Cause Nos. 01-24-00563-CR; 01-24-00596-CR

IN THE COURT OF APPEALS
FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

JUAN DAVID ALMANZA,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

Appeal from the 228th District Court
Harris County, Texas
Cause Nos. 1625009; 1625010

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

IDENTIFICATION OF INTERESTED PARTIES

Pursuant to TEX.R.APP.P. 28.1(a), a complete list of the names and addresses of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

Complainant, victim, or aggrieved party:
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Trial Judge:
Judge Denise Collins
228th District Court
Harris County, Texas

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

OTHER SOURCES

STATEMENT REGARDING ORAL ARGUMENT

Because the issues in this case are adequately developed in the brief, oral argument would not significantly assist the decision-making process.

STATEMENT OF THE CASE

Mr. Almanza was charged by Indictment with the felony offenses of intoxication assault and intoxication manslaughter alleged to have been committed on March 18, 2019.[1] On June 21, 2024, a jury found Mr. Almanza guilty as charged in the Indictment and found one special issue that he used a deadly weapon true.[2] On June 25, 2024, the jury sentenced him to eleven (11) years for intoxication manslaughter and two (2) years for intoxication assault. The trial court's certification of the right to appeal and notice of appeal were filed.[3]

[1] CR at 39, "CR" refers to the Clerk's Record followed by page number.
[2] CR at 670-71.
[3] CR at 674; 678.

APPELLANT'S POINTS OF ERROR

POINT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED IN DENYING MR. ALMANAZ'S MOTION TO SUPPRESS UNRELIABLE BLOOD TEST EVIDENCE.

POINT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED IN ADMITTING EXPERT TESTIMONY THAT WAS UNRELIABLE.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Mr. Almanza's motion to suppress unreliable blood test evidence offered by the State's toxicologist because the State failed to prove by clear and convincing evidence that it was reliable and therefore relevant. While the State offered two blood draws in this case it only relied on the results of one blood draw taken at 6:53 a.m., that was the subject largest mandatory blood vial recall in Harris County. The State also introduced evidence of a blood draw taken at 3:25 a.m. for medical purposes but for a variety of reasons did not rely on this result to convict. Instead, the 6:53 a.m. blood draw which was tested using BD's defective blood vials that effected thousands of vials that either had reduced additives or no additives in the vial. While Mr. Almanza's blood vial appeared to contain additives, it was unknown if the additives included both the anticoagulant and preservatives, or if they were in the correct amounts; all

necessary to ensure the reliability of any testing. Additionally, the State failed to produce evidence that the manufacturer investigated the root cause of the recall, or any efforts made to resolve the issues to ensure validity of any testing. Finally, the State failed to produce evidence that Harris County followed the mandatory blood vial recall to destroy or replace the blood vials. Instead, the evidence at trial is that Harris County continued using the vials even after the recall notices not to use the vials was issued. Additionally, Harris County had no protocols or protections in place to avoid concerns surrounding this mandatory recall. For all these reasons, the State's toxicology expert's testimony did not, because it could not meet the *Daubert or Kelly* requirements for admissibility and the trial court abused its discretion in permitting this testimony.

Mr. Almanza's substantial rights were affected by the introduction of unreliable and therefore irrelevant expert testimony. The evidence in this case was not overwhelming and based on conflicting evidence of intoxication by officers and emergency personnel as well as the inability to retrograde extrapolate in this case, there is insufficient evidence for this Court to conclude the error did not have a substantial and injurious effect or influence in determining the jury's verdict.

STATEMENT OF FACTS

On March 17, 2019, Juan David Almanza was a 36-year-old single father dedicated to providing for his daughter. He was also a hardworking manager at

Vandor Corp., where he distributed shipping containers for funeral homes nationwide.[4] On the evening of March 17, 2019, Mr. Almanza went to a local bar with his cousin and a friend to watch a Houston Rockets game. [5] During his time at, Mr. Almanza admitted to consuming three Bud Light beers. Later that night, after helping his cousin's friend whose car was towed with a ride, both men went to another local bar where Mr. Almanza purchased two additional beers. One of the beers consumed by Mr. Almanza was in a glass cup presumably mixed with green dye as it had a green hue.[6] From that moment forward Mr. Almanza has no memory of the events that followed.[7]

On March 18, 2019, at approximately 2:15 a.m. Mr. Almanza was involved in a head-on collision while traveling on Interstate 45.[8] Unfortunately, in Houston it is not uncommon for wrong-way crashes to occur on roadways even when a person is completely sober.[9] In this case, Mr. Almanza's 1998 Chevrolet Silverado collided with a white Mustang occupied by Emile Sumter and Samelle Holman.[10]

[4] 5 RR 208-209, "RR" refers to the Reporter's Record preceded by volume and followed by page number.
[5] 5 RR 210.
[6] 5 RR 210-213.
[7] 5 RR 213.
[8] 5 RR 224, 5 RR 232.
[9] 5 RR 178.
[10] 5 RR 212.

The collision resulted in the death of Emile Sumter and serious bodily injury to Samelle Holman.[11]

Guillermo Infante, a witness to the accident, was travelling in the middle lane of I-45 South when the accident occurred ahead of him.[12] In response, Mr. Infante quickly moved to the right, turned on his flashers, and grabbed his flashlight before stepping out to assess the situation.[13] He first approached the car involved in the collision, where he Emile Sumter driving and Samelle Holman in the passenger seat, the latter yelling out for help. Mr. Infante yelled out to his friend he was travelling with to call 911. He then turned his attention to the driver of the pickup truck, Mr. Almanza who was also asking for help. As he shined his flashlight toward the truck from afar, he testified he thought Mr. Almanza's eyes were red however Mr. Almanza's airbag had deployed and he was injured in the accident.[14] While he did not detect any odor of alcohol, he remained at the scene until law enforcement and emergency responders arrived.[15]

