NUMBER 13-22-00322-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ROBERT NICHOLAS SIMMONS, **Appellant,**

v.

THE STATE OF TEXAS,

Appellee.

On appeal from the 347th District Court of Nueces County, Texas.

OPINION

Before Justices Tijerina, Silva, and Peña
Opinion by Justice Silva

A jury convicted appellant Robert Nicholas Simmons of intoxication manslaughter, a second-degree felony. *See* TEX. PENAL CODE ANN. § 49.08. He received a sentence of fifteen years' confinement. By two issues, Simmons challenges the sufficiency of the evidence to support his conviction and the trial court's admission of exhibits related to his

blood draw (Exhibits 11, 12, and 14) and toxicology report (Exhibit 13). We affirm as modified.

I. BACKGROUND

On August 12, 2017, at 3:02 a.m., while detained in the back of a police unit, Simmons posted the following status update on his Facebook page: "Some lady just stepped in front of my truck as I was driving and I flipped my truck and killed her[.] I love you guys but I'm probably going to prison[.]" In response to questions regarding the veracity of his post, Simmons wrote: "She is dead as f*** and I hit my head really really really hard[.] I'm all dizzy[. M]y truck flipped into the ditch[.]"

Less than thirty minutes prior, David Acosta was enroute home after his work shift when he came across a vehicle in the 4800 block of Ayers Street lying on its side in a ditch, its wheels still turning. Acosta testified that he pulled over to render aid, and Simmons was pacing back and forth nearby his vehicle, yelling, "I f[-]cked up. I killed somebody. My life is over." Acosta opined that Simmons appeared intoxicated and "smelled of alcohol." Using the flashlight function on his cell phone, Acosta found a woman, later identified as Mariselda Ybarra, face down on Ayers Street. Acosta testified that Ybarra had no pulse and he stood by her body, directing incoming traffic around her, until law enforcement arrived.

Corpus Christi Police Department (CCPD) Investigator Eugene Kronk testified that his post-collision investigation indicated that both Simmons and Ybarra had been traveling northbound on Ayers Street prior to the collision. Simmons then veered right, onto "the shoulder or grassy area off the roadway" where Ybarra was walking and struck

Ybarra, propelling Ybarra "more than 30 feet" forward. Simmons then swerved left, and his vehicle slid and started spinning until it hit the edge of the roadway where it rolled over onto its side in the ditch, facing southbound on Ayers Street.

Simmons reportedly told police he had been going approximately forty-five miles per hour[1] and had been unable to avoid hitting Ybarra, who he claimed was walking on the roadway. Former CCPD Officer Danielle Rodriguez testified that Simmons also admitted to drinking two hours prior to the accident. Although Officer Rodriguez opined Simmons did not appear intoxicated, Officer Rodriguez attempted to administer field sobriety tests pursuant to standard protocol. Officer Rodriguez summoned emergency medical personnel after Simmons began complaining of head pain. Simmons was thereafter transported to a nearby hospital, where Simmons consented to a blood draw.

Officer Rodriguez testified that she filled out and signed the requisite consent form and withdrawal checklist, admitted without objection as State's Exhibits 11 and 12, respectively, but could not remember whether she was in the room at the time Simmons's blood was drawn. Nurse Gabriella Garcia's signature also appeared on the withdrawal checklist, indicating that she conducted the blood draw at 4:17 a.m. At trial, Garcia testified to the procedure utilized for a blood draw.

Catalina Cuervo, Texas Department of Public Safety (DPS) crime laboratory quality manager, testified to Simmons's toxicology results as indicated in State's Exhibit 13, the toxicology report. According to Cuervo, Simmons's blood alcohol level was 0.094

[1] David Schwartz, an accident investigator with the Corpus Christi Police Department (CCPD), testified that the speed limit on Ayers is thirty-five miles per hour.

grams of alcohol per 100 milliliters of blood, which is over the legal intoxication limit of 0.08.

