APPENDIX 2

APPENDIX 2

TRIAL COURT REPORTER'S RECORD, VOL. 5 at 55-70

APPENDIX 2

APPENDIX 2

And then you had an objection or --

MR. VERRET: Yes.

THE COURT: -- you wanted to put something on the record.

MR. VERRET: Can I discuss with the Court --

THE COURT: Okay. You want to go off the record?

MR. VERRET: For a moment.

THE COURT: All right. Let's go off.

(AT THE BENCH, OFF THE RECORD.)

(BREAK.)

(OPEN COURT, DEFENDANT PRESENT, JURY NOT PRESENT.)

THE COURT: We're on the record. Let the record reflect that the defendant, his attorney, State prosecutors are present. The jury is not present.

It's my understanding your next witness is whom?

MR. TAMEZ: Sam Wylie from the Brazoria County Crime lab.

THE COURT: Okay. It's my understanding that the defendant is going to lodge an objection to -- is going to lodge an objection and I'll just -- Mr. Verret, I'll let you proceed.

MR. VERRET: Yes, Your Honor. I'm going to start with relevance. Our relevance objection comes into -- this is -- I anticipate Mr. Wylie's going to be testifying about the blood that was drawn from Mr. Williams and the analysis of that blood is not relevant because there was a four-hour time period from the time of the accident, 9:15, until his arrest. He was in a residence or he was at the very least -- there was nobody that has testified as to what happened to him between 9:30 -- or 9:15 and 1:30 and in which time things could have been ingested that could have contributed to what results the lab analyst will testify to today.

Second, of course, is 403 and 404, the danger of unfair prejudice and the potential of confusing the jury as to issues in this case outweighs its probative value, and of course, 404 for extraneous acts as it relates to how those lab results may include things that could have been ingested after the 9:15 accident.

Third, I believe the State is going to have or is going to -- would like to call this analyst from the Brazoria County Crime Lab to testify as to results from an NMS Lab -- IFL -- NMS -- NMS was the one who produced the report. Our objection under that is

that -- that the State filed a Certificate of Analysis under Article 38.41 Section 1. Our objection is is that the Certificate of Analysis does not comport with the statute.

Starting No. 1, the statute requires that it be prepared by an analyst; and the person who completed the affidavit that was filed was not an analyst of any of the substances that were tested in this case. Attached to the State's affidavit was a list of people who conducted analyses of the substances and the blood and the affiant in the Certificate of Analysis is not the person who actually conducted any of those tests.

The State will argue, I anticipate, that the Certificate of Analysis, though it's not -- I believe they're going to argue that at the very least in substantial compliance. The statutory ideal Certificate of Analysis as listed in 38.41 suggests -- requires that the analyst state the following tests that they conducted. Quote -- I quote: I conducted the following tests or procedures on this evidence. And then describe the test conducted by that analyst and the procedures that that analyst follows.

The affidavit that's filed does not state that the person -- the affiant actually performed any

tests herself or actually followed any specific procedures in performing the test. I believe that -- that probably what happened is as the supervisor, she took the results of other an -- of other analysts as listed in the affidavit and then produced a report and this affidavit.

I don't think that that was the purpose of 38.41, as the State didn't comply with it. We object to 38 -- that the admission of this affidavit and its attached lab reports from NMS under 38.41 and as it does not comply with 38.41 under the Sixth Amendment right to confrontation.

Furthermore, I think that it would be objectionable for the State to examine the analyst from the Brazoria County Crime Lab regarding anything that this -- this Court finds as inadmissible under this statute as well as under the Sixth Amendment. If this Court finds that the statute does not -- excuse me, that the affidavit did not comport with 38.41 and should not be admitted, then the State has a confrontation problem as to this exhibit and as to the information within this exhibit. And the witness should not be allowed to rely on information and put it in front of the jury as a statement of this is what is fact. And there's a confrontation problem there and that is our objection.

THE COURT: All right. Thank you.

Your response.

MR. TAMEZ: Our response -- our response is one of many prongs but I think with regard to the testimony being produced, the defense confuses the issues of weight versus the issues of admissibility. The timing between the blood draw and -- and the actual offense -- again, one of weight to be considered by the jury -- not a barrier to admissibility which is very low. It is directly relevant and passes upon an allegation of the State directly in the indictment.

With regard to the Certificate of Analysis and chain of custody, the statute is plainly clear and governs. It is -- it is a notice and demand statute that requires the State to provide notice to the defense of its intent to produce this affidavit at trial under the specific code section. That notice was provided. That same section provides a time window for which the defense can make a complaint. That time window has elapsed. That demand was not made; and therefore, the defense has waived all of their objections regarding this particular piece of evidence.

It's funny that the defense will argue the purpose of this statute but ignore that purpose when it comes to the -- the ability to confront witnesses at

trial. The purpose of the statute is to allow the State to secure the presence of witnesses, to allow it time to get its witnesses here if there is a deficiency in the pleading or if there's a -- or if there's a demand made with regard to the rights of confrontation. That demand wasn't made. And, therefore, the State's efforts have been frustrated and the State should not be required to produce this -- this witness on a dime when it should have had the time to do so if the defendant had made a timely objection.

The objection -- the objections that the defense lodges fall under the -- the umbrella of Section 1 which says: a certificate of analysis that complies with this article is admissible. And then Section 4 goes on to say that: not later than the 10th day before trial that the opposing party files a written objection. And it specifically references Section 1. But by -- with Section 1 referencing this article, it encompasses all of the requirements of the certificate. And if the defense has a complaint about one of the elements in the certificate, that complaint should have been lodged 10 days prior to trial to avoid this very problem that the State would be having if this certificate were ruled inadmissible. It frustrates the purpose of the statute.

The defense had ample opportunity -- because this case was -- this -- this particular filing was made in March. The defense has had ample opportunity to lodge an objection, more so than the 20 days it could have -- or the 10 days that it could have had to review the file and instead has chosen to lay behind the law and lodge this objection now and, again, in an apparent attempt to frustrate the State's effort to prove its case and to -- to delay the proceedings so -- to require the State to produce a witness it should have had notice it needed to produce 10 days before the commencement of the trial.

All of the defense -- all of the defense's other complaints fall within the -- the -- the umbrella of Section 1, the general compliance with the statute. And because it -- they fall under that section, they were required to make an objection 10 days before trial. They did not do so and, therefore, cannot revive their objections now that the time has lapsed.

It is -- it is a plain reading of the statute and requires no interpretation. The statute says 10 days before trial an objection must be made. An objection was not made. And Section 1 said compliance with this article. All of their complaints deal with compliance with this article. And, therefore, they have

no objection because they were given notice. They made no demand and, therefore, there -- they have no objection to make -- no -- no legal objection that has any merit because the time to make such objection has long since passed.

THE COURT: All right.

MR. TAMEZ: Also, in the event -- well, we'll make another -- another plea if the Court sees otherwise.

MR. VERRET: And then, also, if the Court is going to admit it, there's, I guess, an additional objection to the commentary.

THE COURT: Commentaries. Yes, sir.

MR. VERRET: Yes, sir. Yes, Your Honor.

And also, there was -- there was something in there about like a DWI was suspected or something like that. And I didn't black that out of my redacted copy but I think that that probably should also come out in describing the blood vial tubes on Page 1 -- back up, Your Honor.

THE COURT: Further.

MR. VERRET: No.

THE COURT: Yeah. It's right here.

MR. VERRET: Yeah, right there. I would say that that probably should come out -- or we'd object

to it coming -- we would object to that part coming into evidence as well.

THE COURT: Okay.

MR. TAMEZ: I'm sorry. Judge, may I also --

THE COURT: Yeah. Sure.

MR. TAMEZ: In addition, the defense makes a claim about the type of analysis being done not being shown within the body of the report. It is shown. On Page 2 of 6, it says Analysis By L -- now there are abbreviations. But this does detail the type of analysis that was conducted on the specimen.

And the report states at the very end, Wendy Adams, the author of the certificate and so, their complaints notwithstanding, they're just not reading the report carefully enough to understand what is -- what's been stated in the report.

MR. VERRET: And, I mean, I would just -- my retort to that would be that Wendy Adams didn't actually perform any of the tests that --

MR. TAMEZ: Well, that in itself is debatable. What follows is the chain of custody report, not necessarily a detailed -- a detailed accounting of the -- of the analysis of -- of who conducted the analysis, not to mention the fact that as the author of

the report, she's certifying that she made that analysis. That's what she says in her certificate and, again, we can't provide anything else to say otherwise.

MR. VERRET: Just as an aside, in the State's list of potential witnesses, every person that was an analyst in this was listed as a potential witness.

MR. TAMEZ: Including Dr. Wendy Adams.

MR. VERRET: Including Dr. Wendy Adams, that's correct. So, as far as notice, there's somewhat conflicting notice between the State providing a affidavit saying they're intending to offer it through this statute but at the same time providing a list of witnesses after -- that they potentially could call as witnesses in this case and listing those people named in the affidavit.

MR. TAMEZ: We have no idea about whether or not you're going to lodge the objection. We would be violating the discovery orders or the discovery request made by the defense by waiting until 10 days before trial when you make an objection so that we can list the rest of the witnesses that we would need to provide out of -- we did it out of an abundance of caution. Could go both ways. It's meant to account for the possibility that you may have considered making an objection and in

the event that you did not -- in which case -- in this case you did not -- we simply aren't going to call those witnesses that we -- that we listed.

But we can't -- you can't have it both ways and have us not list those witnesses and wait until you make your objection and then be required to list those witnesses.

THE COURT: Do you have another witness you can move to before you call a lab analyst so I can read a case?

MR. PERRY: Judge, we were going to ask the Court -- and I've talked to the defense about this --

MR. TAMEZ: Yes.

MR. PERRY: -- if you'd be okay with re-calling Rodney Crisp just for a very brief --

THE COURT: However you want to do it. That's fine.

MR. PERRY: Okay. Okay.

THE COURT: But do you have any other witnesses you can move to -- because it's going to take me a little while to look at one particular thing I have some concern about.

MR. TAMEZ: I mean, in the sense -- jump ahead to Amanda Berkley.

THE COURT: Yeah. That's what I'm talking

about.

MR. TAMEZ: You know, if -- yeah.

THE COURT: She's here.

MR. TAMEZ: That's fine.

THE COURT: Yeah. So, we got Mr. Crisp. We got Ms. Berkley here. We have Ms. Weber here.

And then do you have anything else for the rest of the day?

MR. TAMEZ: We don't -- we didn't plan on bringing anybody else for the rest of the day, no. That's -- that's the end of our list of witnesses for the day. We'd have to make arrangements to -- we'd have to make adjustments to get additional witnesses here if that were necessary.

THE COURT: Who would you have to -- are they local or --

MR. TAMEZ: Generally local, yes.

THE COURT: All right. I do want to take a little bit of time to read a particular case.

MR. TAMEZ: I feel like I was a little long-winded in my response. So, just to summarize, the defendant's complaints are -- are addressed by the -- by the filing itself and Dr. Wendy Adams is the one who issued the report and the one who analyzed --

THE COURT: Right.

MR. TAMEZ: -- the report and that -- and that the -- our basic argument is the filing itself is complete --

THE COURT: My --

MR. TAMEZ: -- and the other -- and the follow-up thing is the time for them to complain has passed.

THE COURT: Right. And my concern is a constitutional concern. It's not necessarily the technical concern as to the actual report. There's some things in the report I probably would redact out anyway as far as the comment section --

MR. TAMEZ: Right.

THE COURT: -- and things like that. But I want to read one case in particular and mine's more of a constitutional concern than anything.

MR. TAMEZ: We'd ask the Court to consider *U.S. versus Melendez-Diaz* --

THE COURT: That's the case I'm going to read.

MR. TAMEZ: -- which does specifically permit the State to -- to -- to have notice and demand statutes. This is that.

THE COURT: Right. And I think that's specifically the case I was going to turn to and pull up

and read.

MR. TAMEZ: Okay.