Houston Police Department ("HPD") Officer Cody Thomas arrived at the scene on the southbound lanes of I-45 in the early morning hours of March 18, 2019, responding to a call about a major crash.[16] As Officer Thomas assessed the

[11] 5 RR 224.
[12] 3 RR 122-123.
[13] 3 RR 124.
[14] 4 RR 147.
[15] 3 RR 125-128.
[16] 3 RR 199.

scene, he noted that the sedan contained two occupants, a male driver and a female passenger, the latter of whom required medical attention.[17] His attention then turned to the driver of the pickup truck, Mr. Almanza. Officer Thomas observed Mr. Almanza was attempting to climb out of the vehicle through the window, ignoring commands to stay inside.[18] Officer Thomas testified that he observed Mr. Almanza's balance was unsteady. At this time, officers appeared unaware Mr. Almanza was injured in this major accident[19], and received assistance from medical personnel to get to the ground.[20] As he interacted with Mr. Almanza, Officer Thomas testified he observed several signs he claimed to be consistent with intoxication—his eyes were bloodshot and glossy, his speech was slurred, and there was an odor of alcohol on his breath.[21] However, several officers contradicted these observations including Officer Lunceford who was the lead officer on this case who testified he did not smell the odor of alcohol at the scene.[22] Additionally, Officer Romero did not smell alcohol at the scene.[23]

Houston Fire Department EMS technician Jason Bray was once of the first to arrive at the scene responding to a dispatch for a motor vehicle accident with

[17] 3 RR 199-200.
[18] 3 RR 202.
[19] Mr. Almanza testified that he had a fractured left foot and a bad ankle sprain on his right foot and a sprained right wrist as a result of the accident. 5 RR 215.
[20] 4 RR 12.
[21] 3 RR 203.
[22] 5 RR 188.
[23] 4 RR 45.

extrication. Mr. Bray, who was the in-charge medic for Ambulance 15 was directed to attend to Mr. Almanza.[24] Upon making contact, Mr. Bray noted that Mr. Almanza was standing near his vehicle, complaining of pain.[25] Standard medical procedures were initiated, including C-spine immobilization by placing him on a backboard and securing him in the ambulance for transport.[26]

Once inside the ambulance, Mr. Bray and his partner conducted a full assessment, including checking blood pressure, heart rate, and responsiveness.[27] Mr. Almanza was alert and able to provide personal information, including his social security number, medical history, address and date of birth.[28] His vital signs were stable, and his Glasgow Coma Scale score was a full 15/15, indicating he was fully conscious and responsive. Mr. Almanza also scored consistent with a person that was sober on tests conducted for his orientation to sound, verbal cues and motor skills. [29]

Mr. Bray transported Mr. Almanza to St. Joseph's Hospital, where they handed over patient care to the medical staff. Their role in the response concluded once they provided their report and ensured a smooth transition of care.[30] Hospital staff conducted routine procedures including inserting an IV and taking a blood

[24] 3 RR 81.
[25] 3 RR 91.
[26] 3 RR 92.
[27] 3 RR 92-93.
[28] 3 RR 108.
[29] 3 RR 110.
[30] 3 RR 96.

draw for medical purposes.[31] The hospital's medical blood draw was initiated at 3:25 a.m.[32]

Officer Thomas arrived at the hospital to assist in the investigation.[33] While there, he searched Mr. Almanza's pockets and discovered a receipt from Capitol Bar, which was collected as evidence.[34]

Officer Daniel Lunceford arrived at St. Joseph's Hospital and as a member of the HPD's DWI Task Force at the time, Officer Lunceford was responsible for investigating the intoxication aspect of the accident as lead officer.[35] Upon arrival, he contacted the officers at the scene to gather information about what had happened before making his way to the hospital room where Mr. Almanza was being treated.[36]

When Officer Lunceford first saw Mr. Almanza, he was laying down on a backboard in a hospital bed.[37] As part of his investigation, he attempted to question Mr. Almanza about where he was coming from that night, but Mr. Almanza did not respond and was moaning in pain.[38] Officer Lunceford testified that he observed red, bloodshot eyes and, at one point, when Almanza exhaled, he detected the odor

[31] 4 RR 54.
[32] 6 RR 135.
[33] 4 RR 13.
[34] 4 RR 20.
[35] 5 RR 104-105.
[36] 5 RR 104.
[37] 5 RR 105.
[38] 5 RR 114.

of alcohol.[39] Because of his role in the investigation, Officer Lunceford attempted to administer the Horizontal Gaze Nystagmus (HGN) test, which is used to detect signs of intoxication through involuntary eye movements. However, Mr. Almanza repeatedly closed his eyes and did not cooperate with the test. [40]

Realizing that he would not get a voluntary response, Officer Lunceford proceeded to read Mr. Almanza the DIC-24 form requesting consent for a breath or blood test.[41] Mr. Almanza did not verbally answer, but he shook his head "no," which Officer Lunceford took as a refusal. Consequently, a search warrant for a blood draw was secured, which was executed later that morning.[42] The search warrant authorized a blood draw that was collected at 6:53 a.m., as well as collection of the residual blood the hospital had obtained for medical purposes at 3:25 a.m.[43]

On March 18, 2019, the defendant's blood was drawn at the hospital using a BD Vacutainer Fluoride Tube. On March 20, 2019, BD internally identified defects in some of their blood vials, noting that certain lots contained reduced or no additive, which could lead to inaccurate blood alcohol test results. However, this

[39] 5 RR 111.
[40] 5 RR 112.
[41] 5 RR 112.
[42] 5 RR 139
[43] 6 RR 135

information was not immediately disclosed to the public or law enforcement agencies using these vials.[44]

On May 30, 2019, BD issued a recall, confirming that a portion of Lot 8187663 had been found to have a reduced amount or no additives which are necessary to ensure the validity of any testing results.[45] The mandatory recall indicated that samples collected in these vials could not be considered scientifically reliable. On June 12, 2019, BD released an amended recall, clarifying the affected blood vials were defective because they did not contain the necessary additives. The recall notice was issued to advise laboratories and other relevant agencies not to use the blood vials.[46]

POINT OF ERROR NUMBER ONE (RESTATED)

THE TRIAL COURT ERRED IN DENYING MR. ALMANAZ'S MOTION TO SUPPRESS UNRELIABLE BLOOD TEST EVIDENCE.

