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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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TO THE
COURT OF CRIMINAL APPEALS
OF TEXAS

Donald Ray Couthren

vs.

The State of Texas

PETITION FOR DISCRETIONARY REVIEW

From the Thirteenth Court of Appeals
No. 13-16-00543-CR

Oral Argument Requested

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IDENTITY OF PARTIES

Trial Court Judge:	Steve Smith Judge of the 361st District Court Brazos County, Texas
Petitioner:	Donald Ray Couthren
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Respondent:	The State of Texas
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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests the opportunity to present oral argument in support of his petition. This petition concerns recurring issues concerning application of this court's prior holdings which are important to the jurisprudence of the State. Presentation of oral argument would assist the Court in resolving these issues.

STATEMENT OF THE CASE

Petitioner was convicted of the offense of Driving While Intoxicated with two or more previous convictions. The jury also found that his operation of the vehicle was the use of a deadly weapon during the offense. Petitioner sought a new trial based on the State's failure to disclose exculpatory evidence. That request was denied and the Court imposed a sentence of six years confinement.

PROCEDURAL HISTORY

Petitioner presented two issues to the Thirteen Court of Appeals challenging the denial of his motion for new trial and the sufficiency of the evidence that he used or exhibited a deadly weapon during commission of the offense. In a May 3, 2018 opinion authored by Justice Benavides, joined by

Chief Justice Valdez and Justice Longoria, the court of appeals overruled both issues and affirmed Petitioner's conviction. Because all relevant authority had been presented to the court of appeals, Petitioner did not file a motion for rehearing.

GROUNDS FOR REVIEW

Ground 1. The opinion of the court of appeals is in conflict with opinions of this Court holding there must be evidence of dangerous or reckless operation of a vehicle to support a finding it was used as a deadly weapon and the occurrence of a collision or consumption of alcohol do not establish those elements. (2 RR 139, 157; CR 19).

Ground 2. The court of appeals erred in holding Petitioner was unable to establish the State's failure to disclose exculpatory information created a reasonable probability the outcome of the trial would have been different. (2 RR 70; 4 RR 17; Supp. CR 7, 13).

ARGUMENT

Ground 1. The opinion of the court of appeals is in conflict with opinions of this Court holding there must be evidence of dangerous or reckless operation of a vehicle to support a finding it was used as deadly weapon and the occurrence of a collision or consumption of alcohol do not establish those elements. (2 RR 139, 157; CR 19).

Evidence Concerning the Accident.

The evidence at trial showed that Petitioner was awakened by his girlfriend's daughter to go get the girlfriend, Jennie Rios, from a potentially dangerous location where drugs were being used. (2 RR 70, 156). As he drove to the house where Rios was, Petitioner collided with an intoxicated pedestrian. The *only* evidence about the cause of the collision was Petitioner's testimony that the pedestrian "walked out in front of" his car (2 RR 41, 157), and the pedestrian's testimony that he was walking down the right side of the road (2 RR 139), which was a violation of section 552.006 of the Transportation Code[1] establishing the standard of care for pedestrians. The pedestrian had no other recollection of the collision. Officers did not go to the scene to look for any evidence of whether the collision occurred in the roadway or not. (2 RR 58). Petitioner stopped to aid the pedestrian and

[1] Section 552.006 requires pedestrians to walk on the left facing traffic when there is no sidewalk.

continued to the house were Rios was without incident. Police were called to the house while Petitioner was there.

The State presented no objective evidence of Appellant's intoxication. It was not able to present evidence of breath or blood testing or Petitioner's performance on field sobriety testing. The State relied on the opinion of officers based on general observations of Petitioner at the house(2 RR 55), and the opinion of Rios. (2 RR 74).

Evidence Required to Support a Deadly Weapon Finding

This Court has consistently held that when the State alleges a motor vehicle was used as a deadly weapon there must be evidence that the vehicle was operated in a reckless or dangerous manner. *Sierra v. State*, 280 S.W.3d 250, 256 (Tex.Crim.App. 2009).

In *Sierra*, the case primarily relied on by the court of appeals, this Court rejected the State's argument that evidence of intoxication[2] was sufficient to establish reckless or dangerous operation. 280 S.W.3d at 256. That holding was reaffirmed in *Brister v. State*, 449 S.W.3d 490 (Tex.Crim.App. 2014).

