

No. _____

In the
Court of Criminal Appeals
At Austin

◆

No. 14-15-01078-CR

In the
Court of Appeals
For the
Fourteenth District of Texas
At Houston

◆

No. 2025101

In County Criminal Court at Law No. 1
Of Harris County, Texas

◆

JOSE OLIVA

Appellant

V.

THE STATE OF TEXAS

Appellee

◆

STATE'S PETITION FOR DISCRETIONARY REVIEW
◆

KIM OGG
District Attorney
Harris County, Texas

PATRICIA McLEAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Tel.: 713-274-5826
FAX No.: 713-755-5809
Counsel for the State of Texas

ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 68.4(d), the State requests oral argument because oral argument would assist this Court to resolve the conflict in authority regarding proper treatment of prior DWI convictions in DWI-second-offender cases.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 68.4(a), a complete list of the names of all interested parties is provided below.

Counsel for the State:

Kim Ogg—District Attorney of Harris County

- 1201 Franklin, Ste. 600, Houston, TX, 77002

Patricia McLean—Assistant District Attorney on appeal

- 1201 Franklin, Ste. 600, Houston, TX, 77002

Steve Walsh—Assistant District Attorney at trial

- 1201 Franklin, Ste. 600, Houston, TX, 77002

Catina Haynes—Assistant District Attorney at trial

- 1201 Franklin, Ste. 600, Houston, TX, 77002

Appellant or Criminal Defendant:

Jose Oliva

Counsel for Appellant:

Ted Wood—Defense counsel on appeal

- 1201 Franklin, 13th floor, Houston, TX 77002

Lizet Diaz—Defense counsel at trial

- 3601 Navigation Blvd., Houston, TX 77003

Celene Beck—Defense counsel at trial

- 3601 Navigation Blvd., Houston, TX 77003

Trial Judge:

Honorable Paula Goodhart

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT	ii
IDENTIFICATION OF THE PARTIES	iii
INDEX OF AUTHORITIES	v
STATEMENT OF THE CASE.....	1
STATEMENT OF THE PROCEDURAL HISTORY	1
QUESTION PRESENTED FOR REVIEW	2
1) In DWI-second-offender cases, is a prior DWI conviction an offense element or a punishment enhancement?	2
I. Reason for granting review	2
ARGUMENT	2
I. Relevant Facts.....	2
II. Appellate courts are in conflict as to whether prior DWI convictions are offense elements or punishment enhancements in DWI-second-offender cases.....	5
A. Offense Elements and Punishment Enhancements	5
B. Texas Penal Code Section 49.09	7
C. Authority supporting a finding that prior DWI convictions are punishment enhancements	9
D. Authority supporting a finding that prior DWI convictions are offense elements.....	11
E. Authority leaving the issue unaddressed.....	14
PRAYER FOR RELIEF	18
CERTIFICATE OF SERVICE	19
CERTIFICATE OF COMPLIANCE	19

INDEX OF AUTHORITIES

CASES

<i>Blank v. State</i> , 172 S.W.3d 673 (Tex. App.—San Antonio 2005, no pet.).....	10
<i>Brooks v. State</i> , 957 S.W.2d 30 (Tex. Crim. App. 1997).....	6
<i>Byrd v. State</i> , No. 14-96-00572-CR, 1997 WL 167152 (Tex. App.—Houston [14th Dist.] April 10, 1997, pet. ref'd) (not designated for publication).....	10
<i>Calton v. State</i> , 176 S.W.3d 231 (Tex. Crim. App. 2005).....	6, 8, 12, 13, 17
<i>Dryman v. State</i> , No. 05-15-00078-CR, 2015 WL 8044124 (Tex. App.—Dallas Dec. 7, 2015, pet. ref'd) (mem. op., not designated for publication).....	12
<i>Ex parte Benson</i> , 459 S.W.3d 67 (Tex. Crim. App. 2015).....	6, 9, 11
<i>Ex parte Reinke</i> , 370 S.W.3d 387 (Tex. Crim. App. 2012).....	8
<i>Flowers v. State</i> , 220 S.W.3d 919 (Tex. Crim. App. 2007).....	14
<i>Ford v. State</i> , 334 S.W.3d 230 (Tex. Crim. App. 2011).....	14
<i>Gibson v. State</i> , 995 S.W.2d 693 (Tex. Crim. App. 1999).....	8, 12
<i>Haas v. State</i> , 494 S.W.3d 819 (Tex. App.—Houston [14th Dist. 2016, no pet.).....	15, 16
<i>Holley v. State</i> , 167 S.W.3d 546 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).....	6

<i>Love v. State</i> , 833 S.W.2d 264 (Tex. App.—San Antonio 1992, pet. ref’d).....	10
<i>Mapes v. State</i> , 187 S.W.3d 655 (Tex. App.—Houston [14th Dist.] 2006, pet. ref’d).....	8, 11, 17
<i>Navarro v. State</i> , 469 S.W.3d 687 (Tex. App.—Houston [14th Dist.] 2015, pet. ref’d).....	14, 16
<i>Oliva v. State</i> , No. 14-15-01078-CR, 2017 WL 1155125 (Tex. App.—Houston [14th Dist.] Mar. 28, 2017, pet. filed)	1, 8
<i>Pratte v. State</i> , No. 03-08-00258-CR, 2008 WL 5423193 (Tex. App.—Austin Dec. 31, 2008, no pet.) (mem. op., not designated for publication)	16
<i>Prihoda v. State</i> , 352 S.W.3d 796 (Tex. App.—San Antonio 2011, pet. ref’d)	10
<i>Rizo v. State</i> , 963 S.W.2d 137 (Tex. App.—Eastland 1998, no pet.)	15, 16
<i>Schmutz v. State</i> , 440 S.W.3d 29 (Tex. Crim. App. 2014).....	5
<i>Seeker v. State</i> , 186 S.W.3d 36 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d)	15
<i>State v. Cooley</i> , 401 S.W.3d 748 (Tex. App.—Houston [14th Dist.] 2013, no pet.).....	9
<i>State v. Morgan</i> , 160 S.W.3d 1 (Tex. Crim. App. 2004).....	14, 15
<i>State v. Webb</i> , 12 S.W.3d 808 (Tex. Crim. App. 2000).....	14
<i>Vasquez v. State</i> , No. 13-11-00188-CR, 2012 WL 3612495 (Tex. App.—Corpus Christi Aug. 23, 2012, no pet.) (mem. op., not designated for publication).....	16

<i>Wood v. State</i> , 260 S.W.3d 146 (Tex. App.—Houston [1st Dist.] 2008, no pet.)	9
--	---

STATUTES

TEX. CODE CRIM. PROC. ANN. art. 21.03 (West 2015).....	6
TEX. CODE CRIM. PROC. ANN. art. 36.01 (West 2015).....	6
TEX. CODE CRIM. PROC. ANN. Art. 38.03 (West 2015).....	5
TEX. PENAL CODE ANN. § 1.07 (West 2015)	5
TEX. PENAL CODE ANN. § 12.21 (West 2015)	6
TEX. PENAL CODE ANN. § 12.22 (West 2015)	7
TEX. PENAL CODE ANN. § 12.43 (West 2015)	7
TEX. PENAL CODE ANN. § 38.04 (West 2001)	13
TEX. PENAL CODE ANN. § 49.04 (West 2015)	2, 7, 16
TEX. PENAL CODE ANN. § 49.09 (West 2015)	2, 7, 8, 16