POINT OF ERROR NUMBER TWO (RESTATED)

THE TRIAL COURT ERRED IN ADMITTING EXPERT TESTIMONY THAT WAS UNRELIABLE.

[44] 6 RR 28-29
[45] 1 MS 48, 6 RR 28-29
[46] 1 MS 54-58

ARGUMENTS AND AUTHORITIES

A. THE STANDARD OF REVIEW: ADMISSIBILITY OF EVIDENCE

Appellate review of the admission of evidence is limited to whether the trial court abused its discretion. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex.Crim.App. 2000). A trial court abuses its discretion when it acts "arbitrarily and unreasonably, without regard to any guiding rules and principles." *Breeding v. State*, 809 S.W.2d 661, 663 (Tex.App.–Amarillo 1991, pet. ref'd). This standard is not without limits and does not insulate trial court rulings from reversal. *See Montgomery v. State*, 810 S.W.2d 372, 392 (Tex.Crim.App. 1991)(op. on rehr'g); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995)(review for abuse of discretion is not "tantamount to no review at all"). A trial court has no discretion to determine what the law is, or in applying the law to the facts, and has no discretion to misinterpret the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). "'Abuse of discretion' is a phrase which sounds worse than it is. The term does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge." *United States v. Walker*, 772 F.2d 1172, 1176 n. 9 (5th Cir. 1985); *see also In re Arthur Anderson LLP*, 121 S.W.3d 471, 476 (Tex.App.–Houston [14th Dist.] 2003)(orig. proceeding)("As to legal issues, an error amounting to an abuse of discretion can be as simple as misinterpreting or misapplying the law.").

B. THE STANDARD OF REVIEW: ADMISSIBILITY OF EXPERT TESTIMONY

TEX.R.EVID. 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." As the proponent of the expert testimony, the State shouldered the burden of demonstrating by clear and convincing evidence that her testimony was sufficiently relevant and reliable to assist the jury in accurately understanding the evidence or in determining a fact in issue, and not merely "junk science." *Weatherred v. State*, 15 S.W.3d at 542.

Before a trial court trial court can act as the true "gatekeeper" under Rule 702 in properly admitting expert testimony, it must be satisfied that the State, as the proponent of the evidence, demonstrated by clear and convincing evidence, that: (1) the witness is qualified as an expert by reason of her knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) that admitting the expert testimony will actually assist the fact-finder in deciding the case. *Vela v. State*, 209 S.W.3d 128, 131 (Tex.Crim.App. 2006). When the subject of expert testimony is "scientific knowledge," the basis of this testimony must be grounded in the accepted methods and procedures of that

science. *Daubert v. Merrell Dow Pharmaceuticals***,** 509 U.S. 579, 589-590 (1993)("the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability").

To be reliable, and by extension, admissible, scientific evidence must pass the three-part test: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex.Crim.App. 1992). "Unreliable scientific evidence simply will not assist the [jury] to understand the evidence or to accurately determine a fact in issue; such evidence obfuscates rather than leads to an intelligent evaluation of the facts." *In the Matter of M.P.A.*, 364 S.W.3d 277, 286 (Tex. 2012) (citations omitted). For the reasons that follow, the State's failure to show by clear and convincing evidence that the technique utilized in drawing Mr. Almanza's blood was properly applied in this case necessitates the conclusion that its admission was an abuse of discretion.

C. THE ADMISSION OF THE BLOOD DRAW WAS AN ABUSE OF DISCRETION

As set out below, Mr. Almanza argues the State failed to prove by clear and convincing evidence that the technique utilized drawing Mr. Almanza's blood was properly conducted based on the following considerations.

1. There was a mandatory recall by the manufacturer of the blood vial used in Mr. Almanza's blood draw due to additives being reduced or absent in the tube;

2. There was a mandatory recall by the manufacturer of the blood vial used in Mr. Almanza's blood draw due to the absence of additives in the tube;

3. The State failed to produce evidence that an investigation was conducted to identify the cause of the recall or the ways in which the defective blood vials could impact the blood alcohol concentration in later testing; and

4. The State failed to produce evidence that the HFSC followed the mandatory recall issued by the manufacturer involving the defective blood vials and instead continue using the defective vials in despite the recall notice not to use the vials.

Any one of these violations of the blood testing protocol would be sufficient for this Court to find that the State failed to shoulder its burden of proving that the technique used in drawing Appellant's blood was sufficiently reliable. But the cumulative effect of all these errors is more than enough to compel the conclusion that the trial court's ruling that the scientific technique was properly utilized in this case was a clear abuse of discretion. *See State v. Dominguez*, 425 S.W.3d 411, 423 (Tex. App. Houston [1st Dist.] 2011) ("We hold that the trial court, in suppressing Deputy Pikett's testimony, reasonably could have concluded that his opinion was not reliable because of the inadequacies in his protocol ..."). Moreover, that the trial court's ruling cannot withstand serious scrutiny is also buttressed by the doctrine of chances, a theory based on the concept of logical implausibility. S*ee De*

La Paz v. State, 279 S.W.3d 336, 347 (Tex.Crim.App. 2009) ("The 'doctrine of chances' tells us that highly unusual events are unlikely to repeat themselves inadvertently or by happenstance.")