This Court has also consistently rejected the fallacious *post hoc ergo propter hoc* conclusion that evidence of a collision alone establishes reckless

[2] In *Sierra*, there was evidence that the defendant had a blood alcohol concentration of .12. 280 S.W.3d at 253.

or dangerous operation, and in turn, a deadly weapon finding. In *Sierra* the Court looked beyond the fact of the collision to accident reconstruction evidence that the defendant could have stopped based on the distance to the other vehicle and the speed he was travelg. 280 S.W.3d at 256.

This Court recently applied the analysis of *Sierra* to find a defendant's failure to timely apply brakes, combined with evidence of intoxication, were affirmative evidence of reckless or dangerous driving in *Moore v. State*, 520 S.W.3d 906, 912-13 (Tex.Crim.App. 2017). There the defendant failed to stop behind two vehicles waiting at a traffic light. 520 S.W.3d 907-08. He collided with one of the vehicles with sufficient force that it in turn pushed a preceding SUV into the intersection. *Id*. The only evidence on the cause of the collision was the Defendant's failure to apply his brakes. *Id*. at 912-13. There was no evidence of another cause of the collision. Like *Sierra*, there was also undisputed evidence that the defendant had a blood alcohol content sufficient to establish *per se* intoxication. *Id* at 907.

This rule was applied in *Cates v. State*, to find that evidence that striking a person with a vehicle, even after drinking alcohol, could not support a deadly weapon finding where there was no evidence of reckless or dangerous driving. 102 S.W.3d 735, 739 (Tex.Crim.App. 2003). There the only evidence concerning the manner in which the defendant was driving was the

observation of witnesses who followed the defendant after the collision. What they observed was the driver following traffic signals by maintaining his lane and stopping at a traffic light. 102 S.W.3d at 738. The Court held that evidence "refutes the conclusion the truck was driven dangerously" and did not support a deadly weapon finding even though the defendant had struck a pedestrian and had admitted to drinking alcohol. 102 S.W.3d at 738.

Following these holdings, the courts of appeals have held the absence of evidence of reckless or dangerous driving caused a collision precludes a deadly weapon finding based on evidence of a collision alone. In *English v. State*, the defendant was charged with involuntary manslaughter and felony driving while intoxicated following the collision between two intoxicated drivers at a controlled intersection. 828 S.W.2d 33 (Tex.App.—Tyler 1991, pet. ref'd). Because there was no witness to the collision or other evidence which driver was at fault, the court held the evidence insufficient to support a finding that the defendant operated his vehicle in a manner that supported a deadly weapon finding. 828 S.W.2d at 38.

The type of evidence sufficient to support a deadly weapon finding is shown in the following cases: *Cook v. State*, 328 S.W.3d 95 (Tex.App.—Fort Worth 2010, pet. ref'd) (Evidence that defendant struck victim who was mowing his yard); *Chandler v. State*, 689 S.W.2d 332, 335 (Tex.App.—Fort

Worth 1985, pet. ref'd) (Intoxicated passenger pulled steering wheel to strike and kill jogger); *Morgan v. State*, 775 S.W.2d 403 (Tex.App.—Houston [14th Dist.] 1989, no pet.)(Auto thief drove up to 85 miles per hour with car salesman clinging to the back of the car).

The Court of Appeals Failed to Apply the Established Law.

Here the Thirteenth Court of Appeals found the evidence supported the deadly weapon finding using the very *post hoc* reasoning this court has rejected. While citing this Court's opinion in *Sierra*, the court of appeals disregarded the holding in *Sierra* that there must be evidence beyond the occurrence of a collision to support a finding the defendant's driving was reckless or dangerous. 280 S.W.3d at 256.

Here the court of appeals conceded:

> [T]he speed in [sic] which Couthren was driving is unknown, he testified that he was travelling around thirty miles per hour on a lightly traveled highway access road. We do not know the manner in which Couthren was driving seconds before hitting [the pedestrian], if Couthren applied his brakes prior to the accident, or for certain, if there were other cars on the road.
>
> Slip op. at 10.

The court of appeals then proceeded to use the fact of the collision and evidence that Petitioner had consumed alcohol[3] to substitute for evidence on the manner in which Petitioner was driving. The court held:

> However, the record shows Couthren had been drinking by his own admission and the testimony of the two officers. Couthren was unable to avoid striking Elbrich at a decent rate of speed, since Elbrich's head broke the windshield upon impact."
>
> Slip op. at 10.