THE COURT: So -- and see if there's anything else analogous under the Texas cases.

Off the record.

(BREAK.)

(OPEN COURT, DEFENDANT PRESENT, JURY NOT PRESENT.)

THE COURT: We're on the record. Let the record reflect that the defendant, his attorneys, State prosecutors present. The jury is not present.

State wanted to make a request.

MR. PERRY: Yes, Your Honor. On the video interview, there was a redacted portion in regards to a blue warrant. We want to know how far we can go. We understand the Court's instruction, no mention of a blue warrant.

What is the proper way that we could ask that question without violating any court orders or instructions in regards to the warrant? I guess how much rope do we have?

THE COURT: You-all have an objection to that. Correct?

MR. ROBINSON: We do, Your Honor.

THE COURT: Okay. Just want to make sure

that that's covered.

The only thing I'll allow you to ask Detective Crisp, if he knows, is did the defendant inform him or state to him that he knew that at the time of the accident and at the time right immediately after the accident, if he knew that there was a warrant out for his arrest, without going into what type of warrant it was --

MR. PERRY: Okay.

THE COURT: -- or anything like that. Just that he knew that there was a warrant for his arrest and that's all.

MR. PERRY: Okay.

THE COURT: So, your objection's overruled to cover the record.

MR. VERRET: And that objection is a 403, 404 objection because we have to be specific about the danger of unfair prejudice --

THE COURT: Of course.

MR. VERRET: -- outweighing the probative value --

THE COURT: Of course.

MR. VERRET: -- and the danger of confusing the jury as to the issue -- outweighing the probative value.

THE COURT: Of course.

MR. VERRET: Thank you, Your Honor.

THE COURT: Yeah. That's the limitations I'm going to give.

MR. VERRET: Okay. And may that be a running objection so we don't have to --

THE COURT: Of course.

MR. VERRET: Thank you, Your Honor.

(BREAK.)

(OPEN COURT, DEFENDANT PRESENT, JURY PRESENT.)

THE COURT: For the record let the record reflect that the defendant, his attorneys, State prosecutors are present. The jury is present.

I hope you had a good lunch, nice long lunch.

I think we're ready for our next witness.

State's next witness.

MR. PERRY: State re-calls Rodney Crisp.

THE COURT: Rodney Crisp.

I'll just remind you you're still under oath.

THE WITNESS: Yes. Thank you, Your Honor.

THE COURT: You may proceed.

MR. PERRY: Permission to approach the

APPENDIX 3

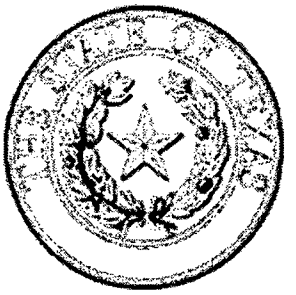
APPENDIX 3

14th DISTRICT COURT OF APPELAS OF TEXAS
MEMORANDUM OPINION

APPENDIX 3

APPENDIX 3

Affirmed and Opinion filed October 3, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00458-CR

ANDREW LEE WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 75253

O P I N I O N

A jury found appellant, Andrew Lee Williams, guilty of manslaughter with an affirmative finding of use of a deadly weapon and accident involving personal injury or death. *See* Tex. Penal Code § 19.04 and Tex. Transp. Code § 550.021. Punishment was enhanced with two prior felony convictions and the jury sentenced appellant to confinement in the Institutional Division of the Texas Department of Criminal Justice for sixty years for each offense; the sentences were ordered to run

concurrently. In multiple issues, appellant contends (1) the evidence was insufficient to support both of his convictions; (2) the trial court erred by denying his motion to suppress his custodial statement; (3) the trial court erred by admitting evidence of (a) drug test results, (b) extraneous offenses about drug use, and (c) improper expert testimony. We affirm.

I. THE EVIDENCE

Around 9:00 a.m. on Saturday, December 13, 2014, the complainant, Donna Treesh, was jogging along Business State Highway 288 ("Business 288"), a main road through the town of Angleton, Texas, with at least six other people, including her daughter, Megan Gonzalez. One of the runners, Marie Silva, testified they ran on the road's shoulder. Silva was running behind Treesh and Gonzalez. She had stopped when a red car went right by her. She looked at Treesh and Gonzales, who were on the shoulder. Treesh was running "maybe two feet from the grass." Silva screamed at Treesh and Gonzalez and tried to "grab" the car. The car sped up and the brake lights did not show the brakes were applied. Silva witnessed Gonzalez being "ejected" to the right-hand side and land in the grass. She saw Treesh ejected "off the hood over the middle of the car . . . about 12 feet into the air." Treesh landed about twenty feet away. Some men from the Goe Harley Davison/Kawasaki dealership ran over, crossing the road. Silva watched the car go back onto the road and continue one mile to Cemetery Road, where it turned right from the left-hand lane. According to Silva, that was the first time the brake lights were activated. She was certain the car never slowed down until it made the turn at Cemetery Road. Silva could not see who was driving but could tell it was a man. She called 911.[1]

[1] The recording of Silva's 911 call was admitted into evidence as State's Exhibit 1 and played in open court.

Megan Gonzales testified that Treesh was ahead of her "on the very closest edge where the grass and the road meet" when Gonzales passed her. Gonzalez then heard screaming and a very loud crash. As Gonzales turned, she saw red and what looked like a Pontiac symbol. Gonzales was hit and then flew through the air and slammed onto the ground. She felt her head slam on the concrete and tried to scream but the breath had been knocked out of her; Gonzalez could not move. She heard people screaming around her and thought she was going to die. Gonzales began yelling "where's my mom." She thought Treesh had been hit. Gonzalez heard someone say "the neck is severed." Gonzalez was taken to the hospital and was later told by her father that her mother had died.

That morning Christopher Petersen was working at the Goe Harley-Davidson/Kawasaki dealership on Business 288 in Angleton. He was out front and saw the joggers. Petersen described the weather as nice, not raining, with perfect visibility. The highway was not busy. Petersen noticed a red Pontiac car come up behind two of the joggers. He could not tell how fast the car was going but it was at least the speed limit of fifty or fifty-five miles per hour. The car went "way off" the road and traveled some distance before striking the two joggers. Treesh was hit "really hard" and went "flying through the air." Gonzalez was hit and rolled off the right side of the car and into the grass. The car continued to Cemetery Road where it turned right. Petersen never saw the car attempt to stop, the brake lights did not activate, and the car did not return to the scene. Petersen ran across the street to Treesh — blood was coming out from underneath her head and her right ear. Petersen checked her pulse and felt "maybe three or four heartbeats" before hearing "a big exhale;" there were no more heartbeats.

Amanda Berkley was dating appellant at the time of the accident. Berkley testified that she and appellant were in Clute, Texas, on the morning of December 13, 2014. She saw appellant take three Somas, which are prescription muscle

relaxants. Subsequently, they headed to Angleton in a four-door red Pontiac. Appellant became very drowsy and "started nodding off to sleep as he was driving." Berkley kept telling him to stop and let her drive but appellant refused. According to Berkley, she "was screaming at him." Berkley convinced appellant to stop for coffee and cigarettes but before they reached a convenience store, "[s]omething hit the front window." Before that, Berkley saw the group of runners on the left side of the road. Berkley did not see "the first thing" but then saw "a body roll over on the hood of the car." Appellant said "he had a warrant" and told Berkley he was not going to stop. Berkley testified that she told appellant "to drive." Berkley told appellant "we hit someone" but he kept saying, "no" and then said, "we must have hit a dog." Berkley stated that she told appellant it was not a dog, but a person. Berkley then testified that she told appellant to turn around and he said, "no, I have a warrant."

Appellant and Berkley drove to a trailer; several other people were there. Berkley overheard appellant talking to someone about a dog or a deer and disposing of the car. Berkley never heard a discussion about appellant going back or calling the police. Berkley testified that she did not believe appellant knew exactly what had happened and it was very difficult to see out of the busted windshield. Berkley admitted that she later told a friend, Debbie Falco, that appellant was going to stop but she told him to go. Berkley said appellant was distracted "with a phone" when the accident occurred. Berkley also agreed that she told Falco that appellant was being stupid and careless.

Charlene Weber was at the trailer when appellant and Berkley arrived; she had never met him before. She witnessed appellant exit the car from the driver's side and Berkley exit from the passenger's side. Weber agreed that she gave a statement that appellant looked "high" when he arrived and testified "Amanda was for sure high. She was slurring her words and everything and like I kind of knew her cause

we worked together." Two people at the trailer left and went to the scene of the accident. When they returned and spoke to appellant, he was very upset, scared and crying. Those present began discussing how to dispose of the car; Weber did not recall appellant saying anything. She admitted that she suggested burning the car. Weber later saw appellant take some pills but she did not know what kind. Weber left before the police arrived.

Weber admitted that she first told law enforcement that they said they hit a deer. Weber also admitted that she told police that Berkley said they were not going back because there was a warrant out for appellant. In her second statement to police, Weber said that both Berkley and appellant knew they hit a person and Berkley said "it was a drunk lady that had stumbled on the road." Weber then testified she did not recall who said it. Weber agreed that she, Weber, told appellant to go back.

Officer Steven Epperley of the Angleton Police Department was transporting a prisoner on the day of the accident and drove past the joggers on that part of Business 288, also called South Velasco. He described it as a clear day, the sun was out, and traffic conditions were very light. As Epperley arrived at the department's garage, he heard over the police radio that there had been a major accident on South Velasco involving a pedestrian and the vehicle had left the scene. Epperley proceeded to the location and controlled traffic. Eventually, Epperley left the scene and went back on patrol.

Ronald Kirby received a call from his wife, Kasey (Treesh's niece), informing him of the accident. Ronald learned Treesh was hit by a red car that had turned down Cemetery Road. Ronald went to Cemetery Road and searched multiple roads. He found a red car parked next to a trailer. The car had a broken windshield and a dent in the hood. Ronald called the Angleton Police Department and reported that he had

possibly found the car involved in the accident. Ronald remained nearby until the police arrived.

Epperley received instructions to proceed to Sunny Meadows in regards to the car involved in the accident. Epperley approached a trailer house with two vehicles in the driveway, one of which was a red Pontiac. On the red car, Epperley observed damage to the windshield on the driver's side as well as the hood and the passenger-side mirror was missing. Officer Jeremy Burch of the Angleton Police Department testified the car's side rearview mirror, and other debris from the car, were found at the scene of the accident.

Appellant was at the trailer and claimed ownership of the red car. When asked what happened to the car and appellant said, "I think I hit a deer." Appellant told Epperley the accident occurred by Spare Time, a bowling alley at Cemetery Road and South Velasco, approximately four city blocks from the scene of the fatality. Appellant also said he "hit something blond." Appellant stated that an acquaintance informed him that he had hit a person and it was a fatality. Appellant claimed that he did not know whether he hit a person, all he saw was a "blond" animal. Appellant said he "saw a blond deer" and saw "blond short hairs in the windshield." Epperley testified that when he observed the car closer at the police department, he saw long strands of blond human hair in the windshield. Appellant stated, "I fled the scene" and "well, damn, I know the laws." Epperley testified that appellant indicated he was aware that he was involved in an accident. Epperley also stated that appellant's train of thought was "scattered" and not in chronological order. Appellant seemed hyper and nervous and his pants appeared urine-stained.

Rodney Crisp, a detective with the Angleton Police Department, also was called to the scene of the accident. After the scene was cleared, Crisp returned to the police department and learned a vehicle matching the description of the one that left the scene was located on Sunny Meadows Road in Sunny Meadows Trailer Park.

When Crisp arrived, Epperley was on the driveway talking to appellant. Crisp observed a red Pontiac Grand Am parked at the trailer. Crisp subsequently learned the vehicle was registered to appellant. Crisp walked to the front of the car and saw front-end damage consistent with having hit someone. The windshield was damaged on the driver's side and hair follicles were embedded into it.