While the State advanced the rote rejoinder that any mistakes made in the testing process went to the weight of Appellant's blood draw and not its admissibility,[47] its singular reply is unavailing on multiple levels. First, this argument impermissibly minimizes the critical responsibility that the trial court plays as the "gatekeeper," one that ensures the integrity of the fact-finding process. In a *Kelly* hearing, the trial court does not satisfy its "gatekeeping" function unless and until the proponent of the evidence first shows by clear and convincing evidence that the technique was properly applied. *Reynolds v. State*, 204 S.W.3d 386, 391 (Tex.Crim.App. 2006); see also *State v. Dominguez*, 425 S.W.3d at 422 ("As a gatekeeper, the trial court is tasked with assessing the reliability of particular testimony.").

Second, this argument is derailed by the fundamental principle that issues of credibility and reliability are not the same. *See Vela v. State*, 209 S.W.3d at 134. While "a jury should evaluate a witness's credibility, unreliable evidence should never reach the jury." *State v. Smith*, 335 S.W.3d 706, 714 (Tex.App. – Houston [14th Dist.] 2011, pet. ref'd); *see also Vela v. State*, 209 S.W.3d at 135-136

[47] 2 MS 124.

(citation omitted) ("an expert's opinion may sometimes be of such little weight that the jury should not be permitted to receive that opinion."). Viewed against this legal backdrop, the State's hollow "weight and not admissibility" stratagem, one that is legalese for the now-disfavored mantra that something is "good enough for government work," cannot support the great weight rested upon it. *See Rhyne v. State*, 387 S.W.2d 896, 905 (Tex.App.– Fort Worth 2012, no pet.) (admission of breath testing results was abuse of discretion where State failed to demonstrate by clear and convincing evidence that technique was properly applied on the occasion in question); *see also Sexton v. State*, 93 S.W.3d 96, 101 (Tex.Crim.App. 2002) ("We conclude ... that the underlying theory of toolmark examination could be reliable in a given case, but that the State failed to produce evidence of the reliability of the technique used in this case. Under the Kelly criteria, the State failed to show that the technique applied in this case was valid.").

D. BD's DEFECTIVE BLOOD VIAL RECALL: DESTROY OR RETURN, BUT DO NOT USE.

Mr. Almanza's counsel filed a pre-trial motion to suppress seeking exclusion of his blood test results taken March 18, 2019 at 6:53 a.m., arguing that the State's forensic evidence failed to meet the reliability standards outlined in *Daubert* and *Kelly*.[48] Specifically, Mr. Almanza asserted the manufacturer of the blood vials,

[48] 1 MS 49, see also D*aubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568, 573 (Tex.Crim.App. 1992).

BD Vacutainer (hereinafter referred to as "BD"), used were unreliable and mandated to be destroyed or returned following a recall that could result in the potential for contamination, fermentation, and artificially inflated BAC results.[49]

1. BD's Blood Vials Were Defective and Recalled.

There is no question that the BD blood vials were defective. BD's own recall notices explicitly confirmed that blood vials used at 6:53 a.m. to collect Mr. Almanza's blood contained reduced or no additives at all. The recall further stated that these defects were confirmed through internal investigation, proving the blood vials did not contain the necessary preservatives to prevent clotting and fermentation.

In the largest recall of blood vials Harris County has ever encountered,[50] BD's blood vial recall impacted all of North America and affected the reliability of more than 252,000 blood vials that were subsequently recalled.[51] BD has never revealed how the manufacturing error occurred or how it was discovered, much less corrected other than the destruction of all the affected vials.[52]

On May 30, 2019, BD issued a nationwide notice to return all blood vials subject to the recall.[53] Just two weeks later, on June 12, 2019, BD issued another

[49] 1 MS at 6.
[50] 2 MS at 112-13. Harris County Forensic Science Center sent back 3000 vials to BD after the recall.
[51] 2 MS 16.
[52] 2 MS 30.
[53] 2 MS 79, See also Defense Exhibit 2.

notice to immediately review inventory and destroy all products subject to the recall.[54] Once the recall was issued, the manufacturer of the blood vials provided two options in dealing with the recalled blood vials: (1) return, or (2) destroy. Specifically, the BD mandatory recall did not allow any discretion in visualizing the blood vial to determine if it contained the necessary additives and continue to use the blood vials.[55] BD did disclose that it received numerous complaints that the blood vials had reduced or no additives which affected the reliability of any testing.[56]

At the suppression hearing, Melissa Lomello a Director of Quality Management for BD testified regarding the recalls.[57] Ms. Lomello said that she reviewed some of the internal documents and reviewed parts of the videos pertaining to Mr. Almanaza's blood draw.[58] Ms. Lomello confirmed that the blood used to collect Mr. Almanza's blood at 6:53 a.m. was defective and subject to BD's mandatory recall. Further, Ms. Lomello testified that BD's recall instructed anyone in possession of the vials to either destroy or return the vials, including the one used for collecting and testing Mr. Almanza's blood, and that the recalled vials should not be used for collection and testing due to reliability concerns.[59]

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[54] 2 MS 79, See also Defense Exhibit 3.
[55] 2 MS at 114-15, 126.
[56] 2 MS 23.
[57] 1 MS 19.
[58] 1 MS 13; 16.
[59] 1 MS 125.

At the suppression hearing, Amanda Culbertson, an expert in forensic toxicology and forensic chemistry involving the testing of drugs and alcohol also testified.[60] Ms. Culbertson previously worked at the Harris County Medical Examiner's Office and worked as a criminalist specialist in toxicology for the Houston Police Department ("HPD") crime laboratory in the toxicology section.[61] After leaving HPD, Ms. Culbertson worked at Lone Star College as a technical supervisor for breath-alcohol testing across Harris County.[62] Ms. Culbertson is a certified expert in blood testing and a qualified expert who has testified for the Harris County District Attorney's Office as an expert in blood testing.[63] Ms. Culbertson reviewed more than 1600 documents produced by BD in preparing her testimony in this case.[64] After her review of the documents and videos of Mr. Almanza's blood draw, Ms. Culbertson testified about the fundamental flaws in the labs forensic testing procedure and opined that no police lab should be testing blood using the faulty recalled blood vials.[65]

[60] 2 MS 7.
[61] 2 MS 7.
[62] 2 MS 7.
[63] 2 MS 8.
[64] 2 MS 10-11.
[65] 2 MS 32; 69.