As noted the court cited *Sierra* in support. Although this Court has permitted evidence of intoxication to be a factor supporting a finding that a defendant operated a vehicle in a reckless or dangerous manner, s*ee Moore*, 520 S.W.3d at 907; *Sierra*, 280 S.W.3d at 256, it has not held that evidence a defendant had consumed alcohol without a showing of intoxication is sufficient. In *Cates* the consumption of alcohol before striking a pedestrian was insufficient to support a deadly weapon finding. 102 S.W.3d at 739.

Even assuming the finding of guilt of the underlying offense established that factor,[4] the court of appeals' holding that the fact of the collision supports the deadly weapon finding is in conflict with this Court's opinions. In *Moore* this Court made a point that it was not holding a factfinder could "infer

[3] The evidence was that the alcohol was consumed hours before the collision. (2 RR 167).

[4] Unlike *Moore* and *Sierra*, there was no evidence establishing intoxication *per se*. Here the State relied on the fact of the collision to establish intoxication (2 RR 199), then relied on the finding of intoxication to support the deadly weapon finding.

reckless or dangerous driving from the unadorned fact that Appellant rear-ended another vehicle." 520 S.W.3d at 912. That is what the court of appeals has done in Petitioner's case.

A factfinder's authority to disbelieve any witness does not extend to finding contrary facts without supporting evidence. Even if the jury disbelieved Petitioner's testimony that the pedestrian stepped in front of his car, there was no evidence supporting an inference that Petitioner had been driving in a reckless or dangerous manner. That dearth of evidence distinguishes this case from *Moore*, 520 S.W.3d at 512 (evidence of defendant's failure to apply brakes) *Sierra*, 280 S.W.3d at (evidence showed failure to stop although there was adequate distance), *Drichas v. State*, 175 S.W.3d 795, 798 (Tex.Crim.App. 2005)(fleeing from police), *Mann v. State*, 58 S.W.3d 132 (Tex.Crim.App. 2001)(defendant nearly caused a head-on collision), and *Tyra v. State*, 897 S.W.2d 796, 798 (Tex.Crim.App. 1995) (Evidence established defendant "was too drunk to control the vehicle").

In finding the evidence sufficient to support the deadly weapon finding, the court of appeals did not acknowledge, address or distinguish the holdings in the factually similar cases cited by Petitioner including *Cates*, 102 S.W.3d at 739, and *English v. State*, 828 S.W.2d 33 (Tex.App.—Tyler 1991, pet. ref'd).

Because the holding of the Thirteenth Court of Appeals is in conflict with holdings of this Court, Petitioner requests the Court grant review on his first ground, permit full briefing and reform the judgment to remove the deadly weapon finding.

Ground 2. The court of appeals erred in holding Petitioner was unable to establish the State's failure to disclose exculpatory information created a reasonable probability the outcome of the trial would have been different. (2 RR 70; 4 RR 17; Supp. CR 7, 13).

Petitioner's first issue at the court of appeals challenged the denial of his Motion for New Trial based on the State's failure to disclose exculpatory information concerning a key prosecution witness, Jennie Rios.

Because the State had no breath or blood test evidence to establish intoxication, it relied heavily on the testimony of Rios that she knew how Petitioner appeared when intoxicated and that he was intoxicated when she saw him that morning. (2 RR 73-74). It also presented her testimony as evidence that Petitioner knew he was intoxicated because, according to her, he asked her to say she had been driving the car at the time of the collision. (2 RR 76). This evidence was not presented through any other source.

Although the State disclosed to the defense and told the jury that Rios was on probation at the time of trial (2 RR 70), it did not disclose that one of

the two prosecutors in the case had personally signed a motion to revoke that probation twenty days before her testimony and the trial court signed an order for issuance of a capias for her arrest a week before the testimony. (Supp. CR 13). Defense counsel was unaware of the pending motion to revoke until after the trial (Supp. CR 11).

Petitioner filed a Motion for New trial based on violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and presented evidence that his counsel would have cross-examined Rios concerning that motion and any expected benefit on her case following her testimony for the State. (4 RR 17). The trial court conducted a hearing and denied the motion finding prosecutors had not "committed any kind of inappropriate conduct" because the Motion to Revoke with the signed order was not marked filed until after Jennie had testified. (4 RR 33). Petitioner had not alleged bad faith (Supp. CR 7) and the good faith of prosecutors is irrelevant. *Strickler v. Greene,* 527 U.S. 263, 266 (1999); *Harm v. State*, 183 S.W.3d 408, 406 (Tex.Crim.App. 2006).