OTHER AUTHORITIES

Act of May 18, 1983, 68th Leg., R.S., ch. 303 § 3, art. 6701/-1, 1983 Tex. Gen. Laws 1568, 1575-76	11
Act of May 24, 1995, 74th Leg. R.S., ch. 318 § 63, 1995 Tex. Sess. Law Serv. 2734, 2755 (West)	11
Act of May 8, 1993, 73rd Leg. R.S., ch. 900 § 1.15, 1993 Tex. Sess. Law Serv. 3589, 3707 (West)	11

RULES

TEX. R. APP. P. 39.7	ii
TEX. R. APP. P. 66.3	2
TEX. R. APP. P. 68.1	2

TEX. R. APP. P. 68.4ii, iii

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

Appellant was charged by information with driving while intoxicated, and the information also alleged appellant had a prior driving-while-intoxicated (DWI) conviction. (CR – 8) He was convicted and sentenced by a jury to 180 days in the Harris County Jail. (CR – 114-15) Appellant timely filed notice of appeal and the trial court certified his right of appeal. (CR – 117, 123-24) In two issues on appeal, appellant claimed 1) the evidence was insufficient to show he operated a motor vehicle while intoxicated, and 2) the evidence was insufficient to support his Class A misdemeanor DWI conviction. (Appellant’s Brief – 11, 21-22, 32-33, 39, 51-54, 59-64)

STATEMENT OF THE PROCEDURAL HISTORY

On March 28, 2017, a panel of the Fourteenth Court of Appeals issued a published opinion reversing appellant’s conviction and remanding the case for the trial court to reform the judgment to reflect a conviction for the lesser-included offense of Class B misdemeanor DWI and to conduct a new punishment hearing for the Class B misdemeanor conviction. *Oliva v. State*, No. 14-15-01078-CR, 2017 WL 1155125 (Tex. App.—Houston [14th Dist.] Mar. 28, 2017, pet. filed). A motion for rehearing was not filed.

QUESTION PRESENTED FOR REVIEW

- 1) In DWI-second-offender cases, is a prior DWI conviction an offense element or a punishment enhancement?¹

I. Reason for granting review

Although the State is not challenging the decision of the Fourteenth Court of Appeals in this case, this Court should grant review of this decision in order to address and resolve the substantial conflict among and within Texas appellate courts regarding whether a prior DWI conviction is an element or a punishment enhancement in DWI-second-offender cases. TEX. R. APP. P. 66.3(a), 68.1.

ARGUMENT

I. Relevant Facts

Houston Police Department (HPD) Officers Aldana and Habukiha were on patrol in the early morning hours of May 10, 2015, when they received a service call of a suspicious person asleep in a vehicle in the street. (RRIII – 11, 24-25, 27, 32-33) They arrived at the scene within a few minutes and found a vehicle parked in the street’s eastbound lane. (RRIII – 12, 14, 25, 28, 32-34, 64-68; RRIV – 35-38) The vehicle was in park, the engine was running, and the key was in the

¹ “DWI-second-offender” refers to the Class A misdemeanor DWI offense in which the offender also has one prior DWI conviction. TEX. PENAL CODE ANN. § 49.09(a) (West 2015). Because more than one Class A DWI offense exists in the Penal Code, the State will refer to the relevant Class A misdemeanor DWI offense as “DWI-second-offender” for clarity and brevity. See TEX. PENAL CODE ANN. § 49.04(d) (West 2015).

ignition. (RRIII – 16, 23, 25, 35) The windows were down and no emergency lights or blinkers were activated. (RRIII – 16-18)

Appellant was alone in the vehicle, asleep while “kind of slouched over the driver’s seat,” and was not wearing a seatbelt. (RRIII – 16-17, 23, 33, 35, 36) Officer Habukiha did not remember whether appellant’s feet were on the pedals. (RRIII – 68) One open beer container was in the cup holder. (RRIII – 36) Appellant did not initially respond when officers tried to wake him and, once he did wake up, he fell out of the car when the officers opened the door. (RRIII – 18-20) He displayed various signs of intoxication, including six clues on the horizontal-gaze-nystagmus (HGN) test,² and his breath-test results were .184 and .183. (RRIII – 7, 17-23, 34, 36-48, 54, 66, 68; RRIV – 17-18)

Appellant was charged with driving while intoxicated and the information also included an allegation of a prior DWI conviction in a separate paragraph. (CR – 8) During the guilt/innocence phase of trial, no mention was made of and no evidence was presented about appellant’s prior DWI conviction. The guilt/innocence jury charge did not mention the prior-DWI-conviction allegation. (See CR – 105-108) Appellant was convicted by the jury. (RRIV – 51)

² Officer Habukiha did not check for equal tracking of appellant’s eyes and agreed that his failure to do so could have invalidated the test. (RRIII – 42-43, 58-59, 61-62)

In the punishment phase, appellant pled “not true” to the prior-DWI-conviction allegation and evidence of the prior conviction was presented. (RRV – 5-6, 8-21) The punishment jury charge instructed, in pertinent part, as follows:

Now . . . if you find from the evidence beyond a reasonable doubt that the Defendant, JOSE OLIVA, was convicted on JUNE 4, 2003 in Cause Number 1162140, in the COUNTY CRIMINAL COURT OF LAW #12 of Harris County, Texas, for the offense of driving while intoxicated, and that said conviction was a final conviction prior to the commission of the offense for which you have found the Defendant guilty, then you must so find and assess the Defendant’s punishment at confinement in county jail for any term of not less than 30 days or more than one year. In addition to confinement, you may assess a fine not to exceed four thousand (\$4,000) dollars.

However, if you do not find from the evidence beyond a reasonable doubt that the Defendant is a repeat offender, you must assess his punishment at confinement in county jail for any term of not less than 72 hours or more than 180 days. In addition to confinement, you may assess a fine not to exceed two thousand (\$2,000) dollars.

(CR – 109)

The punishment verdict sheet listed alternative findings, depending on whether or not the jury believed appellant was a repeat DWI offender. (CR – 112-13) The jury found that appellant had a prior DWI conviction and assessed a 180-day jail sentence. (CR – 112) The judgment stated his conviction was for “DWI 2nd” and designated the offense as a Class A misdemeanor. (CR – 114) The judgment also noted that a “not true” plea was entered for the “Plea to 1st

Enhancement Paragraph,” and a “true” finding was entered for the “Findings on 1st Enhancement Paragraph.” (CR – 114)

Considering the complete trial procedure, the jury charges, and appellant’s judgment, it appears the trial in this case was conducted pursuant to the understanding that the prior DWI conviction was a punishment enhancement.³ (See CR – 105-109, 112-15; RRV – 8-21)

II. Appellate courts are in conflict as to whether prior DWI convictions are offense elements or punishment enhancements in DWI-second-offender cases.

A. Offense Elements and Punishment Enhancements

No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. TEX. CODE CRIM. PROC. ANN. art. 38.03 (West 2015). An offense element is defined as: 1) the forbidden conduct, 2) the required culpability, 3) any required result, and 4) the negation of any exception to the offense. TEX. PENAL CODE ANN. § 1.07(22) (West 2015); see *Schmutz v. State*, 440 S.W.3d 29, 34 (Tex. Crim. App. 2014) (“[a]n ‘element’ is a fact that is legally required for a fact finder to convict a person of a substantive offense”). An indictment or information must by direct and positive averments allege all of the constituent elements of the offense sought to be charged. *Holley v.*

³ Any argument that appellant was charged only with a Class B DWI and enhanced pursuant to Section 12.43(b) with another Class B misdemeanor that just happened to be a DWI would be

State, 167 S.W.3d 546, 548 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d); *see* TEX. CODE CRIM. PROC. ANN. art. 21.03 (West 2015) (“[e]verything should be stated in an indictment which is necessary to be proved”). To sustain a conviction, all the elements of the offense must be proved at the guilt/innocence stage of trial. *Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005).