2. The Lab's Decision to Ignore BD's Mandatory Recall.

The vial lot in question was distributed in 2018. BD became aware of the issue internally in December 2018 but failed to notify the public until May 30, 2019. Mr. Almanza's blood was drawn on March 18, 2019, and tested on April 9, 2019, during a period when law enforcement and forensic labs were unaware of the blood vial defects.

The Houston Forensic Science Center (HFSC) received four blood vials in this case.[66] There were three 002/gray blood vials that were the result of a law enforcement warrant, and one 003/lavender blood vial drawn at the hospital for medical treatment.[67] One blood vial from each designation was selected for testing.[68] Dana Mike is the HFSC toxicologist who tested Mr. Almanza's blood samples. Ms. Mike testified that the gray vials are preferred over other vials because they include an anticoagulant and a preservative. Ms. Mike testified the preservatives are important to prevent fermentation and to prevent ethanol from proliferating in the tube.[69] The anticoagulant is important to prevent the blood from clotting.

As regards the recall and the action she took, Ms. Mike testified she understood that two lots of BD vials were distributed where the preservatives and

[66] 5 RR 10.
[67] 5 RR 11.
[68] 5 RR 15.
[69] 5 RR 17.

anticoagulant were not in the tube.[70] Ms. Mike recalled that initially BD was not sure how many vials were affected. Later, Ms. Mike testified that BD believed it was around 300 vials but that over time when labs started taking inventory the number increased.[71] Finally, Ms. Mike recalled that BD sent out a memo to make labs aware of this issue and to monitor samples.[72] As far as Ms. Mike knew, the recall required her to look at the vials to determine whether there were additives in the blood vials and she was never made aware that there may be a reduced amounts of additives in the vials.[73]

Although Mr. Almanza's blood test shows an additive was present in the blood vial, Ms. Culbertson testified that you cannot see what the additive is and whether that additive is in a reduced amount.[74] Ms. Culbertson further testified that based on the clear language in BD's recall even if the additive is visualized, the blood vial should have been discarded.[75] Finally, as an expert Ms. Culbertson opined that any testing with the recalled blood vials were unreliable.[76]

Dr. Dayong Lee, a HFSC manager of toxicology testified at the suppression hearing that all 3,000 blood vials impacted by the BD recall were returned even if

[70] 5 RR 18.
[71] 5 RR 18.
[72] 5 RR 18.
[73] 5 RR 18.
[74] 2 MS 36-37.
[75] 2 MS 38.
[76] 2 MS 38.

additives could be seen in the vials.[77] At HFSC, Dr. Lee's primary responsibility is to make sure that standard operating procedures are followed.[78] Dr. Lee acknowledged that HFSC's lab had received internal notices about the BD recall and he instructed all agencies not to use the tubes or collection kits and requested replacement tubes.[79] Dr. Lee also testified that his understanding of the recall was that the recall involved a small portion of blood vials that did not contain any additive.[80] Dr. Lee testified he never believed the recall could have a reduced additive based on his communication with BD in spite of the fact that BD's first recall on May 30, 2019 made clear that there were issues with reduced additive in blood vials.[81]

3. Mr. Almanza's Blood Sample Was Compromised by BD's Defective Vials.

Despite the issuance of two recall notices to destroy or return the vials, Harris County continued using BD vials from the recalled batch, without conducting additional confirmatory testing to ensure the accuracy of its forensic results. Contrary to BD's recalls, Dr. Lee and Ms. Mike testified that they didn't believe BD's recall notices and continued to use BD's defective and recalled vials because, in their opinion, the defective vials could still be used to perform BAC

[77] 2 MS 113.
[78] 2 MS 98.
[79] 2 MS 108.
[80] 2 MS 99.
[81] 2 MS 99.

testing. In Harris County, months after BD's recall, approximately 3,000 blood vials were destroyed as a result of the recall notices.[82]

According to BD, they received complaints identifying issues with its blood vials as early as December 2018.[83] On April 9, 2019, Mr. Almanza's blood was tested using the recalled blood vials.[84] BD estimated that the additives were removed or reduced in the vials sometime in August 2018 however the first recall was not issued until May 30, 2019.[85] On May 30, 2019, BD issued a recall that confirmed there were reduced or no additives in the manufacturer's blood vials that was caused by manufacturer error, albeit unspecified.[86]

On June 12, 2019, a second recall notice was issued by BD which claimed the defective blood vials may contain no additive but removed the reduced additive language.[87] Significantly, BD never provided any basis for this updated recall even though several requests were made to the manufacturer. In addition, this new recall notice suggested there was a 95% chance that a nurse could find the problem with the faulty blood vials simply by looking at it.[88]

Problematically, Ms. Lomello testified that the 95% was an estimate that had no basis in any testing to determine its accuracy and no literature to support the

[82] 2 MS 81-82.
[83] 2 MS 31,127-28; See Exhibit 3, Distribution of the affected lot began on August 31, 2018.
[84] 2 MS 116.
[85] 2 MS 16, 31.
[86] MS at 16.
[87] 2 MS 23.
[88] 2 MS 24.

claim.[89] Ms. Culbertson also testified that a BD representative admitted that someone in the corporation made the estimate that 95 % of the faulty blood vials could be visualized by a nurse but BD would not provide any basis for this number or how it was calculated.[90]

In addition to the recall notices, Ms. Culbertson testified that other manufacturing errors occurred that were never noticed to the public.[91] For example, during production, the powder bin responsible for dispensing additives into the vials were documented as being low 87 times, resulting in almost seven hours of downtime.[92] Additional machine faults were recorded, including a powder piston not being down in time, causing interruptions in production for 11 minutes on two separate occasions.[93] Despite these repeated failures, BD has not provided documentation explaining how these machine faults were investigated or resolved.[94]

