IN THE COURT OF APPEALS FOR THE
FIFTH DISTRICT OF TEXAS AT DALLAS

ADAM DEAN SHELLEY,	§	
APPELLANT	§	
	§	
v.	§	**No. 05-08-01496-CR**
	§	
THE STATE OF TEXAS,	§	
APPELLEE	§	

APPEALED FROM CAUSE NUMBER 401-80562-08 IN THE 401ST JUDICIAL DISTRICT COURT OF COLLIN COUNTY, TEXAS, THE HONORABLE MARK RUSCH, JUDGE PRESIDING.

§ § §

STATE'S BRIEF

§ § §

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Oral argument is requested, but only if Appellant is also requesting argument.

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TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Adam Shelley ("Appellant") was charged by indictment with driving while intoxicated with two prior convictions, a third-degree felony. CR 4. He waived a jury and pleaded not guilty before the trial court. CR 28; RR 5. The trial court found him guilty and sentenced him to three years of community supervision and a $500 fine. CR 32; RR 41, 43.

STATEMENT OF FACTS

At 1:30 a.m. on a December morning, Officer Kris Tyler noticed a GMC Sierra pickup approaching northbound on Highway 75. RR 7-8. The Sierra swerved from the center lane to the left lane and back again without signaling. RR 8, 19. A semi truck in the next lane and another pickup immediately behind the Sierra both had to brake to avoid it. RR 8, 19-20. Officer Tyler stopped the Sierra for failure to maintain a single

lane and spoke to the driver, Appellant. RR 9. The officer immediately noticed the strong odor of alcohol, Appellant's bloodshot and watery eyes, and Appellant's slurred speech. RR 9. Appellant admitted to drinking two beers and one shot within the past two and a half hours. RR 9, 21. He performed three standardized field sobriety tests and passed the decision point, indicating intoxication, on all three. RR 11-13. Officer Tyler arrested him for driving while intoxicated and took him to the jail, where he refused to provide a breath sample. RR 13, 16.

SUMMARY OF THE STATE'S ARGUMENTS

State's Reply to Appellant's First Issue:

The officer's testimony that Appellant twice swerved out of his lane, coming close enough to two other vehicles that they had to brake to avoid him, was sufficient to justify Appellant's detention for failure to maintain a single lane.

State's Reply to Appellant's Second Issue:

A motion to quash was not the proper vehicle to complain about the State's proof of a prior conviction because the State is not required to plead evidentiary issues. And the evidence was sufficient to establish Appellant was the person convicted of the alleged 1993 DWI. The State offered a computer printout of the 1993 conviction and Appellant's driver's license record referencing the conviction that contained all of the same identifying information, a photograph, and Appellant's signature, as well as a judgment of a later conviction that found Appellant had been previously convicted of the alleged prior. When considered together, these three exhibits established Appellant's prior conviction.

STATE'S REPLY TO APPELLANT'S FIRST ISSUE
(JUSTIFICATION FOR TRAFFIC STOP)

> Appellant complains that the trial court improperly denied his objection that the officer lacked reasonable suspicion to stop his vehicle. But the officer's testimony that Appellant twice swerved out of his lane, coming close enough to two other vehicles that they had to brake to avoid him, was sufficient to justify Appellant's detention for failure to maintain a single lane.

Standard of Review:

A determination of whether an officer was justified in conducting a traffic stop is reviewed for the totality of the circumstances, using a bifurcated standard of review. *Ford v. State,* 158 S.W.3d 488, 492-93 (Tex. Crim. App. 2005). The reviewing court gives almost total deference to the trial court's determination of historical facts and reviews de novo the trial court's application of law to facts not turning on credibility and demeanor. *Id.* at 493. Where the trial court does not make express findings of fact, the appellate court reviews the evidence in the light most favorable to the trial court's ruling and assumes the court made implicit findings of fact that support the ruling. *Id.*

Argument & Authorities:

A police officer may stop and briefly detain persons suspected of criminal activity if the officer possesses a reasonable suspicion to justify the investigative detention. *Terry v. Ohio,* 392 U.S. 1, 19-20 (1968). In other words, the officer must have specific articulable facts which, premised upon his experience and personal knowledge and when coupled with the logical inferences from those facts, would warrant intruding upon the detained citizen's freedom. *See Garza v. State*, 771 S.W.2d 549, 558 (Tex. Crim. App.

