*, 166 S.W.3d 255, 259 (Tex. Crim. App. 2005) (providing that there is no requirement that an officer must personally witness facts giving rise to criminal activity); *see also Rushing v. State*, No. 13-16-00526-CR, 2018 WL 2371667, at *3 (Tex. App.—Corpus Christi–Edinburg May 24, 2018, no pet.) (mem. op., not designated for publication) (determining that officer testimony that the defendant was in

the driver's seat inside a vehicle "stopped halfway into the intersection and on the wrong side of the road with its lights on and the engine running" was sufficient to establish operation).

While Casas also testified that Sanchez denied driving the vehicle, Casas maintained that such denial was in contravention to other, aforementioned evidence tending to prove Sanchez had operated the vehicle. *See Martinez*, 569 S.W.3d 628; *Woodard*, 341 S.W.3d at 412. Therefore, the trial court did not err in denying Sanchez's motion to suppress because his warrantless arrest is supported by probable cause. *Martinez*, 569 S.W.3d 628; *Woodard*, 341 S.W.3d at 412. We overrule Sanchez's first issue.

III. ADMISSION OF EVIDENCE

Sanchez next objects to the admission of hearsay evidence—the search warrant affidavit—at trial. On appeal, the State concedes error but provides that the error was harmless.

A. Standard of Review and Applicable Law

We review a trial court's ruling on the admission of evidence under an abuse-of-discretion standard. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018). We uphold the trial court's ruling unless it is outside the zone of reasonable disagreement, without reference to any guiding rules and principles, or is arbitrary or unreasonable. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019).

The admission of prohibited hearsay constitutes non-constitutional error, *see Clay v. State*, 240 S.W.3d 895, 905–06 (Tex. Crim. App. 2007), and we review such error to

determine whether the appellant's substantial rights have been affected. *See* TEX. R. APP. P. 44.2(b); *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011).

When a trial court erroneously admits hearsay, but the matter asserted is otherwise established through other admitted evidence at trial, the complained-of error is harmless. *See Clay*, 240 S.W.3d at 905–06 (asserting that erroneously admitted hearsay "established little, if anything, negative about appellant that was not also well established by the properly admitted evidence" and was therefore harmless); *Sanchez v. State*, 595 S.W.3d 331, 339 (Tex. App.—Houston [14th Dist.] 2020, no pet. h.) ("A trial court's improper admission of evidence is not reversible error if the trial court admits the same or similar evidence without objection at another point in the trial."). "We should not overturn a criminal conviction for nonconstitutional error if we, '*after examining the record as a whole*, ha[ve] fair assurance that the error did not influence the jury, or influenced the jury only slightly.'" *Amberson v. State*, 552 S.W.3d 321, 334 (Tex. App.—Corpus Christi–Edinburg 2018, pet. ref'd) (quoting *Barshaw*, 342 S.W.3d at 93).

B. Analysis

Because both parties contend that the trial court erred when it admitted the challenged search warrant affidavit over a hearsay objection, we will presume error, and proceed with our analysis. *See Albitez v. State,* 461 S.W.2d 609, 612 (Tex. Crim. App. 1970) (holding that the trial court abused its discretion in admitting the search warrant and supporting affidavit into evidence); *Saldinger v. State*, 474 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (same); *see also* TEX. R. APP. P. 44.2(b); *Clay*, 240 S.W.3d at 905.

Sanchez specifically objected to paragraph eight of the search warrant affidavit application. In paragraph eight, the fill-in-the-blank form included the following prompt: "Additional facts leading me to believe that the suspect was intoxicated while operating a motor vehicle in a public place are as follows." In response, Casas wrote: "There was [sic] beer cans inside the vehicle he was driving. When I approached the scene of the crash and made contact with him[,] the strong odor of alcohol was emitting from his breath. He admitted to have [sic] drank a 6 pack."