In the court of appeals the State did not dispute its failure to disclose the information concerning the pending motion to revoke Rios' probation or that the information was favorable to Petitioner. The court of appeals did not address those elements, holding only that Petitioner "is unable to show that

there is a reasonable probability the outcome of the trial would have been different." Slip op. at 7. It relied entirely on the evidence of Rios' past criminal history, drug use and that she was on probation to support its conclusion and Petitioner's inability to establish that her testimony was presented pursuant to an agreement. Slip op at 8.

The materiality requirement does not mandate that a defendant show the undisclosed evidence would have resulted in acquittal. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). All that is required is that the undisclosed evidence deprived the defendant of a fair trial. *Id*. In *Pena v. State,* this Court held that the audio portion of a police video recording was material even after the officer testified to the same statements shown on the audio. 353 S.W.3d 797, 811-12 (Tex.Crim.App. 2011). *See also Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex.Crim.App. 2012).

The court of appeals did not correctly apply this rule. It did not discuss how the testimony of Rios fit into the State's case. She was the only witness to claim at trial that Petitioner asked her to say she had been driving when she never told investigating officers that. In holding the evidence of the pending motion to revoke was not material, the court of appeals failed to acknowledge, address or distinguish the cases recognizing the difference between the past criminal history of a witness and pending charges. In *Davis v. Alaska*, the

United States Supreme Court held that cross-examination of a witness concerning probation status is relevant to their credibility. 415 U.S. 308, 94 S. Ct. 1105 (1974). That did not turn on whether the testimony was presented pursuant to an agreement. The pending proceeding against Rios by the same prosecutor who called her as a witness against Petitioner is unlike the circumstances where a state's witness has an undisclosed past criminal history. *See e.g., Drew v. State*, 76 S.W.3d 436, 448 (Tex.App.—Houston [14th Dist.] 2002, pet. ref'd) (witness had received probation for a misdemeanor offense in another county); *Saldivar v. State*, 980 S.W.2d 475, 486 (Tex.App.—Houston [14th Dist.] 1998, pet. ref'd)(final conviction of one of 33 witnesses not material).

The court of appeals failed to properly apply the materiality element of Brady and Petitioner requests the Court grant his petition on this ground, permit full briefing on the merits.

PRAYER FOR RELIEF

For the foregoing reasons, petitioner prays this court grant his petition, allow briefing on the merits, that the opinion and judgment of the Thirteenth Court of Appeals be reversed and remanded to the trial court for a new trial or, in the alternative, remanded to the Tenth Court of Appeals for

consideration of each of petitioner's issues under the proper standards of review.

Respectfully submitted,

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CERTIFICATE

I certify the foregoing document does not exceed the word count limitation of Rule of Appellate Procedure 9.4(i)(2)(D) based on the computer software word count of 3076 words.

I certify that a copy of this Petition for Discretionary Review was served on counsel for the State, Douglas Howell, III, by electronic service to dhowell@brazoscountytx.gov, on June 3, 2018.

_/s/_Clint_Sare_____
Clint F. Sare

APPENDIX

Court of Appeals' Opinion

NUMBER 13-16-00543-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DONALD COUTHREN, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 361st District Court of Brazos County, Texas.

MEMORANDUM OPINION

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

By two issues, appellant Donald Ray Couthren II challenges his conviction for driving while intoxicated, third or more, a third-degree felony. *See* TEX. PENAL CODE ANN. §§ 49.04, 49.09 (West, Westlaw through 2017 1st C.S.). Couthren alleges that (1) the trial court committed error by denying his motion for new trial and (2) there was insufficient evidence to support a deadly weapon finding. We affirm.

I. BACKGROUND[1]

Couthren was charged by indictment with two felony counts: (1) driving while intoxicated, third or more and (2) aggravated assault with a deadly weapon. *See id*. §§ 22.02(a)(2), 49.04, 49.09 (West, Westlaw through 2017 1st C.S.). The State proceeded to trial on the driving while intoxicated charge, but also included a deadly weapon element during trial. *See id*. § 1.07(17)(B) (West, Westlaw through 2017 1st C.S.).