By contrast, prior convictions used as punishment enhancements must be pled in some form, but they need not be pled in an indictment. *Brooks v. State*, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997). When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting those convictions shall not be read until the hearing on punishment is held as provided in Article 37.07. TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1) (West 2015); *see also Ex parte Benson*, 459 S.W.3d 67, 87-88 (Tex. Crim. App. 2015) (“jurisdictional exception in Article 36.01 appears to be tacit recognition that prior convictions that raise offense to felony status are to be treated as elements”).

Class A misdemeanors are punished by: 1) a fine not to exceed \$4,000, and/or 2) confinement in jail for a term not to exceed one year. TEX. PENAL CODE ANN. § 12.21 (West 2015). Punishment for Class B misdemeanors is: 1) a fine not to exceed \$2,000, and/or 2) confinement in jail for a term not to exceed 180 days.

disingenuous in light of the trial court’s punishment jury charge and appellant’s judgment.

Id. at § 12.22. Under the general punishment-enhancement scheme, a Class A misdemeanor enhanced with a prior conviction for a Class A misdemeanor or felony raises the minimum jail sentence to 90 days, but the maximum sentence is still one year. TEX. PENAL CODE ANN. § 12.43(a) (West 2015). A Class B misdemeanor enhanced with a prior conviction for a Class A or B misdemeanor or felony raises the minimum jail sentence to 30 days, but the maximum sentence is still 180 days. *Id.* at § 12.43(b) (West 2015).

B. Texas Penal Code Section 49.09

Section 49.04 of the Texas Penal Code dictates:

- (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
- (b) Except as provided by Subsections (c) [regarding an open container in the vehicle] and (d) [regarding a .15 alcohol concentration] and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

TEX. PENAL CODE ANN. § 49.04(a)-(b) (West 2015).

Section 49.09 of the Penal Code, titled “Enhanced Offenses and Penalties,” states, in relevant part, as follows:

- (a) Except as provided by Subsection (b),⁴ an offense under Section 49.04 . . . is a Class A misdemeanor,

(See CR – 8, 109, 114-15)

⁴ Subsection (b) dictates when a DWI offense is a third-degree, second-degree, or first-degree felony. *Id.* at § 49.09(b)-(b-4) (West 2015). A DWI offense can become a third-degree

with a minimum term of confinement of 30 days, if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated

TEX. PENAL CODE ANN. § 49.09(a) (West 2015) ⁵; *see also id.* at § 49.09(g) (“[a] conviction may be used for purposes of enhancement under this section or enhancement under Subchapter D, Chapter 12, but not under both this section and Subchapter D”).

In this case, after considering the plain language of Texas Penal Code Section 49.09(a) and certain case law, the Fourteenth Court of Appeals held that a prior DWI conviction is an element of the offense of DWI-second-offender. *Oliva*, 2017 WL 1155125 at *4-5 (citing *Ex parte Reinke*, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012); *Calton*, 176 S.W.3d at 233; *Gibson v. State*, 995 S.W.2d 693, 694-97 (Tex. Crim. App. 1999); *Mapes v. State*, 187 S.W.3d 655, 659-60 (Tex. App.—Houston [14th Dist.] 2006, pet. ref’d)). Although the State is not challenging the appellate court’s holding in this petition for discretionary review, because there is a conflict in appellate authority regarding whether a prior DWI conviction is an offense element or punishment enhancement in DWI-second-offender cases, the State requests that this Court resolve this conflict in order to

felony if it is shown on the trial of the offense that the person has been previously convicted twice before for any intoxication-related offense. *Id.* at § 49.09(b)(2).

promote uniform treatment of DWI-second-offender cases in the Texas trial and appellate courts.

C. Authority supporting a finding that prior DWI convictions are punishment enhancements

Appellate courts that have found or have appeared to interpret a prior DWI conviction as a punishment enhancement in DWI-second-offender cases include the First and Fourteenth Courts of Appeals, and this Court. *See Ex parte Benson*, 459 S.W.3d at 88 (noting Section 49.09's title may suggest that, at its inception, it created two sorts of enhancement: 1) offense enhancement, by the two-prior-convictions provision, which raises offense to felony and was jurisdictional, and 2) penalty enhancement, by the one-prior-conviction provision, which merely raised the offense to a higher misdemeanor grade and was not jurisdictional); *State v. Cooley*, 401 S.W.3d 748, 749-51 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (while finding trial court's fine-only sentence in DWI-second-offender case was illegally lenient, appellate court appeared to interpret 49.09(a) as a punishment-enhancement statute specific to the DWI context); *Wood v. State*, 260 S.W.3d 146, 147-49 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (defense counsel was ineffective by allowing State to introduce evidence of defendant's prior DWI conviction during guilt/innocence phase of DWI-second-offender trial in violation

⁵ Although Section 49.09 describes several intoxication-related offenses, because DWI is the only Chapter-49 offense involved in this case, the State will refer only to DWI in this petition

of Texas Code of Criminal Procedure Article 36.01(a)(1), noting State admitted reading enhancement paragraph to jury was improper).

Other opinions—which rely directly or indirectly upon interpretation of Revised Civil Statute Article 6701/-1, Chapter 49’s precursor statute—have also stated that a prior DWI conviction is a punishment enhancement. *See Prihoda v. State*, 352 S.W.3d 796, 806 (Tex. App.—San Antonio 2011, pet. ref’d) (prior DWI conviction is enhancement provision, not an element of a separate offense); *Blank v. State*, 172 S.W.3d 673, 676 (Tex. App.—San Antonio 2005, no pet.) (same); *Love v. State*, 833 S.W.2d 264, 265-66 (Tex. App.—San Antonio 1992, pet. ref’d) (though error was harmless, defendant’s conviction under article 6701/-1(d) was a DWI conviction, subject to enhanced punishment because of an earlier DWI conviction, and prior conviction was not offense element); *see also Byrd v. State*, No. 14-96-00572-CR, 1997 WL 167152, at *1-2 (Tex. App.—Houston [14th Dist.] April 10, 1997, pet. ref’d) (not designated for publication) (defendant’s sentence was within punishment range for unenhanced DWI offense where judgment showed no plea or finding regarding prior-DWI-conviction enhancement, noting *Love* holding that article 6701/-1(d) provides enhancement of punishment provision, not a separate offense).⁶

for discretionary review.

⁶ The *Prihoda* opinion cites to *Blank*, while the *Blank* and *Byrd* opinions cite to *Love*. *See Prihoda*, 352 S.W.3d at 806; *Blank*, 172 S.W.3d at 676; *Byrd*, 1997 WL 167152 at *1.

However, it is important to note that Revised Civil Statute Article 6701/-1, did not specifically label DWI-second-offender cases as Class A misdemeanors—contrary to Texas Penal Code Section 49.09(a)—but instead, read in relevant part:

(d) If it is shown on the trial of an offense under this article that the person has previously been convicted one time of an offense under this article, the offense is punishable by: (1) a fine not less than \$300 or more than \$2,000; and (2) confinement in jail for a term of not less than 15 days or more than two years.