At trial, Casas testified she had "observed beer cans inside the vehicle," and she "could smell the odor of alcohol" coming from Sanchez at the scene. According to Casas, the odor persisted when she made contact with Sanchez at the hospital. Casas said that during her initial conversation with Sanchez, she "asked him to explain to [her] what happened," and "he admitted to [her] the first time that he was driving and that he had drank." Casas added, "after he said that he was driving[,] . . . he recanted that and he said he didn't remember and he was not the driver."

Having reviewed the record, we conclude that all the matters contained in the affidavit were cumulative of Casas's live testimony offered at trial; therefore, there was no reversible error. *See* TEX. R. APP. P. 44.2(b); *Barshaw*, 342 S.W.3d at 93; *Amberson*, 552 S.W.3d at 334. We overrule Sanchez's second issue.

IV. JURY CHARGE ERROR

By his third issue, Sanchez contends that the trial court erred when it refused to include a jury charge instruction challenging the legality of the search warrant. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a).

A. Standard of Review

The purpose of the trial court's jury charge is to instruct the jurors on all of the law applicable to the case. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); TEX. CODE CRIM. PROC. art. 36.14. In analyzing a jury-charge issue, we first determine whether error exists. *See Cortez*, 469 S.W.3d at 598 (citing *Kirsch*, 357 S.W.3d at 649); *Hernandez v. State*, 533 S.W.3d 472, 481 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd). If there is error and the defendant preserved the alleged error, then we must reverse if we find "some harm." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)). The "some harm" analysis requires us to consider: (1) the jury charge as a whole; (2) the arguments of counsel; (3) the entirety of the evidence; and (4) other relevant factors present in the record. *Id.*

B. Article 38.23 Instruction

Article 38.23 provides as follows:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a). A defendant's right to the submission of a jury instruction under article 38.23(a), however, is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible. *Madden v. State*, 242 S.W.3d 504, 509–10 (Tex. Crim. App. 2007);

Hernandez, 533 S.W.3d at 481.

Before a defendant is entitled to a submission of a jury instruction under Article 38.23(a), there are three requirements that a defendant must meet: "(1) The evidence heard by the jury must raise an issue of fact; (2) The evidence on that fact must be affirmatively contested; and (3) That contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence." *Madden*, 242 S.W.3d at 509–10; *Hernandez*, 533 S.W.3d at 482. "And if other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence." *Madden*, 242 S.W.3d at 510.

C. Analysis

Sanchez made the following jury-instruction request at trial:

> Your Honor, I have an objection in the sense that I am requesting a . . . 38.23 instruction, I'm asking that the jury be instructed that no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or the Constitution or laws of the United States of America, shall be admitted into evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes or has a reasonable doubt that the evidence was obtained in violation of the provisions of this article, then and in such event the jury shall disregard any such evidence so obtained.
>
> And my basis for that regard, Judge, is two[-]fold, preliminarily, the officer, when she obtained an affidavit—when she obtained a search warrant. In her affidavit for the search warrant, she indicated that she observed Mr. Sanchez while he was driving, and that's clearly not true. She testified she did not observe him when he was driving. So I would ask the Court with that regard to include that instruction.

As we understand it, Sanchez argues that a question of fact existed regarding the challenged conduct of whether the search warrant was illegally obtained. Sanchez

asserts that Casas improperly indicated on the search warrant affidavit that she observed Sanchez "driving," and that the magistrate court erroneously relied on her falsified statement in its probable cause assessment.

However, Sanchez's contentions do not reflect what is in the record. Casas was unequivocal in her testimony at trial. She repeatedly stated that she did not observe Sanchez driving. Rather, Casas was presented with and relied on other information, including Sanchez's concession and her personal observations, before concluding Sanchez had been operating the vehicle. Casas's search warrant affidavit was also admitted into evidence. In her affidavit, Casas checked off a prewritten statement, indicating she had observed Sanchez "operating a motor vehicle." During Sanchez's cross-examination of Casas, he appears to conflate the terms "operating" and "driving" to create a factual contradiction:

> [Sanchez:] I'm handing you what has been marked State's Exhibit No. 5, can you have a look at that? On that affidavit, there is some paragraphs with a little line in front of it you can check off what happened that evening, is that correct?[5]
>
> [Casas:] Yes.
>
> [Sanchez:] And one of the paragraphs, which one did you check off?
>
> [Casas:] A. It says, ["]I observed the suspect doing so.["]

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[5] Sanchez references paragraph five of the affidavit, which provides as follows:

> The suspect was operating a motor vehicle in a public place in Cameron County, Texas on the above date based on the following facts:
>
> ___ A. I observed the suspect doing so.
>
> ___ B. The suspect admitted to me . . .
>
> ___ C. A witness, (name & address) _____ told me . . .

Casas placed a check mark by option A.

[Sanchez:] And you did not observe the suspect *driving* the vehicle, is that correct?

[Casas:] That is correct.

Casas's testimony and accompanying affidavit create no factual discrepancy; Casas did not testify that she observed Sanchez driving, and the affidavit does not state that Casas observed Sanchez driving. *See Hamal v. State*, 390 S.W.3d 302, 307 (Tex. Crim. App. 2012) (providing that, in this context, a factual dispute is a dispute about what an officer "did, said, saw, or heard"); *see also Madden*, 242 S.W.3d at 513 ("[A] cross-examiner's questions do not create a conflict in the evidence."). She stipulates in the affidavit that she observed Sanchez "operating a motor vehicle," which remains consistent with her testimony, as "operation" and "driving" are not wholly interchangeable terms under the statute, and operation may be evidenced by a defendant's demonstrated control of the vehicle. *See Kirsch*, 357 S.W.3d 650–51; *Denton*, 911 S.W.2d at 389; *Oliva*, 525 S.W.3d at 295; *see also Absalon v. State*, 478 S.W.3d 1, 14 (Tex. App.—Corpus Christi–Edinburg 2014), *aff'd*, 460 S.W.3d 158 (Tex. Crim. App. 2015) ("A misstatement in an affidavit that is merely the result of simple negligence or inadvertence, as opposed to reckless disregard for the truth, will not render invalid the warrant based on it."). Thus, our analysis ends. *Madden*, 242 S.W.3d at 510.

We conclude that the trial court was not required to give an instruction under Article 38.23(a) because the evidence in this case did not raise a disputed affirmatively contested material fact issue requiring the instruction. *Madden*, 242 S.W.3d at 509–10; *Hernandez*, 533 S.W.3d at 482. We overrule Sanchez's third issue.

V. *FRANKS* CHALLENGE

Citing *Franks,* 438 U.S. at 154–56, Sanchez independently asserts that the arrest

warrant affidavit contained a false statement, and therefore, "the magistrate's finding of probable cause should [be] reversed."

A. Applicable Law

Under *Franks*, a defendant may challenge the veracity of statements contained within an affidavit in support of a search warrant following "a substantial preliminary showing that a false statement [was made] knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and was "necessary to the finding of probable cause." *Franks*, 438 U.S. at 155–56. The Texas Court of Criminal Appeals additionally requires that "specific allegations and evidence must be apparent in the pleadings in order for a trial court to even entertain a *Franks* proceeding." *Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim. App. 2007). A defendant must also:

> (1) Allege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false;
>
> (2) Accompany these allegations with an offer of proof stating the supporting reasons; and
>
> (3) Show that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant.

Id. (citing *Cates v. State*, 120 S.W.3d 352, 356 (Tex. Crim. App. 2003)); *see Franks,* 438 U.S. at 155–56; *Gonzales v. State*, 481 S.W.3d 300, 309 (Tex. App.—San Antonio 2015, no pet.); *see also Rodriguez v. State*, No. 13-18-00004-CR, 2019 WL 1066028, at *4 (Tex. App.—Corpus Christi–Edinburg Mar. 7, 2019, pet. ref'd) (mem. op., not designated for publication). If, at the *Franks* hearing, the defendant establishes the allegation of perjury or reckless disregard by a preponderance of the evidence, "[s]uch statements

must be purged from the affidavit, and it is then up to the reviewing judge to determine whether probable cause exists absent the excised statements." *Hyland*, 574 S.W.3d at 911.