Epperley took appellant into custody and placed him in the patrol car. Appellant was "very exhausted or tired" and fell asleep, waking up and going back to sleep several times while being transported to jail. After booking appellant, Epperley asked if he had taken any medication that morning and appellant said no. Appellant agreed to give a blood sample. Pursuant to a warrant, a sample was taken approximately five hours after Epperley first encountered appellant.

On December 18, 2014, Crisp conducted a video-taped interview of appellant. Crisp testified appellant told him that he was aware that he had hit somebody. Appellant told Crisp he heard a loud thud and decided to run. Appellant said Berkley told him to run and "they needed to get their story straight." Appellant also said that he did not know he hit someone. Appellant admitted to taking medication on the day of the crash. Appellant said that he was "messed up on crystal meth and cocaine," was in and out of consciousness, and wanted to get home to lay down. Appellant claimed that when he gained consciousness, he saw damage to the windshield. Appellant told Crisp that an acquaintance told him that he had hit a person. Appellant also said that he thought he had hit a deer when Berkley told him that he hit a person. Crisp testified that he learned that at the time of the crash, appellant knew a warrant had been issued for his arrest.

Sergeant Craig Cummings of the Texas Highway Patrol downloaded the airbag control module, also known as the "black box." He testified the device records if the airbag is deployed or if the vehicle is "jarred" enough to cause a drop in velocity of five miles per hour ("mph"). The data reflected the speed of the vehicle

increased from fifty-two mph to fifty-five mph in the five seconds immediately preceding the crash. Also, the data showed the brakes were not applied immediately prior to the crash. Cummings agreed the data corroborated the eyewitness testimony that the car sped up right before the crash and the brakes were not applied. Cummings acknowledged on cross-examination that he could not say the data report was from any particular crash but it did reveal a crash date of December 13, 2014. Cummings testified the device does not record post-crash data.

Keith Woods inspected appellant's car, a red 2003 Pontiac Grand Am, on December 16, 2014. He checked the brakes, suspension, steering, exhaust and tires and found everything was in good condition. The windshield was caved in on the driver's side. Because of the windshield, the wipers did not properly operate. Woods testified the condition of the car did not contribute to the crash.

Robin Wright, an accident reconstructionist, testified the vehicle was going fifty-five mph in the seconds immediately before the crash, and was accelerating. A reduction in velocity of 1.66 mph occurred and was consistent with an auto-pedestrian crash. Further, Wright testified there was no perception and reaction — the driver "never quit depressing the accelerator. He never touched the brakes. And as a matter of fact, the speed on the vehicle was in the process of increasing as opposed to decreasing." Wright opined the cause of the crash was the driver steering off the main lane onto the road's shoulder without stopping or turning away from the pedestrians on the shoulder. Wright stated that he had no reason to suspect the crash was due to any factor other than appellant. Wright characterized appellant's conduct as a gross deviation from the general standard of care. Wright testified visibility under the conditions at the time of the crash would be "almost unlimited . . .." He agreed that a driver exercising ordinary and prudent care would be able to see the joggers from half a mile, or further, away.

Dr. Lee Ann Grossberg, M.D., a forensic pathologist testified as to the cause and manner of Treesh's death. Grossberg described Treesh's multiple injuries in detail and testified the cause of death was blunt force trauma. According to Grossberg, Treesh appeared to be in excellent health before the crash. Grossberg saw no evidence of medical intervention. Treesh was pronounced dead at the scene at 9:14 a.m. Grossberg testified Treesh died "quite immediately," although not "the split second of the impact." Grossberg agreed that Petersen's testimony that Treesh had a faint pulse and made a gurgling noise was consistent with her injuries. In Grossberg's opinion, no medical intervention could have saved Treesh.

Dr. Sam Wylie, Ph.D., from the Brazoria County Crime Lab testified to the results of appellant's blood test. The screening test detected THC, the psychoactive ingredient in marijuana. Also detected was meprobamate, a metabolite of Soma or carisoprodol, which is a muscle relaxant that affects the central nervous system. Wylie testified it can cause drowsiness or dizziness and is generally described as a depressant. Further testing done by NMS Laboratory found both stimulants and antidepressants in appellant's blood: amphetamine; methamphetamine; delta THC, carboxy THC; benzoylecgonine, a metabolite of cocaine; hydrocodone; carisoprodol and meprobamate.

The jury found appellant guilty of manslaughter and accident involving personal injury or death and sentenced him to prison for sixty years. From those convictions, appellant brings this appeal.

II. SUFFICIENCY OF THE EVIDENCE

In his first and second issues, appellant argues the evidence presented at trial was insufficient to support both his convictions. When engaging in a review of the legal sufficiency of the evidence supporting a conviction, we "examine all of the evidence in the light most favorable to the verdict and determine whether a rational

trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979); *Price v. State*, 456 S.W.3d 342, 347 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). All evidence presented to the jury is considered, whether properly or improperly admitted at trial. *Thomas v. State*, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988).

As the reviewing court, we may not substitute our judgment for that of the fact finder by re-evaluating weight and credibility of evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

A. Manslaughter

A person commits manslaughter if he recklessly causes the death of an individual. *See* Tex. Penal Code § 19.04(a). A person acts recklessly, or is reckless, with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. *Id.* § 6.03(c). The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise as viewed from the defendant's standpoint. *Id.*

Appellant contends Treesh's death was an accident caused by a momentary loss of control due to distraction within the vehicle. Appellant argues the State failed to prove beyond a reasonable doubt that he recklessly caused Treesh's death.

The jury was instructed that it could find appellant guilty of recklessly causing Treesh's death by several means: (1) leaving the roadway in his car and traveling onto the shoulder of the road, (2) driving his car on the shoulder of a roadway, (3) driving his car at an unsafe speed for road conditions and road shoulder

conditions, (4) failing to maintain a proper lookout and avoid hitting Treesh with his car, (5) failing to properly steer and apply brakes, causing his car to collide with Treesh, or (6) driving a car after ingesting drugs, such as methamphetamine, amphetamine, hydrocodone, carisoprodol, marijuana, and cocaine. Because alternatives means for committing manslaughter were submitted to the jury, proof of any one alternative means is sufficient for conviction. *Williams v. State*, 473 S.W.3d 319, 324 (Tex. App.—Houston [14th Dist.] 2014, pet ref'd) (citing *Guevara v. State*, 152 S.W. 3d 45, 49 (Tex. Crim. App. 2004)). Also, when the jury returns a general guilty verdict on an indictment presenting alternative theories of the same offense, as in this case, the verdict stands if the evidence supports one of the theories charged. *Brooks v. State*, 990 S.W.2d 278, 283 (Tex. Crim. App. 1999).

The evidence at trial was sufficient to support all of the alternatives presented to the jury with the sole exception of driving at an unsafe speed. The testimony was uncontested that Treesh was on the shoulder when struck by appellant's car. Thus the evidence was sufficient for a rational trier of fact to find appellant left the roadway and travelled onto the shoulder of the road and drove his car on the shoulder.

Further, the evidence at trial was uncontested the weather was clear, traffic was light, and visibility was excellent; the joggers were clearly visible to witnesses before and after the accident. Accordingly, a rational trier of fact could find from the evidence that appellant failed to maintain a proper lookout and avoid hitting Treesh with his car.

The undisputed evidence was that appellant left the roadway, drove onto the shoulder toward a group of joggers, and his car was accelerating. The testimony established appellant never applied the brakes. From this evidence, a rational trier of fact could find appellant failed to properly steer and brake to avoid hitting Treesh.

Lastly, the jury heard evidence that appellant ingested carisoprodol, in the form of Soma, and then decided to drive his car. Within hours of the crash, his blood contained methamphetamine, amphetamine, hydrocodone, marijuana, and cocaine. The only evidence appellant may have ingested drugs after the crash was the testimony of Weber that he took some unidentified pills. Appellant claimed he had used cocaine and methamphetamines one to two days before the crash, but admitted to taking prescription medication that morning. Rational jurors could have found beyond a reasonable doubt that the drugs found in appellant's system were present before he began to drive the car that morning. Proof that appellant was driving after having ingested controlled substances is sufficient to show recklessness. *See Rubio v. State*, 203 S.W.3d 448, 452 (Tex. App.—El Paso 2006, pet. ref'd) (holding that driving under the influence of alcohol demonstrates a conscious disregard of substantial risk).

Appellant argues "not every accident is felony crime" and "it would have been an accident if [he] had stopped." This is incorrect. From the evidence presented, a rational trier of fact could have found appellant's recklessness caused Treesh's death regardless of whether he stopped the car.

The evidence suggesting appellant was unaware of what he hit and his claim that he was distracted do not render the evidence insufficient to support his conviction. In regards to the manslaughter conviction, the question is not whether appellant knew he hit Treesh but whether his reckless driving caused her death. Recklessness can be applied generally to the act of driving. *Porter v. State*, 969 S.W.2d 60, 63 (Tex. App.—Austin 1998, pet. ref'd). The major factor to be considered is the conscious disregard of the risk *created* by the actor's conduct. *See Lewis v. State*, 529 S.W.2d 550, 553 (Tex. Crim. App. 1975) (emphasis added).

The evidence before the jury was that appellant chose to drive after ingesting

three muscle relaxants and continued to drive even though he was losing consciousness. From this was evidence, a rational juror could find beyond a reasonable doubt that appellant consciously created a substantial and unjustifiable risk of danger to others. *See Rodriguez v. State*, 834 S.W.2d 488, 490 (Tex. App.—Corpus Christi 1992, no pet.). For these reasons, we find the evidence sufficient to support appellant's conviction for manslaughter and overrule his first issue.

B. Accident Involving Death

Appellant contends in his second issue that the evidence was insufficient to support his conviction for accident involving personal injury or death. Section 550.021(c) of the Texas Transportation Code defines the offense of accident involving personal injury or death, also known as failure to stop and render aid. *See* Tex. Trans. Code § 550.021(c); *see also Steen v. State*, 640 S.W.2d 912 (Tex. Crim. App. 1982). The requirements of section 550.021 are found in subsection (a) of the statute, which provides:

> The operator of a vehicle involved in an accident that results or is reasonably likely to result in injury to or death of a person shall:
>
> (1) immediately stop the vehicle at the scene of the accident or as close to the scene as possible;
>
> (2) immediately return to the scene of the accident if the vehicle is not stopped at the scene of the accident;
>
> (3) immediately determine whether a person is involved in the accident, and if a person is involved in the accident, whether that person requires aid; and
>
> (4) remain at the scene of the accident until the operator complies with the requirements of Section 550.023.

Tex. Trans. Code § 550.021(a). Section 550.023 provides:

> The operator of a vehicle involved in an accident resulting in the injury or death of a person or damage to a vehicle that is driven or attended by a person shall:

> (1) give the operator's name and address, the registration number of the vehicle the operator was driving, and the name of the operator's motor vehicle liability insurer to any person injured or the operator or occupant of or person attending a vehicle involved in the collision;
>
> (2) if requested and available, show the operator's driver's license to a person described by Subdivision (1); and
>
> (3) provide any person injured in the accident reasonable assistance, including transporting or making arrangements for transporting the person to a physician or hospital for medical treatment if it is apparent that treatment is necessary, or if the injured person requests the transportation.

Tex. Trans. Code § 550.023.

Based upon subsection (3) of section 550.023, and the testimony of Dr. Grossberg that "no medical intervention could have saved [Treesh's] life," appellant argues the State failed to show that he could have rendered aid to Treesh since she died immediately after impact. Appellant relies upon the allegation in the indictment that he left the scene of an accident "without rendering reasonable assistance to Donna Treesh when it was then apparent Donna Treesh was in need of medical treatment and said accident resulted in the death of Donna Treesh."

Appellant admitted that he was aware he had hit something, and that a loud thud woke him after he passed out while driving. Additionally, he informed police that his passenger told him he hit a person and he then fled the scene. Appellant thus violated section 550.022 in the following ways:

- He did not stop the vehicle at the scene of the accident;
- He did not return to the scene of the accident;
- He made no attempt to determine if a person was involved in the accident or required aid; and
- He did not remain at the scene and comply with section 550.023.