Based on the testimony, on June 16, 2012, Couthren drove towards downtown Bryan on Highway 6, near Tabor Road, when Frank Elbrich stepped in front of Couthren's vehicle. Couthren's vehicle collided with Elbrich, whose head hit the front windshield. Couthren loaded Elbrich into his vehicle and proceeded to 504 N. Washington, near downtown Bryan. Couthren testified that he had loaned his second vehicle to Jennie Rios, his ex-girlfriend, and he wanted to take his second vehicle in order to drive Elbrich to the hospital.

Police were called out to a disturbance. Initially, Couthren and Rios argued, but then multiple males that were at the home came out and "jumped" Couthren. When police arrived, Couthren was standing in the front yard, with minor lacerations to his face. Bryan Police Officer Andrew Doran made contact with Couthren, who recounted the assault. As they were speaking, Officer Doran testified that he could smell alcohol on Couthren's breath. Officer Doran then noticed the damage to Couthren's windshield and discovered Elbrich inside the vehicle. Officer Doran explained that Couthren said he was driving on

[1] Pursuant to a docket-equalization order issued by the Supreme Court of Texas, this case was transferred to this Court from the Tenth Court of Appeals in Waco. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2017 1st C.S.).

Highway 6, near Tabor, when Elbrich stepped out in front of his vehicle and Couthren hit him.

Officer Crystal O'Rear testified that Couthren stated he had been "jumped" and as they were speaking, Officer O'Rear noticed a strong odor of alcohol, slurred speech, bloodshot eyes, and that Couthren was swaying as he stood. Officer O'Rear stated that Couthren admitted to driving that night, his actions did not make sense to her, and it was "pretty obvious" he was intoxicated. Couthren initially told the officers he had not had anything to drink that night, but later admitted to consuming two Four Loko alcoholic beverages, which contain an elevated level of alcohol. Officer O'Rear asked permission to administer the standardized field sobriety tests and Couthren refused. Based on the totality of the circumstances, Officer O'Rear arrested Couthren.

Rios also testified that Couthren showed up at the house and asked her to take responsibility for hitting Elbrich with the vehicle. Rios she could tell Couthren was intoxicated by the way he "handled" her when he grabbed her arm. Rios did confirm that the men at the home came outside and assaulted Couthren, but she just went inside as it occurred and did not speak to police. Rios also admitted she was currently on probation for a burglary case.

Couthren testified on his own behalf. He stated he did drink two Four Loko drinks the previous day between 2:00 PM and 5:00 PM and went to bed around 10:00 PM. Couthren stated Rios's youngest child woke him up and asked him to bring her mother home from the N. Washington location around 2:00 AM. Couthren testified that he was driving to the N. Washington home when Elbrich stepped in front of his vehicle on the access road of Highway 6. Couthren stated he swerved to the left, but still collided with

Elbrich. Elbrich was "out of it," so Couthren decided to take him to the hospital in his own vehicle. He explained that he decided to go to the N. Washington home to get Rios and his other vehicle, because the glass was "splintering" from the broken windshield and falling into the car. Couthren stated he never asked Rios to say she was driving.

Couthren pleaded true to two prior driving while intoxicated offenses and the jury found him guilty of driving while intoxicated, third or more. *See id*. §49.04, 49.09. The trial court assessed punishment at six years' imprisonment in the Texas Department of Criminal Justice—Institutional Division. Following the denial of a motion for new trial, this appeal followed.

II. MOTION FOR NEW TRIAL EVIDENCE

By his first issue, Couthren alleges the trial court committed error by denying his motion for new trial based on the State failing to disclose material evidence.

A. Standard of Review

A trial court's decision to grant a new trial is reviewed only for abuse of discretion, but that discretion is not unbounded or unfettered. *State v. Arizmendi*, 519 S.W.3d 143, 148 (Tex. Crim. App. 2017); *see State v. Zalman*, 400 S.W.3d 590, 593 (Tex. Crim. App. 2013). The test for abuse of discretion is not whether, in the opinion of the appellate court, the facts present a suitable case for the trial court's action, but rather, whether the trial court acted without reference to any guiding rules or principles. *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016). The bare fact that a trial court may decide a matter differently from an appellate court does not demonstrate an abuse of discretion. *Id*. Appellate courts view the evidence in the light most favorable to the trial court's ruling,

defer to the court's credibility choices, and assume that all reasonable fact findings in support of the ruling have been made. *Id*.