B. Preservation

Although Sanchez did not request a formal *Franks* hearing or raise the matter in a motion to suppress, *see Harris*, 227 S.W.3d at 86, he maintains his *Franks* challenge has been preserved because he "renewed [his] objection before the [search warrant affidavit] was introduced and request[ed] the jury charge."

We first note that Sanchez does not indicate where in the record he objected to the affidavit on the basis of a *Franks* challenge, and a review of the record yields no such finding.[6] Further, Sanchez has not provided us with any caselaw that would permit preservation under *Franks* by way of a jury charge instruction request. *See id.*; *see also McMurphy v. State*, No. 03-15-00246-CR, 2016 WL 690995, at *3 (Tex. App.—Austin Feb. 19, 2016, pet. ref'd) (mem. op., not designated for publication) (holding that "a *Franks* claim must be raised in a motion to suppress, and the trial court must be made aware of the claim at the suppression hearing," otherwise a defendant fails to preserve error); *but see Perez v. State*, No. 02-12-00043-CR, 2013 WL 4679180, at *6 (Tex. App.—Fort Worth Aug. 29, 2013, pet. ref'd) (mem. op., not designated for publication) (assuming,

[6] The exchange at trial between counsel prior to the admission of the affidavit as evidence occurred as follows:

> [State:] Your Honor, tendering to defense counsel for inspection.
>
> [Sanchez:] Your Honor, I'm objecting to page two of the affidavit, it [is] essentially an extension of a police report. Otherwise, I have no objection, Judge.
>
> . . .
>
> [Sanchez:] For the record, Judge, my objection was a hearsay objection.

without deciding, that the defendant raised and preserved his *Franks* claim by way of requesting an Article 38.23(a) jury instruction).

Even if preserved, we nonetheless conclude that Sanchez did not meet the requirements necessary to obtain a hearing under *Franks*, nor did he establish, by a preponderance of the evidence, that the search warrant affidavit contained a statement of perjury or reckless disregard requiring excision. *See Hyland*, 574 S.W.3d at 911. Sanchez points to one portion of the affidavit he alleges to be false: Casas's written indication that she observed him "operating a motor vehicle". Having already discussed and concluded *supra* that the challenged statement was not in controversion of any statements made at trial, we additionally observe that Sanchez did not provide an offer of proof to support his allegation of falsity. *See Franks,* 438 U.S. at 155–56; *Harris*, 227 S.W.3d at 85; *see also Absalon*, 478 S.W.3d at 14 ("Under *Franks*, the false statement in the affidavit must have been either intentional or made with reckless disregard for the truth, and must have been necessary to the finding of probable cause, in order to render the warrant invalid." (citing *Dancy v. State*, 728 S.W.2d 772, 782 (Tex. Crim. App. 1987)).

As consequence, Sanchez has not shown that the trial court erred in denying his implied *Franks* motion. *See Franks,* 438 U.S. at 155–56, *Harris,* 227 S.W.3d at 86; *Shedden v. State*, 268 S.W.3d 717, 738 (Tex. App.—Corpus Christi–Edinburg 2008, pet. ref'd) (holding that where the defendant "did not establish that [the officer] intentionally, knowingly, or recklessly made a false statement in his warrant affidavit," the trial court did not err in denying his *Franks* claim); *see also State v. Ozuna*, No. 13-16-00364-CR, 2018 WL 2057274, at *10 (Tex. App.—Corpus Christi–Edinburg May 3, 2018, no pet.) (mem. op., not designated for publication) (concluding that because the defendant failed to prove

a *Franks* violation occurred, "we need not remove [the statement] from the probable cause equation," and the defendant's challenge to the validity of the search warrant affidavit fails). We overrule Sanchez's last issue.

VI. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

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

Delivered and filed the
21st day of May, 2020.