CCPD Officer Jeremy Guerrero testified to the blood draw kit chain of custody form, which was admitted into evidence without objection at trial as State's Exhibit 14. Officer Guerrero testified that the chain of custody form indicates Officer Rodriguez created the CCPD property voucher for the blood draw kit in the CCPD property room on August 12, 2017, at 7:48 a.m. CCPD property room intake personnel confirmed possession of the kit on August 14, at 9:07 a.m., and at 9:17 a.m., the kit was released to Officer Guerrero for transport to the DPS crime lab for testing. On November 14, Officer Guerrero returned the kit to the CCPD property room. The blood draw kit itself was admitted absent objection as State's Exhibit 15.

Dr. Ray Fernandez, an independently contracted medical examiner for Nueces County, testified that Ybarra's cause of death was blunt force trauma. Dr. Fernandez additionally testified to the impairment effects of alcohol on reaction time, perception, and visual acuity.

A jury returned a guilty verdict and sentenced Simmons to fifteen years' confinement. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

By his first issue, Simmons contends that the evidence is insufficient to support his conviction. Specifically, he challenges the State's evidence of intoxication and causation.

A. Standard of Review and Applicable Law

In reviewing the sufficiency of the evidence to support a conviction, "we consider the evidence in the light most favorable to the verdict" and determine whether, based on the evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Edward v. State*, 635 S.W.3d 649, 655 (Tex. Crim. App. 2021) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (adopting the standard of review for a sufficiency challenge as set out by *Jackson*). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Edward*, 635 S.W.3d at 655; *see Garcia v. State*, 667 S.W.3d 756, 762 (Tex. Crim. App. 2023) ("If the record supports conflicting inferences, the reviewing court must presume that the factfinder resolved the conflicts in favor of the prosecution and defer to the jury's factual determinations.") (cleaned up). We remain mindful that "[c]ircumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt." *Delagarza v. State*, 635 S.W.3d 716, 723 (Tex. App.—Corpus Christi–Edinburg 2021, pet. ref'd) (citing *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018)). We measure the sufficiency of the evidence by comparing the evidence produced at trial against "the essential elements of the offense

as defined by the hypothetically correct jury charge." *Curlee v. State*, 620 S.W.3d 767, 778 (Tex. Crim. App. 2021) (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

To establish intoxication manslaughter under a hypothetically correct jury charge, the State was required to prove (1) Simmons (2) operated a motor vehicle in a public place (3) while intoxicated, and (4) by reason of that intoxication, (5) he caused the death of another by accident or mistake. *See* TEX. PENAL CODE ANN. § 49.08; *Matamoros v. State*, 500 S.W.3d 58, 62 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.). In other words, the State was required to prove that Simmons's intoxication caused the fatal result. *See Hanna v. State*, 426 S.W.3d 87, 98 n.57 (Tex. Crim. App. 2014) ("[I]ntoxication manslaughter require[s] proof that it was the intoxicated driving that caused the victim's injuries."); *Matamoros*, 500 S.W.3d at 65.

The penal code defines "intoxication" as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, . . . or having an alcohol concentration of 0.08 or more." TEX. PENAL CODE ANN. § 49.01(2)(A), (B). As for causation, the penal code provides that "[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." *Id.* § 6.04(a).

B. Analysis

1. Intoxication

First, Simmons avers that the State failed to prove he was intoxicated at the time the accident occurred. However, a rational factfinder could have found beyond a reasonable doubt that Simmons was intoxicated at the time of the accident. Simmons admitted to having consumed multiple beverages in the hours leading up to the accident. *See Zavala v. State*, 89 S.W.3d 134, 140 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.) (concluding that, though the precise time the accident occurred was unknown, evidence that appellant had been drinking several hours prior could be used to establish intoxication at the time of the accident); *see also Gandee v. State*, No. 13-18-00343-CR, 2019 WL 5609703, at *3 (Tex. App.—Corpus Christi–Edinburg Oct. 31, 2019, no pet.) (mem. op., not designated for publication) (concluding that the jury could have relied on appellant's admission to law enforcement that he consumed alcohol prior to the accident as evidence of intoxication); *Salazar v. State*, No. 13-16-00645-CR, 2017 WL 6545991, at *7 (Tex. App.—Corpus Christi–Edinburg Dec. 21, 2017, pet. ref'd) (mem. op., not designated for publication) (same). Moreover, a bystander at the scene of the accident testified that he smelled alcohol emanating from Simmons and that Simmons appeared intoxicated. *See Foley v. State*, 327 S.W.3d 907, 915–16 (Tex. App.—Corpus Christi–Edinburg 2010, pet. ref'd) (concluding evidence was sufficient to support intoxication element where evidence included testimony that appellant's breath smelled strongly of alcohol); *see also Garcia v. State*, No. 13-18-00373-CR, 2020 WL 1858285, at *3 (Tex. App.—Corpus Christi–Edinburg Apr. 9, 2020, pet. ref'd) (mem. op., not designated for