Pertaining to the defective vials, BD reported that 298 vials were returned with no additive and 101 were returned with additive.[95] Even though BD issued recall notices after 101 reported blood vials were returned to BD with additive, BD tested only one vial to determine whether there was a reduced additive amount in

[89] 1 MS 98.
[90] 2 MS 36.
[91] 2 MS 27-28.
[92] 2 MS 27-28.
[93] 2 MS 28.
[94] 2 MS 28.
[95] 2 MS 28.

the vial, despite well-established statistical principles requiring a minimum sample of 81 vials to achieve a 95% confidence level in this sampling.[96] BD also failed to sample or analyze the additive inside the tested vial to confirm its composition.[97] The proper functioning of preservatives and anticoagulants in blood-alcohol testing vials is essential to ensure accuracy. The preservative prevents yeast from metabolizing sugar and forming ethanol, which could falsely elevate blood-alcohol concentration.[98] The anticoagulant, meanwhile, keeps the blood from clotting, preserving sample integrity for forensic analysis.[99] The testing of just one returned vial with additives formed the basis of BD's second recall notice removing the reduced additive language. Despite the overwhelming evidence that BD's recalled blood vials were defective, HFSC continued to use the blood vials in direct opposition to industry standards and protocols.

4. Mr. Almanza's Blood Draw Result Was Not Scientifically Reliable.

The Court of Criminal Appeals has made clear that "[r]eliability centers on principles and methodology, and not on conclusions an expert generates by using those principles or methodology." *Vela v. State*, 209 S.W.3d 128, 134 (Tex.Crim.App.2006). "If a trial court properly concludes that an analytical gap exists between the data and the expert's proffered opinion, it may exclude that

[96] 2 MS 29-30
[97] 2 MS 29
[98] 2 MS 63.
[99] 2 MS 63.

expert's opinion." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 595. In *Kelly,* the Court set out a three-prong reliability test and identified seven non-exclusive factors for courts to consider in assessing reliability of scientific evidence. *Kelly v. State*, 824 S.W.2d at 573. These factors are:

> 1. The extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained;
> 2. The qualifications of the testifying expert(s);
> 3. The existence of literature supporting or rejecting the underlying scientific theory and technique;
> 4. The potential rate of error of the technique;
> 5. The availability of other experts to test and evaluate the technique;
> 6. The clarity with which the underlying scientific theory and the technique can be explained to the court; and
> 7. The experience and skill of the person(s) who applied the technique on the occasion in question.

Id. at 573.

Ms. White is the toxicology expert who conducted the testing of Mr. Almanza's blood and testified to the results. Ms. White testified that when she tested Mr. Almanza's blood she believed the BD recall only impacted blood vials with no additive.[100] Ms. White testified she believed that the recall required her to simply look at the vial to see if there was additive in the vial before testing, which

[100] 5 RR 18.

she did in this case.[101] Ms. White testified that based on her testing of Mr. Almanza's blood his ethanol amount was 0.191.[102]

Ms. White's expert testimony does not meet the *Kelly* criteria because the technique in applying the theory to test Mr. Almanza's blood was not valid and it was not properly applied in this case. Ms. White testified she assumed the correct additives were present and in the correct amount when she visualized the additives in the vial.[103] Ms. White also acknowledged the importance of the presence of additives to the accuracy of test results. While Ms. Culbertson testified to the importance of additives, she testified that visualizing the vial alone is not sufficient. Ms. Culbertson testified that if the nurse drawing Mr. Almanza's blood did not know that the additive had sodium fluoride and not the anticoagulant potassium oxalate it would result in the blood clotting.[104] Blood can clot because of a reduced amount of additive or no additive.[105] Ms. Culbertson further testified that the problem with blood clotting is that the toxicologist would then draw from the

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[101] 5 RR 18.
[102] 5 RR 32.
[103] "It is not feasible to determine whether the additive powders (preservative, anticoagulant, or both) were present *after* blood was introduced into the tube. While a possible impact of the missing anticoagulant is that the blood would appear visually different to a forensic analyst due to clotting, it is possible for clotting to occur in grey top tubes containing additive powders. It is also possible for a tube without additive to lack any visual indication of blood clotting." See https://forensicresources.org/2019/nationwide-vacutainer-recall-raises-doubts-about-blood-alcohol-tests/, last visited March 8, 2025.
[104] 2 MS 41-42.
[105] 2 MS 43.

serum around the clot in testing the blood which is no longer whole blood.[106] When the serum around the clot is tested instead of the whole blood it results in a falsely elevated blood-alcohol concentration.[107] Although Ms. White testified that she is required to notate if a clot exists in the blood before testing, Ms. Culbertson testified that in her experience with HFSC it has never required documentation when a clot was visualized.[108]

Ms. White did not test to ensure the proper additives were present or that the additives present were in the correct amount before testing Mr. Almanza's blood at the lab.[109] Ms. White not only admitted she was unaware of the mandatory recall's notice that there could be reduced additive in the blood vials, she testified that she believed she could visualize the vial instead of destroying or replacing it; a belief unsupported by any scientific method and in violation of the mandatory recall.

Similarly, Dr. Lee testified to something similar to Ms. White as the HFSC manager of toxicology whose job it is to ensure standard operating procedures are followed by toxicologists including White.[110] Dr. Lee testified he believed BD's recall only involved a small portion of blood vials that did not contain any additives.[111] Dr. Lee never believed there was a reduced additive issue with BD

[106] 2 MS 43.
[107] 2 MS 43.
[108] 2 MS 44.
[109] 5 RR 18-20.
[110] 2 MS 98.
[111] 2 MS 99.

blood vials even though he acknowledged the May 30, 2019 recall confirmed reduced additive and no additive in vials.[112] For these reasons, Harris County continued to use the recalled BD blood vials without any attempt to ensure the blood vials would provide reliable blood testing results.