1989). The validity of the stop is determined from the totality of the circumstances. *Ford*, 158 S.W.3d at 492.

Here, Officer Tyler had reasonable suspicion to believe that Appellant had violated the traffic offense of failure to maintain a single lane. The Transportation Code provides that a person must drive "as nearly as practical" entirely within a single lane and may not move from the lane "unless that movement can be made safely." Tex. Transp. Code § 545.060(a). Office Tyler testified that Appellant changed lanes twice—from the center lane to the left lane and back—without signaling. RR 8, 19. A semi truck was in the lane next to Appellant and a pickup directly behind him. RR 8, 19. Although Officer Tyler did not know exactly how close they were to Appellant, he explained that both vehicles had to brake to avoid Appellant when he changed lanes. RR 20. Because of the other vehicles, Officer Tyler believed this lane change was unsafe and created a "potentially dangerous situation." RR 8.

Appellant argues that Officer Tyler's testimony was not sufficient to establish that he changed lanes unsafely because the officer did not know how close he was to the other vehicles, relying on *Hernandez v. State,* 983 S.W.2d 867 (Tex. App.—Austin 1998, pet. ref'd). *See* Appellant's Brief at 6. In *Hernandez*, the defendant crossed into another lane for only a few seconds and the officer testified that he did not cause a problem for any other vehicles. 983 S.W.2d at 868. This single, slight swerve was not sufficient to show an unsafe lane change. *Id.* at 871. But additional testimony about road and traffic conditions can support a different conclusion. In *Martinez v. State,* 29 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd), the court held that "it was not unreasonable

for [the officer] to conclude appellant's swerve onto the shoulder of a highway in the early hours of the morning was unsafe." Similarly, this Court held that a defendant swerving into the next lane and suddenly "jerking" back to his lane at approximately 2:00 a.m. with moderate to heavy traffic gave an officer reasonable suspicion to stop him for failure to maintain a single lane. *Anderson v. State,* No. 05-04-01534-CR, 2005 WL 1515693, at *3 (Tex. App.—Dallas June 28, 2005, no pet.) (not designated for publication).

The instant case is more similar to *Martinez* and *Anderson* than *Henderson*. Rather than a single minor swerve with no other traffic around him, Appellant fully changed lanes twice and forced the vehicles around him to take defensive action. RR 20. Officer Tyler did not have to know the precise distance between the vehicles to determine that this action was unsafe. He had reasonable suspicion to stop Appellant for this traffic violation. Appellant's first issue should be overruled.

STATE'S REPLY TO APPELLANT'S SECOND ISSUE
(PRIOR DWI CONVICTIONS)

> In his second issue, Appellant complains that the trial court improperly denied his motion to quash one of the enhancement paragraphs, alleging a 1993 DWI conviction, before trial. He also complains that the evidence was insufficient to prove the 1993 conviction because the State's evidence was not sufficiently linked to him. But a motion to quash was not the proper vehicle to complain about the State's proof of a prior conviction because the State is not required to plead evidentiary issues. And the evidence was sufficient to link the prior conviction to Appellant based on a computer printout of Appellant's conviction, a driver's license record referencing the conviction that contained all of the same identifying information, a photograph, and Appellant's signature, and a judgment of a later conviction that found Appellant had been previously convicted of the alleged prior.

Relevant Facts:

The indictment alleged that Appellant had two prior DWI convictions out of Dallas County—cause number MA97-51442-E in 1997 and cause number MB9127009 in 1993.[1] CR 4. At trial, the State submitted three exhibits. State's Exhibit 1 is a notice from Dallas County that the original record was destroyed and a certified computer printout of a "Judicial Information Sheet" for cause number MB9127009. It provides Appellant's name, sex, race, and date of birth, and it notes he was convicted on October 19, 1993 and sentenced to sixty days in jail, probated for twenty-four months. *See* State's Exhibit 1 at 2-3.

State's Exhibit 2 is a certified driver's license packet. It also shows Appellant's name, sex, and date of birth, and it contains a photograph and signature. *See* State's Exhibit 2 at 1, 3. In the license history, it notes that Appellant was convicted on October

[1] Appellant complains only of the sufficiency of the proof for the second enhancement paragraph, regarding cause number MB9127009 in 1993. *See* Appellant's Brief at 7.