publication) (providing that lay opinion testimony may be probative evidence of intoxication as "a witness does not have to be an expert to testify that a person he observes is intoxicated by alcohol"). Additionally, the State presented evidence that alcohol in an amount over the legal limit of 0.08 or more was found in Simmons's system an hour after the accident, and the State's expert witness, Dr. Fernandez, testified to the physiological effects—such as impairment of reaction time, perception, and visual acuity—associated with alcohol consumption. *See Fulton v. State*, 576 S.W.3d 905, 910 (Tex. App.—Tyler 2019, pet. ref'd) (concluding jury was entitled to believe expert's testimony concerning appellant's toxicology report and explanations of the intoxicating effects of alcohol consumption and its absorption and elimination rates); *see also Embry v. Martinez*, No. 05-20-00022-CV, 2021 WL 2309983, at *5 (Tex. App.—Dallas June 7, 2021, no pet.) (mem. op., not designated for publication) (same).

Based on the aforementioned, we conclude that a rational factfinder could have found beyond a reasonable doubt that Simmons was intoxicated at the time of the accident. *See Edward*, 635 S.W.3d at 655; *Murray v. State*, 457 S.W.3d 446, 449 (Tex. Crim. App. 2015) ("Based on [the defendant's] admission that he had been drinking, [the officer's] observation that [the defendant] appeared 'very intoxicated,' and the fact that no alcoholic beverages were found in the vicinity, a factfinder could have reasonably inferred that [the defendant] consumed alcoholic beverages to the point of intoxication somewhere other than where he was found.").

2. Causation

Finally, Simmons contends that the State failed to prove the requisite connection

between his intoxication and the resulting harm, namely, Ybarra's death. *See* TEX. PENAL CODE ANN. §§ 6.04(a), 49.08; *Hanna*, 426 S.W.3d at 98 n.57. However, "[t]he State is not required to prove that intoxication is the *sole* cause of the accident," *Matamoros*, 500 S.W.3d at 64, and the circumstances of Ybarra's death—she was struck while walking on the grassy area of the roadway—is circumstantial evidence of Simmons's erratic driving due to his intoxication. "Being intoxicated at the scene of a traffic accident in which the actor was a driver is [also] circumstantial evidence that the actor's intoxication caused the accident, and the inference of causation is even stronger when the accident is a one-car collision." *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010).

Thus, applying the necessary standard of review, we conclude the jury could have reasonably found Simmons's intoxication caused Ybarra's death, alone or concurrently with another cause, because Simmons was too impaired to operate his vehicle. *See id.*; *see also* TEX. PENAL CODE ANN. §§ 6.04(a), 49.08; *Matamoros*, 500 S.W.3d at 65 ("Based on the evidence set out above, a reasonable fact[]finder could have found beyond a reasonable doubt that 'but for' appellant's intoxication and operation of a motor vehicle on a public street, the death would not have occurred.").

We overrule Simmons's first issue on appeal.

III. CHAIN OF CUSTODY

Simmons next argues the trial court erred in admitting exhibits eleven through fourteen because "a chain of custody was not established in order to give authentication" to any of these exhibits.