A trial court may not grant a motion for new trial simply because it believes that the defendant has received a raw deal. *Arizmendi*, 519 S.W.3d at 148. Granting a new trial for a "non-legal or legally invalid reason is an abuse of discretion." *Id*. (quoting *State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007)). There is generally no abuse of discretion in granting a new trial if the defendant (1) articulated a valid claim in the motion, (2) produced evidence or pointed to record evidence that substantiated the claim, and (3) showed prejudice under applicable harmless error standards. *Id*.; *see Herndon*, 215 S.W.3d at 907. An appellate court may reverse a trial court's decision on a motion for new trial when the trial court's decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Simpson*, 488 S.W.3d at 322.

B. Applicable Law and Discussion

A prosecutor has an obligation to disclose exculpatory evidence if it is material to the defendant's case. *See Brady v. Maryland*, 373 U.S. 83 (1963). A violation occurs when "a prosecutor 1) fails to disclose evidence, 2) which is favorable to the accused, 3) that creates a probability sufficient to undermine the confidence in the outcome of the proceeding." *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992) (en banc). In order to find reversible error under *Brady* and *United States v. Bagley*, a defendant must show that:

1. the State failed to disclose evidence, regardless of the prosecution's good or bad faith;

2. the withheld evidence is favorable to him;

3. the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.

Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (citing *Brady*, 373 U.S. at 83; *United States v. Bagley*, 473 U.S. 667 (1985)). "Under *Brady*, the defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure." *Id*. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id*. The "duty to disclose encompasses both impeachment and exculpatory evidence." *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) (en banc) (citing *Bagley*, 473 U.S. 667). "This duty also requires disclosure of favorable evidence only known to the police." *Id*.

"Consequently, prosecutors have a duty to learn of *Brady* evidence known to others acting on the state's behalf in a particular case." *Id*. (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)). "It is irrelevant whether suppression of the favorable evidence was done willfully or inadvertently." *Id*. "However, the state is not required to seek out exculpatory evidence independently on the appellant's behalf, or furnish appellant with exculpatory or mitigating evidence that is fully accessible to appellant from other sources." *Id*. at 407.

Couthren filed a motion for new trial alleging that the State did not provide exculpatory or mitigating evidence regarding Rios. Prior to the beginning of trial, the State had signed a motion to revoke Rios's probation on May 4, 2016. The order was signed by the trial court on May 17, 2016, and marked filed on May 24, 2016. Couthren alleges that Rios's credibility was a factor in the case and the notice of her pending motion to revoke

and capias for arrest "would have very likely changed the outcome of the verdict" because defense counsel could have explored Rios's possible bias and possibility of an agreement between the State and Rios. Couthren alleges by not disclosing the pending motion to revoke, the State violated its *Brady* duty. *Brady*, 373 U.S. at 83.

During a hearing on Couthren's motion for new trial, defense counsel testified that he had the opportunity to attack Rios's credibility with her criminal history and status on probation, her drug use and history, and could ask questions about her pending custody case with Couthren. Counsel also testified that he was not aware of any "deals" between the State and Rios with respect to her testimony in the Couthren trial. The State submitted affidavits from the two prosecutors from the Couthren case which stated they were not aware of the pending motion to revoke probation, even though one of the two had signed the motion. The prosecutor stated he was unaware that Rios was the same person involved in the motion to revoke. The trial court denied Couthren's motion for new trial stating that:

> I have in my file documentation that had the prosecution even attempted to look at the clerk's files and see if a motion had been filed they would not have found one at the time they were arguing the case because the testimony concluded an hour before the motion was even filed. So I don't think they've committed any kind of inappropriate conduct whatsoever and the motion for new trial will be denied.

The State does have a duty to learn of any *Brady* evidence known to others acting on the State's behalf, which would include the adult probation department. *See Harm*, 183 S.W.3d at 406. However, even if Couthren shows the State failed to disclose evidence and the evidence was favorable to him, he is unable to show that there is a reasonable probability the outcome of the trial would have been different. *See Hampton*, 86 S.W.3d at 612. Couthren's trial counsel testified that he did question Rios about her past criminal

history, her past drug use, and her current status on probation for a felony offense. Information regarding her prior conviction was before the jury and it is unlikely the jury would have changed their decision knowing a motion to revoke had been filed. Additionally, Couthren's counsel said he was unaware of any agreements between the State and Rios in exchange for her testimony and the State agreed there was no agreement in place. Couthren is unable to meet the standard required regarding *Brady* information. *See id*. We overrule Couthren's first issue.