Sections 550.021 and 550.023 do not require that the life of the injured person could have been saved. Such a requirement would be inapposite to section 550.021's express allowance for a conviction whether the accident results, or is reasonably likely to result, *in injury to* or death of a person. Moreover, section 550.021 does not require that injury or death did, in fact, result from the accident, only that it was *reasonably likely* to result. And section 550.023 requires a person to *provide* reasonable assistance without mandating that assistance be successful.

The primary concern of the statute is leaving the scene of an accident with knowledge that an accident has occurred. *Huffman v. State*, 267 S.W.3d 902, 908 (Tex. Crim. App. 2008); *see also Mayer v. State*, 494 S.W.3d 844, 851 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). The allegation of failure to stop and render aid is complete after it is determined the operator of the vehicle was aware he was in an accident and failed to stop. *See May v. State*, 171 S.W.2d 488, 490–91 (Tex. Crim. App. 1943) (affirming a conviction for failure to stop and render aid after the defendant failed to stop at accident, despite evidence that the victim was "beyond all earthly aid.").

When appellant's windshield was caved in, he was aware he was in an accident. Appellant then failed to comply with section 550.022. Accordingly, the offense was complete. From that evidence, the jury could have found beyond a reasonable doubt that appellant was guilty of accident involving personal injury or death. Accordingly, appellant's second issue is overruled.

III. MOTION TO SUPPRESS

In his third issue, appellant contends the trial court erred in denying his motion to suppress the video statement he gave on December 18, 2014, to Detective Crisp while in custody. Appellant alleges it was obtained in violation of his Fifth and Sixth Amendment right to counsel because an attorney had been appointed to represent

him two days earlier.

When reviewing a trial court's decision on a motion to suppress regarding a custodial interrogation, we must conduct a bifurcated review. *Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012). We afford almost total deference to the trial judge's rulings on questions of historical fact and credibility, and review de novo only the trial court's rulings on application of law to fact questions that do not turn upon credibility and demeanor. *Id.* The evidence presented on a motion to suppress is viewed in the light most favorable to the trial court's ruling. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). We will affirm the trial court's ruling if it is correct under any theory of law applicable to the case. *Id.* at 855–56.

During the motion to suppress hearing, appellant based his argument on the fact that the interview was initiated and conducted by Detective Crisp two days after he requested and was appointed counsel at the magistrate hearing. Appellant asserted that by requesting counsel at the magistrate hearing, any subsequent waiver or discussion outside the presence of his attorney was involuntary. Appellant re-urged his objection prior to Crisp's testimony and admission of his statement into evidence.

The trial court found that before the interview and during the video recording, Crisp read appellant his *Miranda*[2] rights. The trial court further concluded the evidence demonstrated appellant knowingly and intelligently waived his *Miranda* rights and his statement was voluntarily and freely given. As a result, the trial court denied the motion to suppress, stating there was no violation of appellant's Fifth or Sixth Amendment rights. We agree.

The Fifth Amendment protects a criminal defendant from being forced to bear witness against himself. U.S. CONST. amend. V. The *Miranda* rule was intended to protect a defendant against the coercive nature of police questioning and ensure that

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

his Fifth Amendment right is safeguarded. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1883 (1981). Police are required to provide *Miranda* warnings prior to the start of interrogation and once a defendant has invoked his right, questioning must stop. *Id.*

The Sixth Amendment functions similarly to that of the Fifth Amendment. Once the adversarial judicial process begins, the Sixth Amendment guarantees the defendant the right to have counsel present in all critical stages. *Hughen v. State*, 297 S.W.3d 330, 334 (Tex. Crim. App. 2009) (internal citations omitted). Police questioning, while in custody, has been considered to be a "critical stage" of the criminal proceedings protected by Sixth Amendment. *Id.*

Though the *Miranda* doctrine was developed to offer additional protections under the Fifth Amendment, these warnings also serve the interests of the Sixth Amendment right to counsel during interrogation. *See Pecina v. State*, 361 S.W.3d 68, 77 (Tex. Crim. App. 2012) (citing *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079 (2009)). Therefore, waiver of *Miranda* rights constitutes a waiver of both Fifth and Sixth Amendment right to counsel, so long as the relinquishment is voluntary, knowing, and intelligent. *See id.* at 77–80; Tex. Code Crim. Proc., art. 38.22 §2 (b).

Appellant contends that because he invoked his right to counsel at the magistrate hearing, his constitutional right to counsel was violated two days later when Crisp initiated interrogation without notification to and presence of defense counsel. This is no longer the state of the law. *See, e.g., Holloway v. State,* 780 S.W.2d 787, 795 (Tex. Crim. App. 1989) (determining authorities may only initiate interrogation of a charged and represented defendant through notice to defense counsel); *Cloer v. State*, 88 S.W.3d 285, 289 (Tex. App.—San Antonio 2002, no pet.) (concluding detective was prohibited from interviewing defendant without notifying counsel first).

In *Montejo*, the United States Supreme Court expressly overruled the holding in *Michigan v. Jackson,* 475 U.S. 625, 636, 106 S. Ct. 1404 (1986), which barred interrogations initiated by police after a defendant's request for a lawyer at arraignment. *Montejo,* 556 U.S. at 797, 129 S. Ct. at 2091. Under *Montejo,* appellant's request for counsel at an arraignment has no effect on the invocation of his right to counsel during later police-initiated custodial interrogation. *See Pecina,* 361 S.W.3d at 78.

In an attempt to distinguish his case, appellant argues that he requested counsel, whereas Montejo did not. In *Montejo*, the Court appointed counsel to represent the defendant from the Office of Indigent Defenders. *Montejo,* 556 U.S. at 782, 129 S. Ct. at 2082. However, in dicta the Supreme Court discussed how different State practices of appointment of counsel in situations of indigence played a part in its decision to overrule the *Jackson* rule as unworkable. *See* 556 U.S. at 783–84, 129 S. Ct. at 2083–84. Hence, it declined to permit inconsistent application of the rule for one defendant who was instructed to request appointment than for one who was directly appointed counsel by the court, calling the difference "hollow formalism." *Id.* As such, the distinction raised by appellant is irrelevant.

Appellant also contends the holding in *Pecina* is inapplicable because Pecina asked to speak with the police immediately after he requested appointment of an attorney. This is a mischaracterization of the facts of *Pecina.* In response to being asked by the Magistrate Judge if he wanted to talk to police, who were waiting outside his hospital room, Pecina indicated he did. *Pecina,* 361 S.W.3d. at 72. He did not initiate the contact, as appellant's argument suggests. *Id.* at 73 (citing *Pecina v. State*, 268 S.W.3d 564, 568 (Tex. Crim. App. 2008), in which the Court previously decided that Pecina had not initiated contact). The temporal distinction does not

change the fact that in this case appellant was informed of his rights during interrogation and failed to request counsel when he had the opportunity.

Because appellant's request for counsel at a magistrate hearing does not translate to the time of questioning, we must next determine if his waiver given to Crisp was valid. While being questioned, police recorded appellant's statement on video. Crisp read appellant the *Miranda* warnings, which also comported with the standards of Texas Code of Criminal Procedure, art. 38.22, §2 (a). As appellant was informed of his right to have a lawyer present during interrogation, appellant nodded, indicating he understood. Further, in response to being asked if he wanted to talk to the detective, appellant responded, "yes sir, I have no reason not to." There is no evidence that appellant was forced to provide, or promised anything in exchange for, his statement. Thus the record supports the trial court's finding that appellant's statement was voluntarily, freely, and intelligently given, making the waiver of his right to counsel valid.

For these reasons we conclude the trial court did not abuse its discretion in denying appellant's motion to suppress his custodial statement. Accordingly, appellant's third issue is overruled.

IV. ADMISSIBILITY OF EVIDENCE

In points of error four through six, appellant contends the trial court erred by (1) admitting evidence of drug test results; (2) admitting evidence of extraneous offenses; and (3) admitting expert testimony that he acted recklessly. We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *De La Paz v. State,* 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). As long as the trial court's ruling falls within the zone of reasonable disagreement, we will affirm its decision. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). We address each complaint in turn.

A. Admission of Drug Test Results

In his fourth issue, appellant contends the trial court abused its discretion by admitting into evidence the results of his drug tests, accompanied by a Certificate of Analysis, without the testimony of the chemist who performed the testing. *See* Tex. Code Crim. Proc. art. 38.41. Appellant argues admission of the results of blood tests performed by NMS Laboratory violated his right to confrontation under the Sixth Amendment to the Unites States Constitution. *See* U.S. CONST. amend. VI. The Confrontation Clause provides the accused in a criminal prosecution the right to be confronted by the witnesses against him. *Id.* This procedure bars testimonial statements of a witness not present at trial, unless the witness is unavailable or the defendant had a previous opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 1365 (2004). Affidavits that show the results of a forensic analysis, such as drug tests or DNA comparisons, are considered testimonial statements under the Sixth Amendment right to confrontation. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310, 129 S. Ct. 2527, 2532 (2009); *see also Bullcoming v. New Mexico*, 564 U.S. 647, 665, 131 S. Ct. 2705, 2717 (2011).

However, the Sixth Amendment right to confrontation may be waived by failure to object to the offending evidence. *Melendez-Diaz*, 541 U.S. at 314, 124 S. Ct. at 2534, n. 3. States are allowed to adopt notice-and-demand statues requiring the prosecution to provide notice to the defendant of its intent to use an analyst's report at trial without the witness present and allow the defense to object within a given period of time. *Id.* at 327, 124 S. Ct. at 2541.

Texas' notice-and-demand statute for a Certificate of Analysis is codified in article 38.41. *See* Tex. Code Crim. Proc. art. 38.41. Certificates of Analysis of physical evidence conducted by or for a law enforcement agency are admissible without the certifying analyst testifying at trial, so long as they are filed and served

on the opposing party more than twenty days before trial begins. *Id.* art. 38.41 § 4. The defendant must file a written objection to the use of the evidence no later than ten days before the start of trial, or the confrontation clause objection is waived. *Id.*; *Deener v. State*, 214 S.W.3d 522, 526 (Tex. App.—Dallas 2006, pet. ref'd).

Appellant objected to admission of the Certificate of Analysis report under article 38.41 at trial, arguing the statute requires the certifying analyst be the one who conducted the tests. In this case, the Certificate of Analysis only shows that the affiant, Wendy Adams, reviewed the data and does not support that she conducted any of the tests or analysis on the sample of appellant's blood. Therefore, appellant alleged, it did not qualify under the statute for exemption from the *Crawford* rule and he was not required to object within the ten-day allotment.

While the example affidavit form provided in section 5 of the statute does include a portion that states, "I conducted the following tests or procedures on the physical evidence," the section also states that a form that "otherwise substantially complies with this article" is sufficient. *See* Tex. Code Crim. Proc. art. 38.41 § 5. Absent a more specific requirement in the statute that the affiant be the certifying analyst, the Certificate of Analysis substantially complies with the requirements of article 38.41. *See Lopez v. State*, No. 08-10-00285-CR, 2012 WL 1658679, at *4 (Tex. App.—El Paso May 9, 2012, no pet.) (mem. op., not designated for publication) (certificate substantially complied with statute despite it failing to include a statement that the tests or procedures used were reliable); *Johnson v. State*, No. 07-07-0327-CR, 2009 WL 102930, at *6 (Tex. App.—Amarillo Jan. 15, 2009, no pet.) (mem. op., not designated for publication) (a certificate of analysis lacking a statement of accreditation by nationally recognized association still substantially complied with the statute).

Because the Certificate of Analysis substantially complied with the statute, appellant was required to file a written objection at least ten days before the beginning of trial. He had ample time to do so, as the State filed the Certificate of Analysis on March 14, 2016, and trial did not commence until May 2, 2016. Additionally, the State had included the analysts who performed the tests on its witness list, in anticipation of a possible objection by appellant. If appellant had wanted to confront the analysts from NMS Laboratory, he could have done so by filing a written objection.