A. Standard of Review and Applicable Law

We review a trial judge's evidentiary rulings for abuse of discretion. *Inthalangsy v. State*, 634 S.W.3d 749, 754 (Tex. Crim. App. 2021). Texas Rule of Evidence 901 requires the authentication or identification of evidence to establish that the matter in question is what the proponent claims it to be. *See* TEX. R. EVID. 901; *see also Morales v. State*, No. 13-17-00279-CR, 2018 WL 6802127, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 27, 2018, no pet.) (mem. op., not designated for publication). A chain of custody is sufficiently authenticated when the State establishes "the beginning and the end of the chain of custody, particularly when the chain ends at a laboratory." *Mitchell v. State*, 419 S.W.3d 655, 659–60 (Tex. App.—San Antonio 2013, pet. ref'd) (quoting *Martinez v. State*, 186 S.W.3d 59, 62 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd)). "Links in the chain may be proven by circumstantial evidence." *Watson v. State*, 421 S.W.3d 186, 190 (Tex. App.—San Antonio 2013, pet. ref'd); *see also Morales*, 2018 WL 6802127, at *5 ("[T]agging an item of physical evidence at the time of its seizure and then identifying it at trial based upon the tag is sufficient to establish the proper chain of custody."). Absent evidence of fraud or tampering, alleged problems in the chain of custody do not affect the admissibility of the evidence—they affect the weight to be given the evidence. *See Druery v. State*, 225 S.W.3d 491, 503–04 (Tex. Crim. App. 2007); *see also Hicks v. State*, No. 13-11-00636-CR, 2013 WL 782701, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 28, 2013, pet. ref'd) (mem. op., not designated for publication) (applying the same).

B. Analysis

Here, Simmons questions the authentication of State's Exhibits 11–14, alleging that the State failed to meet its burden to establish the chain of custody for the blood draw kit, admitted without objection as State's Exhibit 15. *See* TEX. R. EVID. 901. Specifically, Simmons asserts that the State has not shown the blood drawn at the hospital following the collision was the same blood tested at the toxicology lab because Officer Rodriguez does not recall whether she was in the room present for the blood draw. Assuming without deciding this issue of authentication has been preserved for our review,[2] *see* TEX. R. APP. P. 33.1(a)(1)(A), Simmons does not suggest that the record contains any evidence of tampering or fraud, and we see no such evidence. *See Druery*, 225 S.W.3d at 503–04. Absent evidence of tampering or fraud, any alleged defects in the chain of custody affect the weight—not admissibility of the evidence—and Simmons's claim fails. *See id.*; *see also Clayton v. State*, No. 05-21-00329-CR, 2023 WL 154864, at *7 (Tex. App.—Dallas Jan. 11, 2023, pet. ref'd) (mem. op., not designated for publication) (overruling appellant's authentication of the blood draw evidence complaint "because the record contains no evidence of tampering or impropriety"); *Lindsey v. State*, No. 04-07-00251-CR, 2008 WL 5170397, at *2 (Tex. App.—San Antonio Dec. 10, 2008, no pet.) (mem. op., not designated for publication) (concluding where "the record contains no evidence

[2] "Preservation of error is governed by Rule 33.1 of the Texas Rules of Appellate Procedure." *Mosley v. State*, 666 S.W.3d 670, 676 (Tex. Crim. App. 2023). Rules of preservation for appellate review require that an objection state the grounds for the ruling sought with sufficient specificity. *Id.* However, prior to the admission of Exhibits 11, 12, and 14—a consent to blood withdrawal and testing form; a blood withdraw procedure checklist; and CCPD chain of custody form, respectively—Simmons was given an opportunity to object, but stated, "No objection," in each instance. Only before the admission of Exhibit 13, the toxicology report, did Simmons's object.

suggesting that the blood drawn was tampered, confused or comingled with that of another patient," questions concerning care and custody of the blood draw go to the weight, not admissibility, of the evidence associated).

Moreover, contrary to Simmons's assertions, the State *did* establish the beginning and end of the chain of custody for the blood draw kit. *See Mitchell*, 419 S.W.3d 655, 659–60. Officer Rodriguez affirmed that she recognized the blood withdrawal consent form, State's Exhibit 11; it appeared to be a clear and correct copy, unaltered in any way; and she had filled it out and signed it prior to the blood draw. State's Exhibit 12, the withdrawal procedure checklist for the blood draw, was testified to, filled out, and signed by Nurse Garcia—who additionally testified to the procedure she utilized in conducting Simmons's blood draw. Cuervo testified to the contents of State's Exhibit 13, the toxicology report, and the methodology employed in testing Simmons's blood obtained from the blood draw kit. And, finally, Officer Guerrero confirmed the blood draw kit chain of custody between the hospital, the toxicology laboratory, and its admission at trial as State's Exhibit 15.