III. DEADLY WEAPON FINDING

By his second issue, Couthren alleges the evidence was insufficient to support the jury's finding of a deadly weapon.

A. Standard of Review

The "*Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.); *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When evaluating a sufficiency challenge, the reviewing court views the evidence in the light most favorable to the verdict to determine whether a rational jury could find the defendant guilty beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899; *see Jackson*, 443 U.S. at 319. The jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and a reviewing court is not to substitute its judgment as to facts for that of the jury as shown through its verdict. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). When the reviewing court is faced with a record supporting contradicting inferences, the

court must presume that the jury resolved any such conflict in favor of the verdict, even if it is not explicitly stated in the record. *Id*.

B. Applicable Law and Discussion

Section 49.04 of the Texas Penal Code prohibits a person from operating a motor vehicle in a public place while in a state of intoxication. *See* TEX. PENAL CODE ANN. § 49.04. "Intoxicated" in Penal Code Section 49.01(2) is defined as either: "loss of faculties" or "per se" intoxication (i.e., .08 or more alcohol concentration). *See id*. "Deadly weapon," as defined in Penal Code Section 1.07(a)(17)(B), means "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *See id*. § 1.07(a)(17)(B). An affirmative deadly weapon finding has a negative impact on a defendant's eligibility for community supervision, parole, and mandatory supervision. *Sierra v. State*, 280 S.W.3d 250, 254 (Tex. Crim. App. 2009); *see Moore v. State*, 520 S.W.3d 906, 908 (Tex. Crim. App. 2017).

To justify a deadly weapon finding under Section 1.07(a)(17)(B), the State need not establish that the use or intended use of an implement actually *caused* death or serious bodily injury; only that "the manner" in which it was either used or intended to be used was "capable" of causing death or serious bodily injury. *See Moore*, 520 S.W.3d at 908 (emphasis in original). Nor does the plain language of the provision require that the actor actually intend death or serious bodily injury. *Id*.

In reviewing this case, we must decide whether, in viewing the evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that Couthren used or exhibited his vehicle as a deadly weapon when he was driving while intoxicated. *Sierra*, 280 S.W.3d at 255. We must determine if the manner in which

Couthren used his vehicle when driving while intoxicated was capable of causing death or serious bodily injury. *Id*. In making this determination, we divide this question into two parts: first, we evaluate the manner in which the defendant used the motor vehicle during the felony; and second, we consider whether, during the felony, the motor vehicle was capable of causing death or serious bodily injury. *Id*.

In evaluating the first question, we look to the evidence in the light most favorable to the prosecution. *See id*. at 256. Couthren was driving after consuming two Four Loko beverages, which were determined to have a greater alcohol content than a twelve ounce can of beer. Although the speed in which Couthren was driving is unknown, he testified that he was travelling around thirty miles per hour on a lightly traveled highway access road. We do not know the manner in which Couthren was driving seconds before hitting Elbrich, if Couthren applied his brakes prior to the accident, or for certain, if there were other cars on the road. However, the record shows Couthren had been drinking by his own admission and the testimony of the two officers. Couthren was unable to avoid striking Elbrich at a decent rate of speed, since Elbrich's head broke the windshield upon impact.

Elbrich testified at trial regarding the second question. Although he had no recollection of what had happened, he testified that he woke up in the hospital and suffered six broken ribs, a leg that was broken in two places, and a possible concussion and neck injury due to the collision.

We conclude that a rational fact-finder could infer that Couthren was using his motor vehicle in a manner that was capable of causing death or serious bodily injury regardless of whether he intended to do so. *See id*. It does not amount to speculation for us to conclude that there was more than "a hypothetical potential for danger if others had been

present." *Id*. (quoting *Mann v. State*, 13 S.W.3d at 92). Here, another person was present (Elbrich) and was seriously injured by Couthren. We conclude there was sufficient evidence to support the jury's finding of a deadly weapon. We overrule Couthren's second issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

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

Delivered and filed the
3rd day of May, 2018.