Finally, Ms. Lomello testified that BD was notified of the issues with reduced additives in its blood vials in late 2018.[113] Ms. Lomello testified that 101 defective blood vials were returned with additive but only one was tested to ensure there were no reduced additive issues.[114] After testing just one of the defective vials, BD issued a revised statement indicating there were no issues with reduced additives and stated there was a 95% confidence level that a nurse could find the problem with the defective blood vials simply by looking at them.[115] None of the these assertions has ever been supported by any scientific data or literature and do not, because they cannot meet the *Daubert* and *Kelly* standards required for the admissibility of expert testimony.

For all the foregoing reasons, the State's expert testimony that Mr. Almanza's blood alcohol level was a 0.191 at 6:53 a.m. is not reliable and should not have been admissible at trial. Similarly, just as BD manufacturing initially suggested there were only a small amount of blood vials affected by the recall and

[112] 2 MS 99.
[113] 2 MS 127.
[114] 2 MS 29-30.
[115] 2 MS 24.

later acknowledged thousands of vials had to be destroyed or returned. So, too, over time BD's manufacturing recall has left experts in the scientific community less than confident that any of the results associated with the defective vials were reliable.[116] For all these reasons, this case represents precisely the type of gap that exists between data and an experts proffered opinion that the trial court should have excluded and therefore was an abuse of discretion.

E. THE STATE'S ERROR AFFECTED MR. ALMANZA'S SUBSTANTIAL RIGHTS

The trial court's violation of evidentiary rules that resulted in the erroneous admission of Ms. White's unreliable lab testing evidence is subject to review as non-constitutional error pursuant to TEX.R.APP.P. 44.2(b) which requires this Court to determine if this error affected Appellant's substantial rights. *Delane v. State*, 369 S.W.3d 412, 423 (Tex. App. – Houston [1st Dist.] 2012, pet. ref'd). A substantial right is affected if an error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State,* 953 S.W.2d 266, 271

[116] Several forensic science groups in Texas have released statements recognizing the seriousness of this mistake. The potential for compromised test results has been publicized by the Houston Forensic Science Center (HFSC) in a memo, which states that sharing the information was necessary "…to ensure prosecutors, defendants and all others in the justice system have the information needed to move forward." The Texas Forensic Science Commission also issued a memo stating that "it is not feasible to determine whether the additive powders (preservative, anticoagulant, or both) were present *after* blood was introduced into the tube." The memo goes on to state "[i]t is also possible for a tube without additive to lack any visual indication of blood clotting." See https://forensicresources.org/2019/nationwide-vacutainer-recall-raises-doubts-about-blood-alcohol-tests/, last visited March 8, 2025.

(Tex. Crim. App. 1997). A criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). However, "[i]n cases of grave doubt as to the harmlessness the [appellant] must win." *Burnett v. State*, 88 S.W.3d 633, 638 (Tex. Crim. App. 2002).

Mr. Almanza is not required to prove harm, instead it is this Court's duty to review the record and assess harm. *Johnson v. State*, 42 S.W.3d 1, 4-6 (Tex. Crim. App. 2001). The proper inquiry is whether the error substantially swayed or influenced the jury's verdict. *Booker v. State*, 103 S.W.3d 521, 538 (Tex.App. – Fort Worth 2003, pet. ref'd). In conducting this inquiry, this Court must consider the erroneous admission of this evidence in the context of the entire record and not just whether there was sufficient or overwhelming evidence of guilt. *Motilla v. State*, 78 S.W.3d 352, 355-56 (Tex. Crim. App. 2002); see also *Brown v. State*, 978 S.W.2d 708, 716 (Tex. App. – Amarillo 1998, pet. ref'd)(emphasis in original)("The determining of harm is little more than an educated guess. What the jurors *actually* thought persuasive or *actually* considered is seldom, if ever, available to us. So, we … assess potentialities.").

Here, the State essentially relied on the smell of alcohol and a head-on collision as the basis to arrest Mr. Almanza. At trial, the State relied primarily on

this same evidence. While the State may argue on appeal that the hospital blood drawn at 3:25 a.m. and resulting a blood alcohol result of 0.191 is sufficient to establish "intoxication," this assertion is a nonstarter.

1. The State Did Not Rely On 0.191 Blood Alcohol Level to Convict.

As an initial matter, the State did not, because it could not, retrograde extrapolate Mr. Almanza's blood alcohol level to the time of driving.[117] *See Mata v. State*, 46 S.W.3d 902, 908-09 (Tex. Crim. App. 2001) (overruled on other grounds)(Retrograde extrapolation is a scientific technique by which alcohol concentration at some earlier time is estimated based on the results of testing at some later time.). The State also made clear at trial it was only asking the jury to convict Mr. Almanza based on the blood alcohol result drawn as a result of a law enforcement warrant at 6:53 a.m.[118] The State argued at trial that the hospital blood drawn at 3:25 a.m., taken three and a half hours earlier, was not the basis of its prosecution.[119]

THE COURT: You're saying too much. This is not the blood-alcohol that -- level that was used to prosecute your client, correct?

MR. THIESSEN: Correct. This was not.

THE COURT: And this is taken two hours, or

[117] 5 RR 38.
[118] 5 RR 32.
[119] 5 RR 40;

whatever, before the blood that was actually used to substantiate the criminal charge; is that correct?

MR. THIESSEN: Correct.

MR. ESCOBAR: Yes, Your Honor. That is correct.

THE COURT: Using the methodology that you're planning to put before the jury?

MR. ESCOBAR: Yes, Your Honor, with the Houston Forensic Science Center.[120]

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To be sure, the State attempted to elicit testimony of the 0.191 blood alcohol amount from Mario Morino, the nurse who drew Mr. Almanza's blood at the hospital.[121] The trial court denied the State's request finding:

THE COURT: Okay. Well, not only did I find that the opinion on how they were done may be testimonial, but even if they were not, because of when and how they were taken and not used to prosecute the defendant, I also believe they'd be more prejudicial than they would be probative. So I'm making both of those findings. All right.