We overrule Simmons's second issue.

IV. MODIFICATION OF JUDGMENT

An appellate court has the power to correct and reform the judgment of the court below to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and the nature of the case may require. *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *see* TEX. R. APP. P. 43.2(b)

(permitting the intermediate courts of appeals to "modify the trial court's judgment and affirm it as modified").

The judgment of conviction states that Simmons was convicted of manslaughter and intoxication manslaughter. *See generally Ervin v. State*, 991 S.W.2d 804, 817 (Tex. Crim. App. 1999) ("[M]anslaughter and intoxication manslaughter are the same offense for double jeopardy purposes when they involve the same victim, and imposing convictions for both in this situation violates the Double Jeopardy Clause."); *see also Linzey v. State*, No. 13-18-00353-CR, 2020 WL 1467148, at *5 n.4 (Tex. App.—Corpus Christi–Edinburg Mar. 26, 2020, no pet.) (mem. op., not designated for publication) (explaining appellant "could not have been convicted for both intoxication manslaughter and manslaughter arising from the death of" the same victim because manslaughter and intoxication manslaughter are the same offense for purposes of double jeopardy). However, there is no dispute that the State proceeded only on sentencing for the offense of intoxication manslaughter. Thus, we modify the judgment to recite that Simmons was convicted and sentenced only for the offense of intoxication manslaughter.[3] *See Bigley*,

[3] After filing an appellate brief, Simmons's counsel filed a motion to withdraw, requesting that Simmons be appointed new counsel to pursue complaints of ineffective assistance of counsel and prosecutorial misconduct. We ordered the appeal abated and remanded the cause to the trial court to make its determination of whether appellate counsel should be permitted to withdraw from this case and if so, for the appointment of new appellate counsel in accordance with the prescriptions of Article 26.04. *See* TEX. CODE CRIM. PROC. ANN. art. 26.04; *Meza v. State*, 206 S.W.3d 684, 688 (Tex. Crim. App. 2006). The trial court issued a findings and order on remand, specifically finding as follows: Simmons has not abandoned the appeal; Simmons is not entitled to new appointment of counsel; and it would obstruct the judicial process to grant counsel's motion to withdraw at this juncture. *See* TEX. CODE CRIM. PROC. ANN. arts. 1.051(d), 26.04(j)(2) ("An attorney appointed under this article shall . . . represent the defendant until . . . appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record[.]"). We now deny Simmons's counsel's motion as moot.

During the pendency of this appeal, Simmons filed several pro se letters and a motion entitled "Motion to Abate." However, as noted *supra*, Simmons is represented by counsel on appeal, and he is not entitled to hybrid representation. *See Scheanette v. State*, 144 S.W.3d 503, 505 n.2 (Tex. Crim. App. 2004)

865 S.W.2d at 27–28; *see also Herrera v. State*, No. 13-21-00325-CR, 2022 WL 3654751, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, no pet.) (mem. op., not designated for publication).

V. CONCLUSION

We affirm the trial court's judgment as modified.

CLARISSA SILVA
Justice

Publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed on the
13th day of July, 2023.

(reaffirming appellant does not have a right to hybrid representation on appeal); *see also Benson v. State*, No. 13-19-00519-CR, 2021 WL 4202150, at *4 (Tex. App.—Corpus Christi–Edinburg Sept. 16, 2021, pet. ref'd) (mem. op., not designated for publication) (same). Therefore, we do not address his pro se letters or motion. *See Ex parte Bohannan*, 350 S.W.3d 116, n.1 (Tex. Crim. App. 2011) ("We have received numerous documents from applicant himself, but applicant is represented by counsel and is not entitled to hybrid representation . . . . Because applicant is represented by counsel, we disregard his numerous *pro se* submissions and take no action on them.") (citations omitted).