19, 1993 for DWI in Dallas County under cause number MB9127009M and received a probated sentence. *Id.* at 1. It also notes that he was convicted for DWI on September 26, 1997, with an offense date of April 16, 1997, in Dallas County under cause number MA9751442E.

State's Exhibit 4 is a certified packet from Dallas County for cause number MA97-51442-E, a "DWI 2nd" from County Criminal Court Number 4. The information alleged that Appellant committed DWI on April 16, 1997 and had previously been convicted of DWI under Cause Number MB9127009 in Dallas County Criminal Court No. 2 on October 19, 1993. *See* State's Exhibit 4 at 6. The judgment reflected that Appellant pleaded guilty or nolo contendere, was convicted of "DWI 2ND, CLASS A," and was sentenced to 180 days, probated for 24 months, and a $750 fine. *Id.* at 3. The conditions of community supervision bears Appellant's signature. *Id.* at 2.

Appellant stated that he had no objection to State's Exhibit 4 except for a handwritten notation on the top of the first page that stated he had pleaded true to the second paragraph. RR 26. The trial court sustained the objection and said it would disregard the notation. RR 27. Appellant objected to State's Exhibits 1 and 2 as not providing enough identifying information to connect them to him. RR 27-29. The trial court overruled the objection and admitted both exhibits. RR 31.

Argument & Authorities:

I. The motion to quash was properly denied

Prior to trial, Appellant filed a "motion to quash enhancement count," arguing that the allegation of a prior conviction for Cause Number 91-27000 should be struck from the indictment because the State intended to prove it by introduction of a certified computer record, which he argued was insufficient evidence. CR 14-20. The trial court denied the motion. CR 21. Appellant complains on appeal that the motion to quash should have been granted, but a motion to quash was not the proper vehicle for raising this complaint and thus was properly denied.

The sufficiency of an information is a question of law and should thus be reviewed de novo. *See State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004); *Goodrich v. State*, 156 S.W.3d 141, 145 (Tex. App.—Dallas 2005, pet. ref'd). An indictment must be sufficiently detailed to give a defendant notice of what he is charged with, but the State is not required to plead evidentiary matters. *Ex parte Luna*, 784 S.W.2d 369, 371 (Tex. Crim. App. 1990); *Moreno v. State,* 721 S.W.2d 295, 300 (Tex. Crim. App. 1986). A motion to quash based on factual issues is allowed only where the facts sought are essential to giving notice; otherwise the indictment need not plead the evidence upon which the State will rely. *Thomas v. State,* 621 S.W.2d 158, 161 (Tex. Crim. App. 1981).

Here, Appellant's motion to quash complained solely about the evidence upon which the State would rely to prove the enhancement allegation at trial. CR 14-20. The State was not required to plead its evidence in the indictment. *See Thomas*, 621 S.W.2d

at 161. The indictment alleged the prior conviction with enough specificity for Appellant to know what he was charged with. CR 4. The motion to quash was properly denied.

II. The exhibits were sufficiently connected to Appellant

The State's evidence sufficiently established that Appellant was convicted of the 1993 DWI. To establish that a defendant has been convicted of a prior offense, the State must prove that (1) a prior conviction exists, and (2) the defendant is linked to that conviction. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). But no specific document or mode of proof is required to establish those elements. *Id.* "Just as there is more than one way to skin a cat, there is more than one way to prove a prior conviction." *Id.* at 922. The State may offer, for example, a stipulation, testimony by a person with knowledge, or documentary proof that contains sufficient information to establish both the prior conviction and the defendant's identity. *Id.* at 921-22.

In *Flowers*, the State proved the appellant's prior conviction by offering a driver's license record that contained the appellant's name, sex, age, date of birth, address, and driver's license number, as well as a photograph of the appellant and a reference to the prior conviction by date, county, and offense number. *Id.* at 920. The State also offered a computer printout from the county clerk of the appellant's conviction record, which also contained the appellant's name, date of birth, address, date of arrest, charged offense, finding of guilt, sentence, and case number. *Id.* The Court of Criminal Appeals held that the trial court could compare the information on the two documents and conclude beyond

a reasonable doubt that the appellant had been previously convicted of the alleged prior conviction. *Id.* at 925.