MR. ESCOBAR: Yes, Your Honor.

[120] 4 RR 68-69
[121] 4 RR 68-69.

THE COURT: So I'm excluding that portion of the medical records. I'm not excluding all of the medical records. That's up to you. Just the blood results.

MR. ESCOBAR: Yes, Your Honor.

MR. THIESSEN: Thank you.[122]

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MR. THIESSEN: Yes.

THE COURT: Okay. So not only -- I mean, I get you're making your record regarding testimonial evidence but for me as well was the point that this is not the level that is going to be used in prosecuting him, No. 1. And, No. 2, we didn't know how that level was attained, under what process, what procedure, et cetera. And, 3, because of that, it would definitely be more prejudicial than it would be probative and not really, I don't think, fixable by giving the instruction I would give the jury.

MR. THIESSEN: Correct.[123]

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[122] 5 RR 71.
[123] 5 RR 69.

For these reasons, the trial court correctly denied the State's request to get in back door hearsay about the blood alcohol concentration taken at the hospital at 3:25 a.m. purporting to show a 0.191 ethanol amount and would not allow that result to be part of the medical records admitted into evidence. For this reason, any argument that the 0.191 blood draw at 3:25 a.m. is somehow sufficient to eliminate the harm to Mr. Almanza is arguably waived by the State's assertions at trial and wide of the mark.

The State prosecuted Mr. Almanza based on the blood draw taken as a result of a search warrant taken at 6:53 a.m., almost five hours after the accident.[124] While Ms. White testified that Mr. Almanza's ethanol amount was 0.191 at 3:25 a.m., the State did not rely on this evidence to prove Mr. Almanza was "intoxicated" as a result of blood alcohol level that was.08 or above. Instead, the State relied upon the blood draw taken after a search warrant issued at 6:53 a.m., resulting in a blood alcohol result of 0.118 which was the result of using the defective blood vials as the basis for charges and this conviction. While Ms. White did testify that Mr. Almanza had a blood alcohol level of 0.191 at 3:25 a.m., the State did not rely on this result and did not even discuss the blood draw in closing arguments. This appellate court also should not place too great a weight on the

[124] 5 RR 68-69,

BAC of 0.191 drawn at 3:25 a.m. in its decision to find Mr. Almanza's substantial rights were affected because it was not the basis of this prosecution.

2. Other Evidence of "Intoxication".

The other evidence at trial was no more overwhelming than the tainted blood draws. The State offered conflicting evidence in attempt to prove Mr. Almanza was intoxicated. Officer Lunceford was the lead officer investigating the accident and he made the final determination about whether he believed Mr. Almanza was intoxicated. Officer Lunceford testified he had a cold on the night of this accident and could barely smell anything. Officer Lunceford testified that he did not smell the odor of alcohol at the scene[125] and could only smell the odor of alcohol on Mr. Almanza when he exhaled directly in his face at the hospital.[126] Officer Thomas testified he observed red, bloodshot and glossy eyes and a strong odor of alcoholic beverage.[127] Officer Sears also repeated the exact same information from the scene.[128] However, Officer Romero testified he didn't smell any odor of alcohol. [129] Officer Faulkner also said he did not smell alcohol on Mr. Almanza that morning.[130]

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[125] 5 RR 188.
[126] 5 RR 132.
[127] 3 RR 203.
[128] 4 RR 114.
[129] 4 RR 45.
[130] 5 RR 183.

Houston Firefighter and EMS technician Jason Bray testified that he was one of the first people to arrive on the scene of the accident at 2:32 a.m.[131] Mr. Bray testified that Mr. Almanza was able to recite his social security number, birthday, home address and the day of week.[132] Mr. Bray also testified that Mr. Almanza's eyes did not exhibit jerking, were open with a 15 out of 15 Glasgow Coma Scale, and that he was oriented to sound and verbal cues.[133] Ultimately, Mr. Bray testified that Mr. Almanza's eyes, ears and motor abilities were consistent with a sober person.[134]

Sergeant Egdor is an independent impaired driving expert who reviewed the officers' bodycams and other available discovery in Mr. Almanza's case.[135] Sergeant Egdor testified that based on his experience and training, he believed Mr. Almanza's appearance on the morning of this accident was not consistent with a 0.191 blood alcohol level.[136] Sergeant Egdor is a 23-year veteran of HPD and former head of the HPD DWI Task Force who trains officers on standard field sobriety testing and

[131] 3 RR 105.
[132] 3 RR 108.
[133] 3 RR 110.
[134] 3 RR 110-11.
[135] 5 RR 175.
[136] 5 RR 200.

drug recognition testing.[137] Egdor testified there were several officers on bodycams that said they did not smell alcohol on Mr. Almanza and he did not believe Mr. Almanza's speech was slurred on the day of this accident.[138]

When this Court considers all the evidence submitted to this jury this Court should find that Mr. Almanza's substantial rights were affected by the erroneous admission of blood test results that had no relevance because they were not reliable. Combined with other evidence at trial, including the 0.191 blood alcohol test result taken at 3:25 a.m., that could not be retrograde extrapolated to the time of driving as well as the conflicting testimony from officers about whether Mr. Almanza was intoxicated at the time of the accident, this Court cannot have a fair assurance that the error did not influence the jury or had but a slight effect.

For all the foregoing reasons, Appellant prays this Court sustain these points of error and find that the trial court's admission of the blood test results and expert testimony harmed Appellant's substantial rights.

The judgment of conviction entered below must be reversed and the cause remanded for a new trial.

[137] 5 RR 170-73.
[138] 5 RR 179.

CONCLUSION AND PRAYER

Appellant prays that this Honorable Court, reverse the trial court's ruling and remand for new trial.

RESPECTFULLY SUBMITTED,

/s/ Carmen Roe

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served by electronic filing same on March 10, 2025.

/s/ Carmen Roe

_____

CARMEN ROE

CERTIFICATE OF COMPLIANCE

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CARMEN ROE

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