By failing to timely file a written objection to the Certificate of Analysis, appellant failed to preserve the issue for our review. *See Deener*, 214 S.W.3d at 528. Appellant's fourth issue is therefore overruled.

B. Extraneous Offenses

In his fifth issue, appellant asserts the trial court erred by admitting evidence of extraneous offenses. Specifically, appellant complains of the evidence of his drug use in the days immediately preceding and the day of the crash. Appellant objected to the evidence of these extraneous offenses because they were irrelevant — since he was not charged with intoxication manslaughter — and the evidence was more prejudicial than probative. *See* Tex. Penal Code § 49.08 (setting forth the offense of intoxication manslaughter); Tex. R. Evid. 401, 402, 403, and 404(b).

The admissibility of evidence is within the discretion of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). We uphold the trial court's evidentiary ruling as long as it was within the zone of reasonable disagreement. *Id.* (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)). We cannot simply substitute our own decision for the trial court's and should reverse only for a clear abuse of discretion. *See id.*

Generally, extraneous offense evidence that does not have relevance apart from character conformity is inadmissible during the guilt/innocence phase of trial. Tex. R. Evid. 404(b). However, such evidence is admissible when the extraneous act is: (1) relevant to a fact of consequence in the case aside from its tendency to show action in conformity with character, and (2) its probative value is not substantially outweighed by the danger of unfair prejudice. *Hedrick v. State*, 473 S.W.3d 824, 829 (Tex. App.—Houston [14th Dist.] 2015, no pet.). We defer to the trial court's determinations of whether extraneous evidence has relevance apart from character conformity and whether the probative value is substantially outweighed by the danger of unfair prejudice. *See Moses*, 105 S.W.3d at 627.

Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action. Tex. R. Evid. 401. Even if the extraneous evidence is relevant, the trial court may properly exclude it under rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Tex. R. Evid. 403. "When Rule 403 provides that evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,' it simply means that trial courts should favor admission in close cases, in keeping with the presumption of admissibility of relevant evidence." *Montgomery*, 810 S.W.2d at 389.

Appellant contends that because he was not charged with intoxication manslaughter, the evidence of his drug use was not relevant and constituted an extraneous offense. An extraneous offense is any act of misconduct, whether prosecuted or not, that is *not shown in the charging papers*. *Manning v. State*, 114 S.W.3d 922, 926 (Tex. Crim. App. 2003) (emphasis added).

The indictment in this case alleged six means by which appellant acted recklessly, one of which was "driving a motor vehicle after ingesting drugs and by driving a motor vehicle with methamphetamine, amphetamine, hydrocodone, carisoprodol, marijuana, and cocaine in [his] body." Thus the evidence of appellant's drug use on the day of the crash and within one or two days of the crash did not constitute an extraneous offense, *see Manning*, 114 S.W.3d at 927, and was clearly relevant to the charged offense.

Moreover, even if appellant's drug use were an extraneous offense, such evidence may be admissible for other purposes besides character conformity. Tex. R. Evid. 404(b). Rebuttal of a defensive theory is one of these "other purposes." *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see also Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008) (stating that "other purposes" includes rebutting the defensive theory that a complainant fabricated her allegations against defendant). Evidence that the crash was caused by appellant ingesting drugs before driving rebutted his defensive theory that the crash was caused by "distraction" and was an unfortunate accident that should not have been criminalized, *e.g.,* that he was not driving recklessly. *Hedrick*, 473 S.W.3d at 832. Thus it was admissible under Rule 404(b).

We next address whether the probative value of the extraneous offense evidence substantially outweighs the danger of unfair prejudice, beginning with the presumption that it does. *Montgomery*, 810 at 389; *Grant v. State*, 475 S.W.3d 409, 420–21 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). It is the defendant's burden to demonstrate that the danger of unfair prejudice substantially outweighs the probative value. *Id.*; *Kappel v. State*, 402 S.W.3d 490, 494 (Tex. App.—Houston [14th Dist.] 2013, no pet.). In reviewing trial courts' balancing determinations under

Rule 403, we reverse only rarely and upon a clear demonstration of abuse of discretion. *Id.*

The following factors are considered relevant to the analysis under Rule 403: (1) the strength of the evidence in making a fact more or less probable; (2) the potential of the extraneous offense evidence to impress the jury in some irrational but indelible way; (3) the amount of time the proponent needed to develop the evidence; and (4) the strength of the proponent's need for the evidence to prove a fact of consequence. *Grant*, 475 S.W.3d at 420–21; *Bargas v. State*, 252 S.W.3d 876, 892–93 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

The first factor weighs strongly in favor of admissibility because the evidence was relevant to establish recklessness and rebut appellant's defensive theory. *See id.* As set forth above, one of the means by which appellant drove recklessly, as alleged by the State, was that he drove after ingesting drugs. The evidence directly contradicted appellant's theory that the accident was not caused by his reckless driving.

The second and third factors also weigh in favor of admissibility. The extraneous offenses were far less inflammatory than the crime for which appellant was indicted, so the testimony was not likely to create such prejudice in the minds of the jury that it would have been unable to limit its consideration of the evidence to its proper purpose. *See Taylor v. State,* 920 S.W.2d 319, 323 (Tex. Crim. App. 1996). Any danger the testimony may have impressed the jury in a prejudicial way is overshadowed by its probative value. *See Bargas*, 252 S.W.3d at 893 (viewing prejudicial tendencies of extraneous-offense testimony in sexual assault case as outweighed by its probative value when it was used to rebut a defensive issue). Furthermore, the complained-of testimony was adduced from two of the State's

thirteen witnesses, in addition to appellant's own statement, in the course the four-day guilt-innocence proceedings.

The State's need for this testimony was also significant, favoring admissibility under the fourth factor. As noted above, this evidence discredits appellant's theory that the crash was an accident for which he should not be held responsible.

Considering the above factors, we conclude the probative value of the extraneous-offense evidence was not substantially outweighed by unfair prejudice. The evidence was probative in assessing whether appellant was driving recklessly and the State needed the evidence to counteract the defensive theory that he was not. We conclude that under Rule 403 the trial court did not abuse its discretion in admitting the evidence. *See Bargas,* 252 S.W.3d at 893; *see also Montgomery*, 810 S.W.2d at 391–92. Appellant's fifth issue is overruled.

C. Expert Testimony of Recklessness

In his sixth issue, appellant claims that Wright's expert testimony was inadmissible pursuant to Texas Rule of Evidence 702, because Wright's opinion pertained to a pure question of law. We disagree.

Rule 702 provides: "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." Tex. R. Evid. 702. A party may challenge expert testimony on at least three specific grounds: (1) qualification, (2) reliability, and (3) relevance. *Vela v. State,* 209 S.W.3d 128, 131 (Tex. Crim. App. 2006). The three requirements raise distinct questions and issues, and an objection based on one of these requirements does not preserve error as to another. *Turner v. State,* 252 S.W.3d 571, 584 n. 5 (Tex. App.—Houston [14th

Dist.] 2008, pet. ref'd) (holding that an objection based on the expert's qualifications did not preserve the reliability issue). As such, if a party objects to expert testimony without identifying one or more of these issues, no error is preserved for our review. *Shaw v. State*, 329 S.W.3d 645, 655 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). In addition, an expert's opinion may not be objected to solely because it encompasses an ultimate issue. *See* Tex. R. Evid. 704.

In a *Daubert*[3] hearing outside the presence of the jury, appellant objected to allowing Wright to discuss appellant's mental culpability for the offense of manslaughter. More specifically, appellant argued the expert was not permitted to discuss whether he was "reckless" since that would invade the province of the jury as an ultimate issue of law. During Wright's testimony, appellant reiterated his objection under Rules 701, 702, and 704.

On appeal, appellant does not specifically state which of the three prongs under Rule 702 he is challenging and does not address the Rule 701 or 704 objections. As we understand appellant's argument from the context of his brief, he is arguing on appeal that Wright lacked the necessary qualifications to testify that appellant drove recklessly, as that is a mental state defined by statute.

A party may allege he witness does not qualify as an expert because the witness lacks the requisite knowledge, skill, experience, training, or education in the subject matter of the expert's testimony. *Vela,* 209 S.W.3d at 131; *see* Tex. R. Evid. 702. In the *Daubert* hearing, appellant agreed to allow Wright to testify as an accident reconstructionist. By doing so, he stipulated that Wright had the necessary knowledge, skills, experience, training, or education to discuss the incident.

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[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

Appellant's primary ground for his objection is therefore that the expert is testifying to a pure question of law. An expert witness may not testify to his opinion on a pure question of law. *Anderson v. State*, 193 S.W.3d 24, 28 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). However, an expert witness may state an opinion on a mixed question of law and fact, as long as the opinion is confined to the relevant issues and is based on proper legal concepts. *Blumenstetter v. State,* 135 S.W.3d 234, 248 (Tex. App.—Texarkana 2004, no pet.) (internal citations omitted). "[A] mixed question of law and fact [is] one in which a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard." *Id.* The relevant expert testimony adduced at trial is as follows:

> Q. [State]: And after reviewing the evidence in this case, do you have an opinion as to whether the conduct of the driver in this case, the defendant, consciously disregarded a substantial and unjustifiable risk and was a gross deviation from the normal standard of care in this case?
>
> MR. ROBINSON [Appellant counsel]: I object, Your Honor. And I ask that I be allowed to ask this witness some questions.
>
> THE COURT: You may.
>
> [Voir Dire Examination]
>
> . . . .
>
> Q. [State]: Okay. And based on all of those factors and your review of everything and in your expert opinion, did the defendant's conduct in this case comport with the general standard of care that we expect of operators of motor vehicles?
>
> A. [Wright]: No, sir. It did not.
>
> Q. [State]: Are you telling us that it constituted a deviation from the general standard of care?
>
> A. [Wright]: Yes.
>
> Q. [State]: Okay. And would you characterize it in your opinion as a gross deviation?
>
> A. [Wright]: Yes, I would.

The State asked Wright for his opinion as to whether appellant "consciously disregarded a substantial and unjustifiable risk." Wright did not answer that question because appellant objected, and the State did not repeat it.

Wright was then asked if appellant's operation of his car was a "gross deviation" from the normal standard of care. This question constitutes a mixed question of law and fact because it asks Wright to opine whether the facts and circumstances revealed by his investigation measure up to a standard of legal culpability. *See Blanchard v. State*, No. 02-11-00267-CR, 2013 WL 1759905, at *8 (Tex. App.—Dallas Apr. 25, 2013, no pet.) (mem. op., not designated for publication). Wright was not asked to give his opinion on a pure question of law, such as whether appellant committed manslaughter. Accordingly, we determine the trial court did not abuse its discretion.

Moreover, any error in admitting Wright's expert opinion was harmless. *See Humaran v. State*, 478 S.W.3d 887, 905 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (court held that admission of expert's testimony was harmless error, if any, because it had no effect on the jury's verdict). Under the applicable standard for nonconstitutonal error, we must disregard the trial court's error, if any, unless we determine it affected a defendant's substantial rights. *Id.;* Tex. R. App. P. 44.2(b). A defendant's substantial rights are affected when the error has a substantial and injurious effect or influence on the jury's verdict. *Id.* If the error had no or only a slight influence on the verdict, the error is harmless. *Id*

Irrespective of Wright's testimony, the State provided ample evidence from which the jury could find appellant was driving recklessly. As noted above, several eyewitnesses testified appellant was driving on the shoulder when he hit Treesh. Appellant admitted to ingesting medication and being in and out of consciousness while driving. Berkely testified appellant lost consciousness at least once before the

accident. Accordingly, any error in admitting Wright's opinion that appellant was reckless did not affect appellant's substantial rights. For these reasons, appellant's sixth issue is overruled.

V. CONCLUSION

Having overruled all of appellant's issues, the judgment of the trial court is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Boyce, Donovan, and Jewell.
Publish — Tex. R. App. P. 47.2(b).