In the instant case, the three exhibits offered by the State were sufficient to connect Appellant to the alleged priors. Just as in *Flowers*, the State offered a driver's license record that contained appellant's name, sex, date of birth, and a photograph. *See* State's Exhibit 2. The driver's license record referenced two DWI convictions by date, county, and offense number.[2] *Id.* The State offered a computer printout from the Dallas County Clerk showing Appellant's name, sex, date of birth, charged offense, sentence, and case number. *See* State's Exhibit 1. The information in these documents is virtually identical to the information in the *Flowers* documents, and the trial court was free to compare the information on the documents and the photograph to Appellant and conclude beyond a reasonable doubt that Appellant had been convicted of the prior offenses. *See Flowers*, 220 S.W.3d at 925.

Additionally, State's Exhibit 4, regarding the 1997 DWI, also connected Appellant to the 1993 conviction. The exhibit reflected that Appellant was charged with DWI 2nd, a Class A misdemeanor. The alleged prior in that offense was the 1993 conviction, alleging the same county, cause number, and conviction date as in State's Exhibit 1. *See* State's Exhibit 4 at 6. Although the trial court sustained Appellant's objection to the handwritten notation in State's Exhibit 4 that Appellant pleaded true to the enhancement,

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[2] Appellant complains that the reference to convictions in State's Exhibit 2 is hearsay and should not be considered. *See* Appellant's Brief at 9. But the exhibit was introduced into evidence without restriction and thus may be considered for all purposes. Furthermore, the exhibit was a certified public document and thus not excluded under the hearsay rule. Tex. R. Evid. 803(8).

the exhibit nonetheless included the judgment that Appellant had been convicted of DWI 2nd, necessarily including the finding that he had committed the 1993 conviction. *See* State's Exhibit 4 at 4. Indeed, the trial court specifically noted when State's Exhibit 4 was introduced that it reflected Appellant was convicted of a "DWI *second*." RR 27. In *Jones v. State,* No. 2-08-298-CR, 2009 WL 1905372, at *2 (Tex. App.—Fort Worth July 2, 2009, pet. dism'd) (not designated for publication), the State introduced a pen packet for a second conviction that used the alleged prior conviction as an enhancement. The court found that this sufficiently connected the defendant to the alleged prior. *Id.* Similarly, the finding in State's Exhibit 4 that Appellant committed the 1993 conviction connected Appellant to that conviction.

Furthermore, State's Exhibit 2 also contained a signature, which the trial court could compare to the defendant's signature on the conditions of probation in State's Exhibit 4 and Appellant's signature on his jury waiver form, thus connecting both documents to each other and to Appellant. *See Vargas v. State,* No. 03-08-00508-CR, 2010 WL 1507870, at *3 (Tex. App.—Austin Apr. 15, 2010, no pet. h.) (not designated for publication) (finding prior conviction sufficiently tied to defendant where factfinder could compare signature and photograph from driver's license pack to defendant's signature on jury waiver and appearance in court).

In all, the three exhibits introduced by the State were sufficient to connect Appellant to the 1993 conviction. Although Appellant argues that the exhibits did not provide enough identifying information, the information is nearly identical to that approved of in *Flowers*. *See Flowers*, 220 S.W.3d at 924-25. As the Court of Criminal

Appeals explained, the proof used to establish that a defendant was the person previously convicted "closely resembles a jigsaw puzzle." *Id.* at 923. Although the individual pieces may have little meaning, "when the pieces are fitted together, they usually form the picture of the person who committed the alleged prior convictions." *Id.* Here, when State's Exhibits 1, 2, and 4 are examined together, they form a clear picture that Appellant was the person convicted of the 1993 DWI. Thus, the evidence was sufficient to support the trial court's conclusion that Appellant was guilty of felony DWI. Appellant's second issue should be overruled.

PRAYER

Appellant's trial was without prejudicial error. The State prays that Appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the State's brief has been sent by first-class mail to counsel for Appellant, the Honorable Larry Finstrom, Renaissance Tower, 1201 Elm Street, Suite 2510, Dallas, Texas 75270, on this, the _____ day of April, 2010.

_____
Andrea L. Westerfeld