Act of May 18, 1983, 68th Leg., R.S., ch. 303 § 3, art. 6701/-1, 1983 Tex. Gen. Laws 1568, 1575-76, *repealed by* Act of May 8, 1993, 73rd Leg. R.S., ch. 900 § 1.15, 1993 Tex. Sess. Law Serv. 3589, 3707 (West); Act of May 24, 1995, 74th Leg. R.S., ch. 318 § 63, 1995 Tex. Sess. Law Serv. 2734, 2755 (West); *see also Ex parte Benson*, 459 S.W.3d at 84-87 (examining legislative and case-law history regarding DWI offenses in evaluating whether intoxication assault and felony DWI are the same offense for double jeopardy purposes when arising out of same transaction).

D. Authority supporting a finding that prior DWI convictions are offense elements

Appellate courts that have found or have appeared to interpret prior DWI convictions as elements of DWI-second-offender cases include the Fifth and Fourteenth Courts of Appeals, and this Court. *See Mapes*, 187 S.W.3d at 658-61 (defendant's prior void DWI-second-offender conviction was a Class A

misdemeanor, stating “one prior DWI is a required element of the offense of Class A misdemeanor DWI under Section 49.09(a), to which the punishment enhancements under Sections 12.42 and 12.43 do not apply”); *see also Gibson*, 995 S.W.2d at 694-97 (two prior DWI convictions arising from single act could be used to enhance defendant’s current DWI to felony, stating, under Section 49.09(b), prior intoxication offenses are elements of felony DWI and Section 49.09(b) should not be viewed as punishment-enhancement statute similar to Section 12.43(d)); *Dryman v. State*, No. 05-15-00078-CR, 2015 WL 8044124, at *2 (Tex. App.—Dallas Dec. 7, 2015, pet. ref’d) (mem. op., not designated for publication) (noting prior conviction is an offense element because the “prior DWI conviction defines the new offense as a Class A misdemeanor and therefore enhances the offense, rather than the punishment”).

Although not directly related to DWI-second-offender cases, this Court’s opinion in *Calton v. State* is instructive as to the treatment of non-jurisdictional prior convictions that change the degree of an offense. *See* 176 S.W.3d 231. The *Calton* Court addressed whether, under a former version of Texas Penal Code Section 38.04, a defendant’s prior evading-arrest conviction should have been proven in the guilt/innocence phase of his felony evading-arrest trial. *See id.* at 232. The at-issue evading statute in *Calton* dictated that an actor who used a vehicle to evade police 1) committed a state-jail felony if the actor had no previous

evading convictions, or 2) committed a third-degree felony if the actor had been previously been convicted of evading. *See* TEX. PENAL CODE ANN. §§ 38.04(a), (b) (West 2001). The *Calton* Court held that, under the statute’s plain language, a prior evading conviction was an element of the defendant’s current evading offense. *Id.* at 233-34.

Although court jurisdiction was not an issue in *Calton*, the Court stated, “whether something is an element of an offense is a completely separate inquiry from whether it is jurisdictionally required . . . [and] jurisdiction is not an element of an offense.” *Id.* at 234-35. This Court also stated that prior convictions must be proven at the guilt/innocence stage if they are elements of the offense, whether or not they are jurisdictional, and if prior convictions are alleged for enhancement purposes, they are not offense elements. *Id.* at 235. The Court further clarified:

A prior conviction alleged for enhancement is not really a component element of the primary offense. Instead, it is a historical fact to show the persistence of the accused, and the futility of ordinary measures of punishment as related to him. An enhancement increases the punishment range to a certain range above that ordinarily prescribed for the indicted crime. It does not change the offense, or the degree of the offense, of conviction. There can be no enhancement until a person is first convicted of an offense of a certain degree.

Id. at 233-34 (internal quotations omitted).

Other authority can be considered to support a finding that a prior DWI conviction is an element of DWI-second-offender cases. *See State v. Webb*, 12

S.W.3d 808, 811-12 n.2 (Tex. Crim. App. 2000) (discussing, in controlled-substance case, statutory text differences between enhanced offense and enhanced punishment); *compare with Ford v. State*, 334 S.W.3d 230, 235 (Tex. Crim. App. 2011) (under Article 62.102(c)'s plain language, defendant's prior failure-to-register conviction did not increase the grade of his current offense, but increased only punishment level that applied to the primary, third-degree-felony offense), *and Navarro v. State*, 469 S.W.3d 687, 696 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (.15 alcohol allegation is an element of Class A misdemeanor DWI, and not a “basis for enhancement” because “this conversion represents a change in the degree of the offense, rather than just an enlargement of the punishment range for a Class B misdemeanor”).

E. Authority leaving the issue unaddressed

Finally, some courts, including this Court, have described trial-court treatment of prior DWI convictions in DWI-second-offender cases without addressing whether such treatment was correct. *See Flowers v. State*, 220 S.W.3d 919 (Tex. Crim. App. 2007) (examining sufficiency of punishment-phase evidence offered to prove defendant had prior DWI conviction “and thus prove [the] enhancement allegation”); *State v. Morgan*, 160 S.W.3d 1 (Tex. Crim. App. 2004) (finding no jurisdiction over State's appeal from trial judge's ruling that he would treat defendant's DWI information—which also alleged a prior DWI conviction in

a separate paragraph—as charging a Class B misdemeanor with a Section 12.43 punishment enhancement, rather than a Section 49.09 Class A misdemeanor)⁷; *Seeker v. State*, 186 S.W.3d 36, 37-38 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d) (evaluating whether trial court considered incorrect punishment range where prior DWI conviction was presented in sentencing hearing and trial court found allegation of prior conviction not true)⁸; *see also Haas v. State*, 494 S.W.3d 819, 820-21 (Tex. App.—Houston [14th Dist. 2016, no pet.) (addressing punishment-evidence sufficiency where prior DWI conviction was treated as punishment enhancement after information was amended to include .15 blood-alcohol-concentration allegation)⁹; *Rizo v. State*, 963 S.W.2d 137, 138-39 (Tex. App.—Eastland 1998, no pet.) (addressing whether prior DWI conviction is “final” for enhancement purposes if sentence has not been imposed, under “special

⁷ While declining to resolve the substantive issue, this Court disagreed with the State that the trial judge’s order effectively terminated the prosecution of the Class A misdemeanor, noting that: 1) no matter how the Court were to rule, the prosecution would proceed, 2) the trial judge’s ruling “forces the State to alter the information before trial can proceed in the manner in which the State chooses,” 3) the trial court’s order affected only the possible punishment range, and 4) Section 49.09 is one of two Penal Code statutes “providing for potentially increased punishment in the case of a person’s second offense of driving while intoxicated.” *Morgan*, 160 S.W.3d at 4-5.

⁸ The First Court of Appeals also noted the defendant “had been charged with a Class A misdemeanor and thus could be characterized as being considered for a Class A misdemeanor, even though the trial court was not going to assess [his] punishment as a Class A misdemeanor, having found the evidence insufficient to prove the enhancement paragraph that alleged the prior DWI conviction.” *Seeker*, 186 S.W.3d at 38.

⁹ Although a .15-alcohol-concentration allegation creates a Class A DWI misdemeanor offense, the issue of whether the prior DWI conviction would have been treated as a punishment enhancement or an offense element, had the .15 allegation not been later included, was

enhancement statute,” Section 49.09)¹⁰; *Pratte v. State*, No. 03-08-00258-CR, 2008 WL 5423193, at *1 n.1 (Tex. App.—Austin Dec. 31, 2008, no pet.) (mem. op., not designated for publication) (noting that, considering Section 49.09(a)’s title, because DWI-second is a Class A misdemeanor, prior-conviction allegation was necessary to establish Class A misdemeanor offense and is arguably an element, but also noting no jurisdictional difference between Class A and Class B misdemeanors and Article 36.01(a)(1)’s seeming bar of reading prior-conviction portion of information); *see also generally Vasquez v. State*, No. 13-11-00188-CR, 2012 WL 3612495, at *1 (Tex. App.—Corpus Christi Aug. 23, 2012, no pet.) (mem. op., not designated for publication) (while addressing other legal issues, opinion’s description of trial procedure indicates that prior DWI conviction was treated as punishment enhancement).