APPENDIX 4

APPENDIX 4

TEXAS COURT OF CRIMINAL APPEALS MEMORANDUM OPINION

APPENDIX 4

APPENDIX 4

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1199-17

ANDREW LEE WILLIAMS, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS BRAZORIA COUNTY

KEASLER, J., delivered the opinion of the Court, in which HERVEY, RICHARDSON, YEARY, NEWELL, and SLAUGHTER, JJ., joined. KELLER, P.J., filed a concurring opinion. WALKER, J., filed a dissenting opinion. KEEL, J., concurred.

OPINION

Andrew Williams was charged with manslaughter for killing a pedestrian with his vehicle. One of the State's theories was that Williams was intoxicated when the crash occurred. To support this theory, pursuant to Article 38.41 of the Code of Criminal Procedure,[1] the State offered an analysis of Williams's blood without calling the analyst who

[1] *See generally* TEX. CODE CRIM. PROC. art. 38.41 ("Certificate of Analysis").

tested the blood as a sponsoring witness. The court of appeals decided that the trial judge properly admitted this evidence over Williams's confrontation objection. We agree.

I. BACKGROUND

Donna Treesh was jogging when she was struck and killed by a vehicle driven by Andrew Williams. After colliding with Treesh, Williams fled the scene. Police located Williams and his vehicle a short time later. Suspecting that Williams was intoxicated, the police obtained a search warrant to collect a sample of his blood. Williams was ultimately charged with manslaughter and failure to stop and render aid.[2]

Williams's blood sample was sent to two labs. First, the blood was tested at the Brazoria County Crime Laboratory by analyst Sam Wylie. Wylie's analysis revealed the presence of meprobamate, a metabolite of carisoprodol or "Soma," and THC, the psychoactive ingredient in cannabis, in Williams's blood. The blood was also tested at "NMS Labs" (NMS), an independent forensic testing facility in Pennsylvania. Under the more-sensitive NMS analysis, Williams's blood tested positive for amphetamine, methamphetamine, delta-9 THC, delta-9 Carboxy THC, benzoylecgonine, hydrocodone, carisoprodol, and meprobamate.

About 50 days before the trial began, the State notified the trial court and Williams that, pursuant to Code of Criminal Procedure Article 38.41, it would offer the NMS laboratory report as evidence at trial *via* a "certificate of analysis." Attached to this notice

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[2] TEX. PENAL CODE § 19.04; TEX. TRANSP. CODE § 550.021(c)(1)(A).

was an affidavit from Dr. Wendy Adams, an Assistant Laboratory Director at NMS.

As relevant here, Adams's affidavit established that (1) Adams is employed by NMS Labs; (2) NMS is accredited by the American Board of Forensic Toxicology; (3) Adams is familiar with NMS's standard operating procedures; (4) Adams's duties as an Assistant Laboratory Director include the analysis of evidence "for one or more law enforcement agencies"; (5) Adams's *curriculum vitae*, which was attached to the affidavit, accurately reflected her educational background; (6) she had "reviewed the data from the tests or procedures on the toxicological evidence" from Williams's case; and (7) the attached lab report represented "an accurate record of the tests or procedures performed on the . . . evidence received by this laboratory and are reliable and approved by NMS Labs."

Also attached to the State's notice were fifteen pages of records comprising the results of NMS's analysis, as indicated above. Williams did not lodge a pre-trial objection to the use of the certificate.

But at trial, when the State offered the NMS report into evidence without calling anyone from NMS as a sponsoring witness, Williams did object. Williams claimed that admitting the report without the testimony of an NMS analyst would violate his Sixth-Amendment right to confrontation. While Williams acknowledged that the State's timely filed certificate of analysis might, in theory, have operated to defeat his confrontation objection, he argued that the certificate in this case did not "substantially compl[y]" with Article 38.41. Williams posited that, to meet the minimum threshold of "substantial

compliance," a certificate of analysis must contain a sworn statement from the analyst who actually conducted the tests. The State's certificate in this case did not establish that Adams herself conducted or observed any of the tests done on Williams's blood.

The State countered that, under the article's notice-and-demand provision, Williams was required to raise any objections at least ten days before trial—and that his failure to do so forfeited his confrontation objection. The trial judge overruled Williams's objection without stating his reasons for doing so. The jury ultimately found Williams guilty of both offenses and sentenced him to sixty years' imprisonment for each one.

On appeal, Williams argued that the trial court abused its discretion when it admitted the State's certificate of analysis over his confrontation objection. The Fourteenth Court of Appeals rejected this argument and affirmed the conviction, holding that "[a]bsent a more specific requirement in the statute that the affiant be the certifying analyst, the Certificate of Analysis substantially complies with the requirements of [A]rticle 38.41."[3] That being the case, "appellant was required to file a written objection at least ten days before the beginning of trial."[4] Since counsel failed to object pre-trial, the court of appeals determined that Williams had failed to preserve his confrontation complaint.[5]

The court of appeals expressly decided that this certificate of analysis "substantially

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[3] *Williams v. State*, 531 S.W.3d 902, 917 (Tex. App.—Houston [14th Dist.] 2017) (citations omitted).

[4] *Id.* at 918 (referring to TEX. CODE CRIM. PROC. art. 38.41, § 4).

[5] *Id.*

complies with the requirements of [A]rticle 38.41."[6] The thrust of Williams's argument is that this certificate does not "substantially compl[y]" with Article 38.41,[7] and the thrust of the State's argument is that it does.[8] There is therefore no basis for the suggestion that this issue was not adequately briefed by the parties or is not properly before us.[9] It is entirely appropriate for us to decide this issue, even if we ultimately construe "substantial compliance" to mean something other than what the parties or the court of appeals understood it to mean.[10]

II. LAW

The Sixth Amendment Confrontation Clause provides the accused in a criminal prosecution the right to be confronted with the witnesses against him.[11] So when the State

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[6] *Id.* at 917 (citing TEX. CODE CRIM. PROC. art. 38.41, § 5).

[7] *See* Appellant's Brief on Discretionary Review at 6 ("Appellant argues that a certificate that does not contain the sworn affidavit of the chemist who personally conducted the testing does not substantially comply with Section 5 of Article 38.41").

[8] *See* State's Brief on Discretionary Review at 2 ("At issue is whether the certificate admitted into evidence as State's Exhibit 138 substantially complies with the requirements of article 38.41.").

[9] *See* Concurring Opinion at 1–2.

[10] *Cf. Oliva v. State*, 548 S.W.3d 518, 520 ("We, of course, are not bound by any agreement or concessions by the parties on an issue of law.").

[11] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); *see also Pointer v. Texas*, 380 U.S. 400, 406 (1965) (holding that the Sixth Amendment right of confrontation is "enforced against the States under the Fourteenth Amendment") (citations omitted).

offers a "testimonial" statement against the accused into evidence, the accused generally has a right to insist that the person making the statement appear in court and be subject to cross-examination.[12] Forensic laboratory reports created solely for an evidentiary purpose, made in aid of a police investigation, are considered testimonial.[13] Ordinarily, then, a criminal defendant has a right to insist that a forensic analyst making incriminating claims in a laboratory report explain and defend her findings in person at trial.

But the State may, without offending the Confrontation Clause, adopt "procedural rules" governing confrontation-based objections.[14] For example, the Constitution permits a State to enact a "notice-and-demand" statute.[15] "In their simplest form, notice-and-demand statutes require the prosecution to [notify] the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial."[16] The United States Supreme Court has listed Article 38.41 in the Texas Code of Criminal

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[12] *See Crawford v. Washington*, 541 U.S. 36, 52–54 (2004).

[13] *Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009)).

[14] *Melendez-Diaz*, 557 U.S. at 327 (citing *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977)).

[15] *Id.* at 326–27.

[16] *Id.* at 326.

Procedure as an example of a constitutionally permissible notice-and-demand provision.[17]

Article 38.41, Section 1 says that a "certificate of analysis that complies with this article is admissible in evidence . . . to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court."[18] Section 3 says that a certificate of analysis under Article 38.41 "must contain" the following information certified under oath: (1) the analyst's name and the name of the laboratory employing her; (2) a statement that the laboratory is properly accredited; (3) a description of the analyst's education, training, and experience; (4) a statement that the analyst's duties include analyzing evidence for one or more law enforcement agencies; (5) a description of the tests or procedures conducted by the analyst; (6) a statement that the tests or procedures were reliable and approved by the laboratory; and finally (7) the results of the analysis.[19]

Section 4, the notice-and-demand provision, requires the offering party to file the certificate with the trial court and provide a copy to the opposing party "[n]ot later than the 20th day before the trial begins."[20] But in any event, "[t]he certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a

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[17] *Id.*

[18] TEX. CODE CRIM. PROC. art. 38.41, § 1.

[19] *Id.* § 3.

[20] *Id.* § 4.

written objection to the use of the certificate."[21]

Finally, Section 5 states that a certificate "is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article."[22] A form affidavit, worded in the first person, is provided: "My name is . . . . I am employed by . . . . My educational background is . . . ,"[23] and so forth. The issue in this case is whether, this first-person language notwithstanding, someone other than the analyst who conducted the testing can serve as the affiant for a certificate of analysis under Article 38.41.

III. ANALYSIS

A. Has Williams forfeited his confrontation claim?

At the outset, we note that there is a potential procedural-default issue. As noted above, Article 38.41, Section 4 requires the offering party to give the other party a copy of the proposed certificate of analysis "not later than the 20th day before the trial begins."[24] The State complied with this requirement in this case. Section 4 also says that a certificate offered under Section 1 is not admissible if, "not later than the 10th day before the trial begins," the opposing party files a written objection.[25] In this case, Williams did not object

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[21] *Id.*

[22] *Id.* § 5.

[23] *Id.*

[24] TEX. CODE CRIM. PROC. art. 38.41, § 4 (some capitalization altered).

[25] *Id.*

pre-trial; he waited until the certificate was offered at trial to raise his confrontation objection. By failing to object to the certificate within the statutory timeline, did Williams forfeit his subsequent constitutional, confrontation-based objection?

The parties seem to agree that if the State timely files a substantially compliant certificate of analysis and the defendant fails to object, the certificate is admissible at trial "without the necessity of the analyst personally appearing in court."[26] In that scenario, any confrontation objection at trial would necessarily fall on deaf ears. By virtue of the timely filed, substantially compliant certificate of analysis, the defendant would have been put on notice that, if he wanted to assert his right of confrontation, he needed to assert it within a particular time frame. And, if he fails to do so, the certificate will be admitted over any subsequent confrontation objection.

But what if the State files a certificate that neither fully nor even "substantially" complies with Article 38.41? What if, for example, the State timely files a certificate that includes only the results of the analysis without any accompanying affidavit or sworn statement—and then declares its intent to offer the certificate without calling the analyst as a sponsoring witness? Is it still the case that, if the defendant fails to timely object to the use of that certificate, it remains admissible over his subsequent confrontation objection?

Williams argues that Section 4's timely-objection requirement is triggered only if the proffered certificate meets the minimum threshold standard of "substantial compliance" with

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[26] *See* TEX. CODE CRIM. PROC. art. 38.41, §§ 1, 4, 5.

Article 38.41.[27] And, according to Williams, the State's certificate in this case did not substantially comply with the article because it did not contain a sworn statement from the analyst who tested his blood. Under Williams's reading of the statute and his assessment of the State's certificate in this case, he was under no obligation to object to the certificate pre-trial. He therefore asserts that his confrontation objection was properly made when the State offered the certificate into evidence at trial.

Because we decide that the certificate in this case does substantially comply with Article 38.41 (at least in the particular, narrow regard Williams has complained about on appeal), we need not decide this preservation issue. In receipt of a substantially compliant certificate of analysis more than twenty days before trial, Williams was required to object to the use of the certificate in a timely manner or risk losing his ability to assert his right of confrontation at trial. We leave for another day an examination of the procedural-default consequences of a defendant's failure to timely object to a certificate of analysis that does not substantially comply with Article 38.41.

B. What is "substantial" compliance?

While Section 3 of Article 38.41 describes the information that a certificate of analysis "must contain,"[28] the plain purpose of Section 5 is to describe the various forms that a

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[27] *See also* State's Brief on Discretionary Review at 22 (arguing that Dr. Adams's affidavit "substantially complies with 38.41 . . . and thereby triggered a time frame" in which Williams was obligated to object).

[28] TEX. CODE CRIM. PROC. art. 38.41, § 3.

certificate can permissibly take. If the offering party uses the prescribed form (what Section 5 refers to as "the following form"), worded in the first person, it can rest assured that the certificate will be deemed "sufficient" for purposes of Article 38.41.[29] But that is not the only form that a certificate of analysis may take. Section 5 is worded in the disjunctive; a certificate is sufficient if it uses the prescribed form "or if it otherwise substantially complies with" Article 38.41.[30]

The word "otherwise," as it appears in Section 5, is a clear indication that Section 5 is a permissive provision about form, not a mandatory provision about substance. That is, Section 5 does not dictate what kinds of information the certificate "must contain."[31] It describes how the certificate may, at the proponent's discretion, be worded. In common usage, "otherwise" means "in a different way or manner."[32] What Section 5 says, then, is that the offering party may structure the certificate of analysis in any "way or manner" it wishes, so long as the certificate "substantially" complies with Article 38.41.

That brings us to the critical question in this case: What does it mean for a certificate of analysis to "substantially" comply with Article 38.41? To answer this question, we look

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[29] *Id.* § 5.

[30] *Id.*

[31] *See id.* § 3.

[32] *Otherwise*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1st ed. 1980); *see also Kirsch v. State*, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012) (citing TEX. GOV'T CODE § 311.011) ("[U]ndefined words and phrases [in a statute] shall be construed according to the rules of grammar and common usage.") (internal quotation marks omitted).

to our construction of another statute containing the phrase "substantial compliance."

Article 26.13(a) of the Code of Criminal Procedure says that, before accepting a plea of guilty or *nolo contendere*, the trial judge "shall admonish the defendant" upon six separately enumerated items.[33] However, subsection (c) provides that, in admonishing the defendant, "substantial compliance by the court is sufficient."[34] There was a time in our jurisprudence when we held that, if one of the statutorily enumerated admonishments was not given "but the admonishment was immaterial to the plea," the trial judge's admonishments would still, as a whole, be considered substantially compliant with Article 26.13(a).[35]

But in *Cain v. State*, we "rejected the . . . approach of finding substantial compliance where there was in fact no compliance with a particular admonishment."[36] We described as "legal fiction" the idea that "an admonishment was in substantial compliance even though it was never given."[37] And we quoted approvingly from a concurring opinion in an earlier, related case, *Morales v. State*: "It is the sense of [Article 26.13(c)] that defendants need not

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[33] *See* TEX. CODE CRIM. PROC. art. 26.13(a).

[34] *Id.* art. 26.13(c).

[35] *E.g.*, *Whitten v. State*, 587 S.W.2d 156, 158 (Tex. Crim. App. 1979) (citations omitted).

[36] *See Cain v. State*, 947 S.W.2d 262, 263 (Tex. Crim. App. 1997) (citing *Morales v. State*, 872 S.W.2d 753, 754–55 (Tex. Crim. App. 1994)).

[37] *Id.* at 264.

be admonished in any particular form of words, but only that the information be communicated to them in some effective way."[38] That concurrence also construed "substantial compliance" as "the opposite of 'formal compliance,' not a synonym for 'virtual, partial, or near compliance.'"[39]

That is precisely how we understand the phrase "substantially complies" in Article 38.41, Section 5. A certificate of analysis under Article 38.41 does not need to be phrased "in any particular form of words."[40] But it must, at a bare minimum, "substantially" comply—that is, comply with all of the substantive requirements of—Article 38.41. As we have already observed, the mandatory, substantive requirements of an Article 38.41 certificate are laid out in Section 3.[41] That is because Section 3 is the only provision of the statute that speaks to what a certificate of analysis "must contain."[42]

Section 3 requires the certificate to include information that might arguably be considered personal to the laboratory analyst—her name, educational background, duties of employment, and so forth. But there is no express requirement in Section 3 that any of that

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[38] *Id.* at 263 n.3 (quoting *Morales*, 872 S.W.2d at 756 (Meyers, J., concurring)).

[39] *See Morales*, 872 S.W.2d at 756 (Meyers, J., concurring).

[40] *See id.* (Meyers, J., concurring).

[41] *See Franklin v. State*, No. PD-0787-18, 2019 WL 2814861, at *2 (Tex. Crim. App. July 3, 2019) ("A statute must be read as a whole in determining the meaning of particular provisions, and it is presumed that the entire statute is intended to be effective.") (footnotes and citations omitted).

[42] *See* TEX. CODE CRIM. PROC. art. 38.41, § 3.

information come from the analyst herself. Section 3 says that the information must be "certified under oath," but it does not require that oath to be given by any particular individual. It seems to us that any person or group of persons with knowledge of the analyst, laboratory, and forensic testing procedures and results could truthfully swear to any or all of the information that Section 3 requires.[43]

Does it matter if the affiant is someone who could not, over a Sixth Amendment confrontation objection, serve as a sponsoring witness for the laboratory results at trial? The answer is no. No matter who the affiant is, the defendant can always assert his right of confrontation, as long as he is diligent about it. If, after the State provides the defendant with a substantially compliant certificate of analysis, the defendant still wishes to confront his accuser in court, Article 38.41 allows him every opportunity to do so. All he has to do is assert his right of confrontation "no[] later than the 10th day before the trial begins"[44] and it will be afforded to him; this is true even if the certificate of analysis tracks the statute word-for-word.[45] But if the defendant does not promptly object to a timely filed and substantially compliant certificate, his confrontation objection will be forfeited. This does not diminish the defendant's right of confrontation in the slightest.[46]

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[43] *Contra* Dissenting Opinion at 4 (arguing that "nobody other than the testing analyst could provide a description of the tests used or the reliability thereof").

[44] TEX. CODE CRIM. PROC. art. 38.41, § 4.

[45] *See Melendez-Diaz*, 557 U.S. at 310–11.

[46] *See id.* at 326–27.

C. The certificate in this case survives Williams's challenge.

Williams's specific contention is that the certificate of analysis in this case does not substantially comply with Article 38.41 because it fails to establish that the affiant, Dr. Adams, was the analyst who tested his blood. As we have just demonstrated, there is no requirement in the statute, express or otherwise, that the affiant be the analyst who tested the physical evidence. That is essentially a matter of form, discretionary with the offering party, not a matter of substance. The only way a certificate of analysis will fail to substantially comply with Article 38.41 is if it omits information that Section 3 says a certificate "must contain."[47]

The dissenting opinion misunderstands our holding. We do not hold that it is permissible for an affidavit to describe facts about "any person capable of analyzing" and omit facts pertinent to "the analyst" herself.[48] We do not hold that "anyone else's background and abilities" may be listed in lieu of the analyst's background, training, and experience.[49] We do not hold that the affidavit can list the duties of a non-analyst in lieu of the analyst's duties and still "substantially" comply with Article 38.41.[50] We acknowledge

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[47] *See* TEX. CODE CRIM. PROC. art. 38.41, § 3.

[48] Dissenting Opinion at 2.

[49] *Id.* at 3.

[50] *See id.*

that when Section 3 says "the analyst," it means "*the* analyst."[51] Our holding is simply that, for Section 5, substantial-compliance purposes, the affiant need not be the same person as the analyst. It is still the case that, whoever the affiant is, she must provide information that is responsive to Section 3—including information pertinent to "the analyst."

To be sure, the State's certificate in this case is missing at least one item of information that Section 3 plainly requires: "a description of the analyst's educational background, training, and experience."[52] Although the certificate provides Dr. Adams's educational background, training and experience, it does not establish that Dr. Adams was "the analyst" in this case, *i.e.*, the person who "conducted" the relevant "tests or procedures" on the physical evidence.[53] Similarly, although the certificate lists the names of the various individuals performing tests upon Williams's blood sample, it does not describe the educational and professional qualifications of those individuals. That is information that, per Section 3, a certificate of analysis "must contain."[54]

Had Williams apprised the trial judge that the State's certificate was missing information that Section 3 says a certificate "must contain," he might well have succeeded in his argument that this certificate does not substantially comply with Article 38.41. The

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[51] *Id.* at 2 (emphasis in original).

[52] TEX. CODE CRIM. PROC. art. 38.41, § 3.

[53] *See id.* § 5.

[54] *Id.* § 3.

problem is that Williams never once complained that the certificate of analysis in this case lacked one or more of the mandatory Section 3 requirements. We cannot fault the trial judge for overruling Williams's confrontation objection when, in response to the State's counter-argument that it had timely filed a certificate of analysis, Williams's only counter-counter-argument was that the certificate was noncompliant because the affiant was someone other than the analyst. For the reasons explained in this opinion, that response was meritless, and the trial judge rightly rejected it. Neither can we fault the court of appeals for affirming the trial judge when, once again, Williams's only argument on appeal was in the same vein—that the statute requires that the affiant be the analyst. For the very same reasons, that argument lacks merit, and the court of appeals rightly rejected it. Whatever other deficiencies the certificate of analysis in this case suffers from, it does not fail to "substantially compl[y]" with Article 38.41 for the reason that Williams has proposed.

IV. CONCLUSION

We reiterate that Article 38.41 does not in any way diminish a criminal defendant's core Sixth Amendment right "to confront those who bear testimony against him."[55] The defendant can always defeat an Article 38.41 proffer—by asserting his Sixth-Amendment right of confrontation, in writing, "not later than the 10th day before the trial begins."[56] If he acts within this time frame, there is no need for him to explain to the trial judge how or

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[55] *See Melendez-Diaz*, 557 U.S. at 309 (quoting *Crawford*, 541 U.S. at 51) (internal quotation marks omitted).

[56] *See* TEX. CODE CRIM. PROC. art. 38.41, § 4.

why he thinks the certificate fails to comply with Article 38.41;[57] his constitutional right of confrontation simply trumps the statute. But if he tries to act outside this time frame, all bets are off.[58]

We affirm the court of appeals' judgment.

Delivered: October 9, 2019

Publish

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[57] *See id.* § 5.

[58] *See supra* Part III-A.

APPENDIX 5

TEXAS COURT OF CRIMINAL APPEALS (DISSENTING)
MEMORANDUM OPINION

APPENDIX 5

APPENDIX 5

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1199-17

ANDREW LEE WILLIAMS, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS BRAZORIA COUNTY

WALKER, J., filed a dissenting opinion.

DISSENTING OPINION

Today, this Court holds that a certificate of analysis that is missing information required by Article 38.41 may nevertheless be in substantial compliance. Moreover, the majority maintains that even if a certificate of analysis is missing mandatory information, the defendant is still required to exercise or forfeit his constitutional rights in accordance with Article 38.41's pre-trial timeline. This position is incompatible with the language and existence of § 3 of the statute. Accordingly, I respectfully dissent.

The specific question in this case is whether this certificate of analysis substantially complied

with Article 38.41. Because it omits several pieces of information required under § 3, it must fail to substantially comply. Section 3 of Article 38.41 states that a certificate of analysis "must contain" the following:

> (1) the names of *the* analyst and the laboratory employing *the* analyst;
>
> (2) a statement that the laboratory employing *the* analyst is accredited by a nationally recognized board or association that accredits crime laboratories;
>
> (3) a description of *the* analyst's educational background, training, and experience;
>
> (4) a statement that *the* analyst's duties of employment included the analysis of physical evidence for one or more law enforcement agencies;
>
> (5) a description of the tests or procedures conducted by *the* analyst;
>
> (6) a statement that the tests or procedures used were reliable and approved by the laboratory employing *the* analyst; and
>
> (7) the results of the analysis.[1]

A plain, reasonable reading of the statute makes it clear that the information included in the affidavit is to be about a certain analyst. Every time the word *analyst* is used it is preceded by the word *the*. The statute never once says *an analyst*. Use of *the* analyst instead of *an* analyst means the statute is only concerned with a particular, specific analyst—not just any person capable of analyzing. Specifically, the use of *the* analyst appears to be exclusively regarding *the* testing analyst. The wording of subsection (5) is particularly probative as to the meaning of the statute. Subsection (5) requires that the certificate of analysis must contain a description of the tests or procedures conducted by *the* analyst. Obviously, *the* analyst in subsection (5) is *the* analyst who conducted the tests or procedures. So it would follow that, since every time the word analyst is used in § 3 it is

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[1] TEX. CODE CRIM. PROC. Art. 38.41 (emphasis added).

preceded by the word *the*, the entirety of § 3 is referring to *the* analyst who performed the tests or procedures.