Section 49.09(a)’s plain language directs that the existence of a prior DWI conviction changes not only the punishment range, but also raises the offense level of a DWI from a Class B misdemeanor to a Class A misdemeanor. TEX. PENAL CODE ANN. § 49.09(a) (West 2015). Therefore, because the prior DWI conviction changes the level of offense, the Fourteenth Court of Appeals was correct in

unaddressed by the appellate court. *See* TEX. PENAL CODE ANN. § 49.04(d) (West 2015); *Navarro*, 469 S.W.3d at 696; *Haas*, 494 S.W.3d at 820-21, 822 n.1.

¹⁰ Although unclear in the opinion at which trial phase the prior conviction was proven, it appears that the appellate court may have considered Section 49.09 to be a punishment-enhancement statute, specific to repeat intoxication offenses. *See id.* at 138-39.

holding that a prior DWI conviction is an element of Class A DWI-second-offender misdemeanors. *See Calton*, 176 S.W.3d at 233-34; *Mapes*, 187 S.W.3d at 659-60.

However, in light of the substantial conflict in authority on this issue, the State respectfully requests that this Court address and resolve the conflict by determining whether a prior DWI conviction is an offense element or a punishment enhancement in DWI-second-offender cases. This request is made in an effort to promote uniform treatment of DWI-second-offender cases in trial courts and appellate courts across the State.

PRAYER FOR RELIEF

It is respectfully requested that this petition be granted and the lower appellate court's decision be 1) affirmed if this Court determines a prior DWI conviction is an element of DWI-second-offender cases, or 2) reversed if this Court determines a prior DWI conviction is a punishment enhancement of DWI-second-offender cases.

KIM OGG
District Attorney
Harris County, Texas

/s/ Patricia McLean
PATRICIA MCLEAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 274-5826
TBC No. 24081687
mclean_patricia@dao.hctx.net

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent to the following email addresses via e-filing:

Ted Wood
Attorney for Appellant
ted.wood@pdo.hctx.net

Stacey Soule
State Prosecuting Attorney
information@spa.texas.gov

/s/ Patricia McLean
PATRICIA MCLEAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 274-5826
TBC No. 24081687

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this computer-generated document has a word count of 3,954 words, based upon the representation provided by the word processing program that was used to create the document.

/s/ Patricia McLean
PATRICIA MCLEAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 274-5826
TBC No. 24081687

Date: 4/27/2017

APPENDIX A – *Oliva v. State* opinion

Reversed and Remanded and Opinion filed March 28, 2017.



In The
Fourteenth Court of Appeals

NO. 14-15-01078-CR

JOSE OLIVA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Ct at Law No 1
Harris County, Texas
Trial Court Cause No. 2025101**

O P I N I O N

Appellant Jose Oliva appeals his conviction for the Class A misdemeanor offense of driving while intoxicated (DWI). *See* Tex. Penal Code § 49.09(a) (West 2015). Appellant argues, in two issues, that the evidence is legally insufficient to prove that he: (1) has a prior DWI conviction, and (2) operated a vehicle while intoxicated. We hold that a prior DWI conviction¹ is an element of the charged offense. Because there is

¹ Although Section 49.09 includes several intoxication-related offenses in addition to DWI, we will

sufficient evidence that appellant operated a vehicle while intoxicated, but no evidence during the guilt-innocence phase of the trial that appellant has a prior DWI conviction, we reverse the conviction and remand to the trial court with instructions to reform the judgment to reflect a conviction for the lesser-included offense of Class B misdemeanor DWI, and to conduct a new punishment hearing for the Class B misdemeanor conviction. *See id.* § 49.04(a),(b) (West 2015).

I. BACKGROUND

The 3400 block of Hadley Street is a two-lane public roadway in Houston, Harris County, Texas. The street runs east and west. The street has no lane markings. Located on either side of Hadley Street are homes. At about 1:00 in the morning on May 10, 2015, Houston police officers Aldana and Habukiha responded to a call regarding a suspicious person on Hadley Street. Within a few minutes of the call, officers arrived at the scene and saw a parked car. At trial, Habukiha testified that the car was not legally, parallel parked beside the street curb. Although Habukiha could not recall how far away from the curb the car was, he testified that the car was parked in a lane of moving traffic.

The officers approached the car. The engine was running and the key was in the ignition. The car's emergency lights were not activated. The officers found appellant asleep, slouched, and in the driver's seat. He was not wearing a seatbelt, a shirt, or shoes. Habukiha did not remember whether appellant's feet were on the pedals. The car's cup holder had one open container of beer.

The officers tried to wake appellant, but initially he was unresponsive. When the officers opened the car door, appellant woke up and fell out onto the street. The officers detected a strong odor of alcohol in the car and on appellant's breath. Appellant slurred

refer only to DWI for the sake of brevity and because DWI is the only intoxication-related offense applicable to this case.

his speech and had glassy eyes and poor balance. Appellant showed six clues on the horizontal-gaze-nystagmus test. His breath-test results were over the legal limit of intoxication (.08) at .184 and .183 at 2:18 a.m. and 2:21 a.m., respectively. The technical supervisor with the Texas Department of Public Safety's Breath Alcohol Testing Program testified that "using the average of .02 per standard drink," it would take "roughly about nine drinks" for a person to reach appellant's alcohol-concentration level.

Appellant was charged by information with driving while intoxicated. The information contained two paragraphs, the second of which alleged a prior DWI conviction. Appellant pleaded not guilty. During the guilt-innocence phase of trial, the State referred only to the DWI offense that occurred in May 2015 on Hadley Street. The State did not attempt to prove that appellant had a prior DWI conviction, and no evidence was offered of it. Additionally, the trial court's charge to the jury made no mention of appellant's prior DWI conviction.² The jury convicted appellant of DWI. During the punishment phase of the trial, the state introduced evidence that appellant previously had been convicted of DWI. The jury found that the appellant had a prior DWI conviction and assessed his punishment at 180 days' confinement. The trial court's written judgment reflected that appellant was convicted of "DWI 2ND" and the degree of offense was labeled as a "Class A Misdemeanor."

² The relevant portion of the charge reads:

Therefore, if you believe from the evidence beyond a reasonable doubt that the Defendant, JOSE OLIVA, on or about the 10th day of May, 2015, in Harris County, Texas, did while intoxicated, namely, not having the normal use of the Defendant's mental or physical faculties by the reason of the introduction of alcohol into the Defendant's body, operate a motor vehicle in a public place, or if you believe from the evidence beyond a reasonable doubt that the Defendant, JOSE OLIVA, on or about the 10th day of May, 2015, in Harris County, Texas, did then and there unlawfully while intoxicated, namely, having an alcohol concentration of at least 0.08 in the Defendant's breath, operate a motor vehicle in a public place, you will find the Defendant guilty.

II. STANDARD OF REVIEW

In reviewing legal sufficiency in a criminal case, we view all the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). “This standard tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts.” *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 198 (2015). We consider direct and circumstantial, as well as properly and improperly admitted, evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Circumstantial evidence alone may be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to a defendant’s guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id.* The State is not required to disprove every conceivable alternative to a defendant’s guilt. *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). When the record supports conflicting inferences, appellate courts presume the factfinder resolved the conflicts in favor of the verdict, and defer to that determination. *Murray*, 457 S.W.3d at 449.

III. ANALYSIS

Appellant’s first issue has two subparts. Appellant argues that a prior DWI conviction is not a punishment enhancement for a Class B misdemeanor; rather, it is an element of the offense of Class A misdemeanor DWI under subsection 49.09(a) that must be proven during the guilt-innocence phase of a jury trial. Next, appellant argues that because no evidence showed, during the guilt-innocence phase of the trial, that appellant had a prior DWI conviction, the evidence is legally insufficient to support

appellant's conviction. The State asserts that there is a conflict in authority³ regarding appellant's first subpart but concedes that during the guilt-innocence phase of the trial, the State presented no evidence proving appellant had a prior DWI conviction.

A. A prior DWI conviction is an element of a Class A misdemeanor DWI offense.

(i) Class A and B misdemeanors

A reviewing court must look to the plain language of the statute when discerning whether any given fact constitutes an element of the offense. *Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005). Sections 49.04 and 49.09 of the Texas Penal Code are at issue. Under subsection 49.04(b), a DWI is a Class B misdemeanor. This Section requires no prior DWI convictions, stating, in part:

(a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.

(b) Except as provided by Subsections (c) and (d) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

Tex. Penal Code § 49.04(a), (b). By contrast, a DWI offense under subsection 49.09(a) is a Class A misdemeanor. This subsection requires proof of one prior DWI conviction, stating:

an offense under 49.04, . . . is a Class A misdemeanor, with a minimum

³ The conflict is among intermediate courts of appeals. For instance, the State asserts that these cases treated prior DWI convictions as punishment enhancements: *Prihoda v. State*, 352 S.W.3d 796, 806 (Tex. App.—San Antonio 2011, pet. ref'd); *Wood v. State*, 260 S.W.3d 146, 147, 149 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Blank v. State*, 172 S.W.3d 673, 676 (Tex. App.—San Antonio 2005, no pet.); and *Love v. State*, 833 S.W.2d 264, 265–66 (Tex. App.—Austin 1992, pet. ref'd). Conversely, this court treated a prior DWI conviction as an element of a DWI offense in *Mapes v. State*, 187 S.W.3d 655, 658 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). The State also directs as to these cases that may support a finding that prior DWI convictions are elements of a DWI offense: *Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005); *State v. Webb*, 12 S.W.3d 808, 811 n.2 (Tex. Crim. App. 2000); and *Gibson v. State*, 995 S.W.2d 693, 694–97 (Tex. Crim. App. 1999).

confinement of 30 days, if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated

Id. § 49.09(a).

Generally, punishment for a Class A misdemeanor is: “(1) a fine not to exceed \$4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement.” Tex. Penal Code § 12.21 (West 2015). Punishment for a Class B misdemeanor is: “(1) a fine not to exceed \$2,000; (2) confinement in jail for a term not to exceed 180 days; or (3) both such fine and confinement.” *Id.* § 12.22 (West 2015).

(ii) Punishment enhancements

To determine whether the prior DWI conviction is an element of the offense or a punishment enhancement, we must examine the differences between the two concepts. A punishment enhancement is a fact that “increase[s] the punishment range to a certain range above what is ordinarily prescribed for the indicted crime. It does not change the offense, or the degree of the offense, of conviction.” *Calton*, 176 S.W.3d at 233 (alteration in original). While a defendant is entitled to written notice of a punishment-enhancement allegation, it need not be pled in the indictment nor proven during the guilt-innocence phase of trial. *Brooks v. State*, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997).

Under Chapter 12’s general punishment-enhancement scheme, a Class A misdemeanor offense enhanced with a prior conviction for a Class A misdemeanor or felony raises the minimum jail sentence to 90 days. Tex. Penal Code § 12.43(a) (West 2015). The maximum jail sentence is still one year. *Id.* A Class B misdemeanor enhanced with a prior conviction for a Class A or B misdemeanor or felony raises the minimum jail sentence to 30 days. *Id.* § 12.43(b). The maximum jail sentence is still 180 days. *Id.*

(iii) Elements of the offense and elements that enhance the degree of an offense

The Penal Code defines an “element” of an offense as: “(A) the forbidden conduct; (B) the required culpability; (C) any required result; and (D) the negation of any exception to the offense.” *Id.* § 1.07(22) (West 2015); *see Schmutz v. State*, 440 S.W.3d 29, 34 (Tex. Crim. App. 2014) (“An ‘element’ is a fact that is legally required for a fact finder to convict a person of a substantive offense.”). An element must be proven beyond a reasonable doubt at the guilt-innocence phase of trial. Tex. Code Crim. Proc. Ann. art. 38.03 (West 2015); *Calton*, 176 S.W.3d at 234. An element also must be pled in the indictment. Tex. Code Crim. Proc. Ann. art. 21.03 (West 2015).

Proof of an additional element may “enhance” an offense to a greater degree. *See Ex Parte Reinke*, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012) (contrasting punishment and offense enhancements). To illustrate the difference between statutory schemes that use elements to “enhance” the degree of an offense versus schemes that only enhance punishment, we find instructive the *Reinke* court’s comparison of Chapter 49’s intoxication offenses and Chapter 12’s punishment-enhancement provisions. *Id.* Section 49.07 defines the offense of intoxication assault and then states, “Except as provided by Section 49.09, an offense under this section is a felony of the third degree.” Tex. Penal Code § 49.07(c) (West 2015). In turn, Section 49.09 enhances the degree of the offense, stating, “[a]n offense under Section 49.07 is a felony of the second degree if it is shown on the trial of the offense that [defendant caused traumatic brain injury].” *Id.* § 49.09(b–4). The language indicates the legislature intended to increase the degree of the offense. *See Reinke*, 370 S.W.3d at 389 (analyzing Tex. Penal Code §§ 49.07(c), 49.09(b–4)). By contrast, the “shall be punished for a felony of the ____ degree” language in Section 12.42 indicates the legislature’s intent to enhance the range of punishment. *See id.* (discussing Tex. Penal Code § 12.42 (*passim*)); *see also Ford v. State*, 334 S.W.3d 230, 231 (Tex. Crim. App. 2011) (“Because Article 62.102(c) states

that ‘*punishment for the offense . . . is increased to the punishment for the next highest degree of felony,*’ we hold that only the level of punishment was enhanced.” emphasis added)).

In *Gibson v. State*, the Court of Criminal Appeals held that subsection 49.09(b), which concerns felony DWI, should not be viewed as a punishment-enhancement statute similar to Section 12.43. 995 S.W.2d 693, 694–97 (Tex. Crim. App. 1999). The *Gibson* court also held that under subsection 49.09(b), prior intoxication offenses are elements of felony DWI. *Id.*⁴ Following *Gibson*, this court in *Mapes v. State* addressed punishment enhancements in the context of subsection 49.09(a). *See Mapes v. State*, 187 S.W.3d 655, 658 (Tex. App.—Houston [14th Dist.] 2006, pet. ref’d). The relevant issue in *Mapes* was whether a prior, Class A misdemeanor DWI conviction was void because the trial judge sentenced the defendant below the minimum, statutory requirement for the offense. *Id.* In finding the prior conviction void, the trial court rejected the State’s argument that the defendant was actually convicted of a non-enhanced, Class B misdemeanor DWI (and therefore his sentence was not below the statutory minimum). *Id.* at 659. The *Mapes* court stated that the State “appear[ed] to interpret Penal Code Section 49.09 as a punishment enhancement statute.” *Id.* The *Mapes* court concluded “one prior DWI is a required element of the offense of Class A misdemeanor DWI under Section 49.09(a), to which the punishment enhancements under Sections 12.42 and 12.43 do not apply.” *Id.* at 659–60 (citing *Gibson*, 995 S.W.2d at 696).