The subsections that unequivocally require the information to be from or about the testing analyst are (3)-(6). Starting with subsection (3): why would the legislature write that the certificate of analysis "must contain" the background, experience, and schooling of anyone other than the testing analyst? Why would anyone else matter? There is no question that if the information of some analyst from some other lab was included in the certificate, it would not substantially comply. It is inconsequential, for example, to the results that some extraneous analyst employed over at Bayer, went to a nice school, and has worked for eight years. A description of a random analyst's educational and work history is no less informative or relevant than that of a reviewing or supervising analyst that just so happens to be employed at the lab where the test was actually conducted. I cannot fathom a scenario where the Legislature would be adamant that an affidavit include whether and for how long someone went to school and worked in this field unless it is the person whose intelligence and experience actually come into play. Accordingly, the only person's background or ability that matters to the results is that of the testing analyst. It is untenable to hold that including anyone else's background or abilities could even come close to complying with this subsection.

Now, for subsection (4), I cannot think of a single reason why a certificate of analysis would need to contain a statement that it is one of the analyst's duties to analyze physical evidence unless the analyst happened to analyze some of the physical evidence in that case. It is unclear why anybody would need to ensure that someone merely reviewing the results has an "analyzes physical evidence" bullet point in their job description. In theory, reviewing analysts just need to know how to read and

understand what the results mean. It truly makes no difference if, on occasion, they are tasked with analyzing physical evidence unrelated to the evidence contained in the certificate. The defendant is only interested in the fact that the one who did analyze the physical evidence was hired to do so—and that it was not the janitor or some other individual employed at the lab that decided to try their hand at forensic analysis that day. Again, it is inconsistent with the purpose of this statute to suggest that a certificate of analysis could be in compliance with this statute by including information from any person other than the testing analyst.

The purpose of this statute appears to be to provide a mechanism that would allow a defendant to effectively agree to allow an analyst's report to be automatically admitted in evidence if the defendant is notified of the State's intention to do so within a specified time limit, the notice contains all seven of the statute's requirements, and the defendant does not object to the admission of the report within a statutorily specified period of time. The underlying purpose seems to relieve laboratory analysts from the task of going to court when the defendant is satisfied as to what the analyst's direct-examination testimony would consist of and that there would be no practical reason for cross-examination. The only way these purposes can be met is to read the statute to require that subsections (3)–(6) must relate to the analyst that performed the lab tests, and again, reading the statute as a whole, I would hold that the statute does just that and is unambiguous in that respect.

Lastly, for subsections (5) and (6), nobody other than the testing analyst could provide a description of the tests used or the reliability thereof. If a reviewing or supervising analyst provides this information it would be purely general or completely speculative, which is not what "must [be] contained." This part of the statute is about the specific tests that were used by the analyst and whether they were, specific to the results contained in the certificate of analysis, actually reliable.

Including a description on the tests that *an* analyst generally conducts does not get us anywhere. Moreover, procedures that are generally reliable are not informative to the actual reliability of the proffered results. The purpose of this is not to make sure that the tests generally used are on par with the scientific community and that the lab is generally producing sound results. The purpose is to provide a descriptive account of how the tests were *actually done* by the analyst and a statement regarding whether the results were obtained reliably, through accepted laboratory standards. Stating that results are generally achieved by a reliable and approved method does not serve any purpose in this scenario.

The certificate of analysis filed in the present case is missing at least four of the seven requirements of § 3. The front page of the certificate of analysis states that Dr. Adams is familiar with the general procedures of the lab, that her duties include the analysis of toxicological evidence, and that her *curriculum vitae* is attached. She merely reviewed the results and was not present for any of the actual testing. Nowhere does it have any background, experience, or educational information about any of the analysts who were involved in the actual procedures. Nowhere does it list that it was the duty of any of the testing analysts to analyze physical evidence. Nowhere does it describe the tests that were actually performed. Nowhere does it state that what was actually performed was reliable or approved. All that was included was a general, boilerplate statement that the procedures and tests that were performed were reliable and approved by the lab. The most that can be said of this certificate of analysis is that it spelled out the results and stated that the lab was accredited. It did additionally include the testing analyst's name, but you had to search deep in the results for it, and it did not state that she was even employed at the lab.

The certificate of analysis that was filed in this case does not meet the minimum threshold

of substantial compliance. As the majority explains, a certificate of analysis "must, *at a bare minimum*, 'substantially' comply—that is, comply with *all* of the substantive requirements of —Article 38.41. As we have already observed, the mandatory, substantive requirements of an Article 38.41 certificate are laid out in Section 3."[2] Thus if, a certificate of analysis is missing any of the seven requirements it cannot be said to substantially comply. The majority even concedes that omitting information that must be contained under § 3 is the one way to guarantee that the certificate of analysis will fail to substantially comply.[3]

A certificate of analysis, such as this one, that does not substantially comply with the statute cannot trigger a timer for a defendant to forfeit his constitutional rights. This is true even if it is timely filed. Nevertheless, the majority essentially holds that because *something* was timely filed that mostly resembled a compliant certificate of analysis, the defendant was on notice to object or forfeit his rights before trial. The majority's position would essentially permit any person—who maybe just so happened to glance at the forensic results—to scribble their personal details on any piece of paper, get it notarized, and staple it to some forensic results and thereafter require the defendant to make a decision whether he wants to forfeit his constitutional rights. Why even require anything in § 3 at all if a defendant is still going to be required to make a pre-trial demand for the analyst's live testimony simply because something partially on par with the mandatory requirements of § 3 was filed alongside forensic results? Why not just write a statute where only the results need to be filed? It is inconceivable to hold a defendant accountable to an invalid affidavit, regardless of the fact that it was filed on time. That flies in the face of the entire existence of § 3.

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[2] Majority Op. at 13.

[3] *Id.* at 15.

The certificate of analysis is required to include at least seven pieces of information. In this case, it—at best— included three. There is no way this certificate of analysis can comply with Article 38.41 if it includes less than half of the information required. A certificate of analysis that fails to substantially comply cannot trigger the statute's timer and require the defendant to exercise or forfeit his constitutional rights before trial. That completely ignores the presence and purpose of § 3 in the statute. Therefore, in my opinion, Williams was under no obligation to waive his objection before trial. His objection at trial was valid and should not have been overruled. Respectfully, I dissent.

Filed: October 9, 2019
Publish

APPENDIX 6

APPENDIX 6

Tx.C.Crim.P., Art. 3.01; 26.13; and 38.41

APPENDIX 6

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Article 3.01. WORDS & PHRASES

All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined. (Tx.C.Crim.P. Art. 3.01);

Article 26.13. PLEA OF GUILTY

In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was mislead or harmed by the admonishment of the court. (Tx.C.Crim.P. Art. 26.13 (c));

Article 38.41. CERIFICATE OF ANALYSIS

Sec.1. A certificate of analysis that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court.

Sec.2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the results of the analysis.

Sec.3. A certificate of analysis under this article must contain the following information certified under oath:

(1) the names of the analyst and the laboratory employing the analyst;

(2) a statement that the laboratory employing the analyst is accredited by a nationally recognized board or association that accredits crime laboratories;

(3) a description of the analyst's educational background, training, and experience;

(4) a statement that the analyst's duties of employment include the analysis of physical evidence for one or more law enforcement agencies;

(5) a description of the tests or procedures conducted by the analyst;

(6) a statement that the tests or procedures used were reliable and approved by the laboratory employing the analyst; and

(7) the results of the analysis.

Sec.4. No later than the 20th day before the trial begins in a proceeding in which a certificate of analysis under this article is to be introduced, the certificate must be filed with the clerk of the court and a copy must be provided by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the opposing party. The certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the certificate with the clerk of the court and provides a copy of the objection by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the offering party.

Sec.5. Acertificate of analysis is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article:

CERTIFICATE OF ANALYSIS

BEFORE ME, the undersigned authority, personally appeared _____, who being duly sworn, stated as follows:

My name is _____. I am of sound mind, over the age of 18 years, capable of making this affidavit, and personally acquainted with the facts stated in this affidavit.

I am employeed by the _____, which was authorized to conduct the analysis referenced in this affidavit. Part of my duties for this laboratory involved the analysis of physical evidence for one or more law enforcement agencies. This laboratory is accredited by _____.

My educational background is as follows: (description of educational background)

My training and experience that qualify me to perform the tests or procedures referred to in this affidavit and determine the results of those tests or procedures are as follows: (description of training and experience)

I received the physical evidence listed on laboratory report no. _____ (attached) on the _____ day of _____,20___. On the date indicated in the laboratory report, I conducted the following tests or procedures on the physical evidence: (description of tests and procedures)

The tests and procedures used were reliable and approved by the laboratory. The results are as indicated on the lab report.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20_____.

_____
Notary Public, State of Texas

(Tx.C.Crim.P. Art. 38.41)

APPENDIX 7

APPENDIX 7

Tx.Govt.Code §§ 311.011; 311.021; 311.023

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Govt. § 311.011. COMMON & TECHNICAL USAGE OF WORDS

(a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage.

(b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. (Tx.Govt.Code § 311.011);

Govt. § 311.21. INTENTION IN ENACTMENT OF STATUTES

In enacting a statute, it is presumed that:

(1) compliance with the constitutions of this state and the United States is intended;

(2) the entire statute is intended to be effective;

(3) a just and reasonable result is intended;

(4) a result feasible to execution is intended; and

(5) public interest is favored over any private interest. (Tx.Govt.Code § 311.021);

Govt. § 311.023. STATUTE CONSTRUCTION AIDS

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

(1) object sought to be attained;

(2) circumstances under which the statute was enacted;

(3) legislative history;

(4) common law or former statutory provisions, including laws on the same or similar subjects;

(5) consequences of a particular construction;

(6) administrative construction of the statute; and

(7) title (caption), preamble, and emergency provision. (Tx.Govt.Code § 311.023)

APPENDIX 8

APPENDIX 8

Tx.Rules of Evidence, Rule 403; 404

APPENDIX 8

APPENDIX 8

TRE 403. EXCLUSION OF RELEVANT EVIDENCE ON SPECIAL GROUNDS

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. (Tx. Rules of Evidence, Rule 403)

TRE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) **Character Evidence Generally.** Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent character trait pffered:
(A) by an accused in a creiminal case, or by the prosecution to rebut the same, or
(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) Character of victim. In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assultive conduct offered on the issue of self defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) **Other Crime, Wrongs or Acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction. (Tx. Rules of Evidence, Rule 404)

APPENDIX 9

APPENDIX 9

Tx.R.App.P. Rule 33.1

APPENDIX 9

APPENDIX 9

TRAP 33. PRESERVATION OF APPELLATE COMPLAINTS

33.1. Preservation; How Shown.

(a) **In general.** As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

(b) **Ruling by operation of law.** In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgement preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

(c) **Formal exception and seperate order not required.** Neither a formal exception to a trial court ruling or order nor a signed, seperate order is required to preserve a complaint for appeal.

(d) **Sufficiency of evidence complaints in nonjury cases.** In a nonjury case, a complaint regarding the legal or factual in sufficiency of the evidence — including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact — may be made for the first time on appeal in the complaining party's brief. (Tx.R.App.P., Rule 33.1)