Under the statute’s plain language, and applying *Reinke*,⁵ *Calton*,⁶ *Gibson*,⁷ and

⁴ The *Gibson* court also recognized that the two prior convictions are required to establish jurisdiction, i.e., that the offense is a felony triable in district court. *Id.* at 696 & n.2.

⁵ *Reinke*, 370 S.W.3d at 389.

⁶ *Calton*, 176 S.W.3d at 233.

⁷ *Gibson*, 995 S.W.2d 694–97.

Mapes,⁸ a prior DWI conviction is an element of the offense of Class A misdemeanor DWI under Section 49.09(a). Subsection 49.09(a) is clear and unambiguous. The prior DWI conviction is a fact that is “legally required for a fact finder to convict a person” of Class A misdemeanor DWI. *See Schmutz*, 440 S.W.3d at 34 (defining “element”). If the defendant has a prior DWI conviction, the statute enhances the degree of the offense, from a Class B misdemeanor DWI to a Class A misdemeanor DWI. *See* Tex. Penal Code §§ 49.04(b), 49.09(a); *Calton*, 176 S.W.3d at 233 (an enhancement does not change the degree of the offense of conviction). Said differently, a prior DWI conviction is not a punishment enhancement of a Class B misdemeanor DWI. Nor could it be, because the offense for which appellant was charged is not a Class B misdemeanor DWI. *See Calton*, 176 S.W.3d at 233 (a punishment enhancement “increases the punishment range to a certain range above that ordinarily prescribed *for the indicted crime.*” emphasis added)). Further, Section 49.09 lacks the “shall be punished” language that is present in other statutes containing punishment enhancements. *See, e.g., Reinke*, 370 S.W.3d at 389 (discussing Tex. Penal Code § 12.42); *Ford*, 334 S.W.3d at 231 (discussing Tex. Code Crim. Proc. Ann. art. 62.102).

The State directs us to cases in which a prior DWI conviction was treated as a punishment enhancement instead of an element of a separate offense.⁹ These cases are ultimately based on *Love v. State* or *Wilson v. State*, cases in which the statute at issue was Section 49.09’s predecessor, article 6701/-1. *See Love*, 833 S.W.2d 264, 265–66 (Tex. App.—Austin 1992, no pet.); *Wilson*, 772 S.W.2d 118, 123 (Tex. Crim. App. 1989); *see also Ex parte Benson*, 459 S.W.3d 67, 87 (Tex. Crim. App. 2015) (“The new legislative scheme plainly superseded *Wilson*’s holding in at least one respect: “serious

⁸ *Mapes*, 187 S.W.3d at 659–60.

⁹ *See, e.g., Prihoda*, 352 S.W.3d at 806 (relying on *Blank*, 172 S.W.3d at 676); *Wood*, 260 S.W.3d at 147, 149 (relying on *Wilson v. State*, 772 S.W.2d 118, 123 (Tex. Crim. App. 1989)); *Blank*, 172 S.W.3d at 676 (relying on *Love*, 833 S.W.2d at 265–66); *Love*, 833 S.W.2d at 265–66 (under former DWI statute, a prior DWI conviction was not offense element).

bodily injury” was no longer part of a punishment enhancement; it was an element of the new intoxication-assault offense.”). The former DWI statute did not label a second DWI offense as a Class A misdemeanor, but read: “(d) If it is shown on the trial of an offense under this article that the person has previously been convicted one time of an offense under this article, the offense is punishable by: (1) a fine not less than \$300 or more than \$2,000; and (2) confinement in jail for a term of not less than 15 days or more than two years.” Act of May 18, 1983, 68th Leg., R.S., ch. 303 § 3, art. 6701/-1, Tex. Gen. Laws 1575–76. In 1993, the legislature created different degrees of DWI offenses. *See* Act of May 8, 1993, 73rd Leg., R.S., ch. 900, § 1.01, §§ 49.04, 49.09, 1993 Tex. Gen. Laws 3697–98 (codified at Tex. Penal Code §§ 49.04, 49.09). Commission of a second DWI became a Class A misdemeanor. *See id.* As a result of this change, the prior DWI conviction became an element under a Class A misdemeanor DWI by virtue of defining the new offense as a Class A misdemeanor. Accordingly, the cases that rely on the former DWI statute are not instructive.

Therefore, a prior DWI conviction is an element of the offense of Class A misdemeanor DWI under subsection 49.09(a).

B. The evidence is insufficient to support appellant’s conviction under subsection 49.09(a).

No evidence of appellant’s prior DWI conviction was presented to the jury during the guilt-innocence phase. *See* Tex. Code Crim. Proc. Ann. art. 38.03 (West 2015) (requiring every element to be proven beyond a reasonable doubt to convict a person of an offense); *Calton*, 176 S.W.3d at 234 (same). The State presented evidence of appellant’s prior DWI conviction during the punishment phase. However, we may not consider such evidence in a bifurcated jury trial on a plea of not guilty because the jury did not consider it at the time it rendered its verdict. *See Barfield v. State*, 63 S.W.3d 446, 450 (Tex. Crim. App. 2001). Accordingly, the evidence is legally insufficient to

sustain appellant's conviction under subsection 49.09(a). *See Jackson*, 443 U.S. at 319.

C. The proper disposition is to reverse and remand to the trial court to reform the judgment to delete the conviction for the Class A DWI offense and instead to reflect a conviction for the lesser-included offense of Class B misdemeanor DWI, and to conduct a new punishment hearing.

Having determined that the evidence is legally insufficient to support a conviction for the Class A DWI offense, we turn now to the proper disposition. We are guided by *Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014). The *Thornton* court found the evidence insufficient to support the defendant's conviction, but sufficient to support a conviction for a lesser-included offense. *Id.* The *Thornton* court consequently remanded the case to the trial court to reform the judgment to reflect a conviction for a lesser-included offense. *Id.* at 307. Appellant's judgment may be reformed to reflect a conviction for a Class B misdemeanor if: (1) in the course of convicting appellant of the greater offense, the jury necessarily must have found every essential element necessary to convict appellant for the lesser-included offense; and (2) conducting an evidentiary-sufficiency analysis as though appellant had been convicted of the lesser-included offense at trial, the evidence is sufficient to support a conviction for that offense. *Id.* at 300.

First, the charge of the court instructed the jury to determine whether appellant, while intoxicated, operated a motor vehicle in a public place. In the course of convicting appellant of Class A misdemeanor DWI, the jury necessarily must have found every essential element necessary to convict appellant of a Class B misdemeanor. *See* Tex. Penal Code §§ 49.04(a), 49.09(a). Therefore, a Class B misdemeanor DWI is a lesser-included offense of Class A misdemeanor DWI. Second, the evidence is sufficient to convict appellant of a Class B misdemeanor DWI. Appellant disagrees, arguing in his second issue that the evidence is insufficient to prove appellant operated his car while intoxicated.

A person commits a Class B misdemeanor DWI if that person: (1) is intoxicated; (2) while operating a motor vehicle; (3) in a public place. Tex. Penal Code § 49.04(a). Appellant does not contest, and the evidence is sufficient to prove, the public-place element. We next examine the first two elements together.

There must be a temporal link between defendant's intoxication and operation of the vehicle. *Kuciemba v. State*, 310 S.W.3d 460, 463 (Tex. Crim. App. 2010). The Penal Code does not define the term "operate." In *Denton v. State*, the Court of Criminal Appeals took a "totality of the circumstances" approach in deciding whether the defendant operated a vehicle within the meaning of the Penal Code. 911 S.W.2d 388, 390 (Tex. Crim. App. 1995). The *Denton* Court stated the defendant operated a vehicle when he "took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." *Id.* While driving involves operation, operation does not necessarily involve driving. *Id.* at 389. In other words, the definition of operation does not require that the vehicle actually move. *Id.*

The facts of this case are similar to those in *Hearne v. State*, 80 S.W.3d 677, 678–79 (Tex. App.—Houston [1st Dist.] 2002, no pet.), and *Murray*, 457 S.W.3d at 450, where the accuseds were found to have "operated" their vehicles for purposes of DWI. In *Hearne*, as here, the arresting officer found Hearne asleep in his car. 80 S.W.3d at 678–79. He was not touching the brake or accelerator pedals. *Id.* The arresting officer could not tell how long Hearne's truck had been parked. *Id.* However, our sister court found the evidence sufficient to prove Hearne was operating his truck at the moment he was found because: (1) the truck was in a lane of moving traffic; (2) the engine was running; (3) Hearne was in the driver's seat; (4) the truck was registered to Hearne; (5) no other person was nearby; and (6) Hearne stipulated that he was legally intoxicated. *Id.*

In *Murray*, unlike *Hearne*, the evidence was sufficient prove that Murray operated his car while intoxicated *before* the arresting officer found him parked and asleep in a private driveway. *Compare Murray*, 457 S.W.3d at 449–50, *with Hearne*, 80 S.W.3d at 678–79. The *Murray* court reasoned that a jury could have inferred Murray had driven his car while intoxicated based on these facts: (1) Murray was in the driver’s seat; (2) Murray was the only person in the vehicle and in the vicinity; (3) no alcoholic substances or containers were found in the area; and (4) based on the arresting officer’s observations, Murray was intoxicated. *See Murray*, 457 S.W.3d at 449. The court concluded that “a factfinder could have also reasonably inferred that Appellant drove his vehicle to the location at which he was found after drinking to intoxication.” *Id.*

From the totality of the circumstance and viewing the evidence in the light most favorable to the State, a jury reasonably could have found that appellant operated a vehicle while intoxicated like the appellants in *Murray* and *Hearne*. Similar to *Hearne*, the jury could have inferred that appellant was operating the vehicle at the time he was found intoxicated and asleep, based on these facts: appellant’s car was parked in a lane of moving traffic; the key was in the ignition; the car was running; appellant was in the driver’s seat; no other person was in the car; no evidence suggested that another person operated the car; and appellant does not contest, and the breathalyzer and Habukiha’s testimony show, that appellant was intoxicated when the arresting officers found him.

Additionally, as in *Murray*, the jury could have inferred that appellant drove his vehicle to the location at which he was found asleep after drinking to intoxication based on the above-recited facts, in addition to these two facts: there was one open container of beer in the car, and appellant’s blood-alcohol concentration level, which was more than twice the legal limit, indicated he had consumed more alcohol than one beer contains. *See Kuciemba*, 310 S.W.3d at 463 (A “high-blood alcohol level—more than twice the legal limit—found in a sample taken at the scene, supports an inference . . .

that he had been intoxicated for quite a while.”). Therefore, the evidence is sufficient to prove that appellant was driving a motor vehicle while intoxicated in a public place.

Appellant argues that because he was found in a residential area, he could have consumed alcohol at a nearby residence after parking his car. However, there is no evidence suggesting appellant had a reason to be in the neighborhood. Further, the State is not required to disprove every conceivable alternative to appellant’s guilt. *See Ramsey*, 473 S.W.3d at 808. Appellant also directs us to cases that predate *Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991), *overruled in part by Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000).¹⁰ Before *Geesa*, courts applied the “reasonable hypothesis” standard, which the *Geesa* court overturned. *See Geesa*, 820 S.W.2d at 162. That standard required the State to exclude all reasonable hypotheses, other than the defendant’s guilt, for the evidence to be found sufficient on appeal in a conviction based on circumstantial evidence. *Carlsen v. State*, 654 S.W.2d 444, 447 (Tex. Crim. App. 1983), *overruled by Geesa*, 820 S.W.2d at 161. Now, we examine both direct and circumstantial evidence in the same manner and we do not consider every reasonable hypothesis other than guilt. *Geesa*, 820 S.W.2d at 162. Appellant’s pre-*Geesa* authorities therefore are not persuasive.

Appellant also attempts to compare the circumstances of his case to those in *Texas Department of Public Safety v. Allocca*, 301 S.W.3d 364, 368–70 (Tex. App.—Austin 2009, pet. denied). In *Allocca*, the evidence was insufficient to support a probable-cause finding that Allocca was operating his car (1) at the moment, and (2) before, he was found. Supporting the *Allocca* court’s first finding was this evidence: Allocca was not stopped in the middle of a roadway or in a moving lane of traffic; he

¹⁰ Appellant cites *Hudson v. State*, 510 S.W.2d 583, 584 (Tex. Crim. App. 1974); *Ballard v. State*, 757 S.W.2d 389, 391 (Tex. App.—Houston [1st Dist.] 1988, pet. ref’d) (finding persuasive *Reddie v. State*); *Reddie v. State*, 736 S.W.2d 923, 926–28 (Tex. App.—San Antonio 1987, pet. ref’d) (declining to infer defendant drove or operated the vehicle while intoxicated because other reasonable hypotheses existed).

was parked in his usual parking space behind the building where he worked; he was not touching the brake; the car's headlights were not on; the car was in park; the engine was running; and the front seat was reclined to accommodate sleeping. *Id.* Unlike in *Allocca*, in today's case, no evidence suggests that appellant had a reason or purpose to be in the area. Nor was appellant legally parked in a parking spot. The *Allocca* court signaled the significance of this latter fact when it discussed *Hearne* and other cases, stating: "In each of these cases, there was at least one additional factor, other than the driver being asleep with the engine running, that indicated the driver had attempted or intended to drive the vehicle." *Id.* at 368 & n.3.

Supporting the *Allocca* court's second finding was this evidence: a caller reported a suspicious vehicle; the car had no signs of being involved in a collision; no bystanders reported seeing *Allocca* driving; and the car was not blocking traffic. The *Allocca* court reasoned that the evidence suggested *Allocca*'s car was parked in a public parking space "long enough to arouse suspicion." Additionally, the circumstances under which the car was parked, that is, the legality and location, were insufficient to indicate *Allocca* had driven there while intoxicated. Again, unlike in *Allocca*, appellant was illegally parked in a moving lane of traffic. Therefore, *Allocca* is not persuasive.

Having found the evidence legally sufficient to support appellant's conviction of a Class B misdemeanor DWI, we overrule appellant's second issue. Following *Thornton*, we reverse the judgment and remand the case to the trial court with instructions to reform appellant's judgment to reflect a conviction for Class B misdemeanor DWI and to conduct a new punishment hearing for the Class B misdemeanor DWI conviction. *See Thornton*, 425 S.W.3d at 307; *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012).

IV. CONCLUSION

We reverse the judgment of the trial court and remand to the trial court to reform the judgment as set forth above. After reforming the judgment to reflect a conviction of a Class B misdemeanor DWI under subsection 49.04(b) of the Texas Penal Code, the trial court shall hold a new punishment hearing for the Class B misdemeanor DWI conviction. *See Thornton*, 425 S.W.3d at 307.

/s/ Marc W. Brown
Justice

Panel consists of Chief Justice Frost and Justices Brown and Jewell.
Publish — TEX. R. APP. P. 47.2(b).