



CARLOS MORQUECHO PEREZ,	§	No. 08-18-00188-CR
Appellant,	§	Appeal from the
v.	§	County Criminal Court 1
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20180C00373)

OPINION

Appellant, Carlos Morquecho Perez, challenges his conviction of driving while intoxicated. TEX.PENAL CODE ANN. § 49.04. In two issues, Appellant asserts trial court error and seeks reversal. In Issue One, Appellant claims the trial court improperly admitted retrograde extrapolation testimony, and in Issue Two, asserts the blood alcohol concentration (“BAC”) test result was also improperly admitted. We affirm.

BACKGROUND

Factual Background

At approximately 2:50 a.m., El Paso Police Department Officer Munoz, accompanied by his field-training officer, Officer Azar, observed Appellant fail to stop at a red light. The officers conducted a traffic stop and when Appellant stopped his vehicle, he parked on top of a sidewalk. Upon making initial contact with Appellant, Officer Munoz smelled alcohol and detected

Appellant's glossy eyes and mumbled speech. Appellant admitted to Officer Munoz he was coming from a party and had consumed two whiskey drinks.

Munoz performed the three standard field sobriety tests ("SFSTs") on Appellant. Appellant failed two and was unable to perform the third; Appellant scored: (1) a six out of six clues on the horizontal-gaze nystagmus ("HGN"); (2) a four out of eight clues on the walk-and-turn¹; and (3) on the one-leg stand, Appellant was unable to complete because he "pretty much stopped, he put his foot down, he was having a hard time balancing, [and] he hopped I believe a couple of times."

At trial, Officer Munoz explained the administered SFSTs and how he concluded Appellant was intoxicated. Regarding the HGN test, Officer Munoz admitted he was unaware of any other causes for the failed HGN beside the consumption of alcohol. The final test, the one-leg stand test, showed Appellant encounter difficulty balancing. Based on the failed SFSTs and Appellant's odor of alcohol, slurred speech, and glossy eyes, Officer Munoz arrested Appellant for DWI at around 3:07 a.m.

After the arrest, Appellant refused to provide a breath or blood sample. Officer Munoz subsequently executed a warrant for Appellant's blood sample. The blood draw occurred at approximately 6:00 a.m., and only one blood sample was taken from Appellant.

At trial, and outside the presence of the jury, the trial court inquired into whether the State showed sufficient reliability to admit the blood sample taken three hours after the traffic stop. Appellant argued a single test after three hours from the time of the traffic stop can be reliable only if the expert is familiar with the personal characteristics of the driver, which was not the case for Appellant. Over Appellant's objection, the trial court admitted the expert testimony on retrograde extrapolation and the jury was free to determine whether to consider the admitted BAC results.

¹ Exhibiting four out of eight clues on the walk-and-turn test is a fail. See *Baker v. State*, 177 S.W.3d 113, 120 (Tex.App.—Houston [1st Dist.] 2005, no pet.).

Sarah McGregor, a forensic scientist with the Texas Department of Public Safety, performed the alcohol analysis of Appellant’s blood and testified to her findings of the blood sample.² The result of Appellant’s blood sample was .084, above the legal limit. To determine the blood alcohol level at the time of the traffic stop, McGregor explained what is known as “retrograde extrapolation,” which is a scientific method that involves “using the blood-alcohol concentration at the time of the draw, an elimination rate[,] and the time between the draw and the stop to estimate the blood-alcohol concentration at the time of the stop.” Using retrograde extrapolation, McGregor estimated Appellant’s BAC at the time of the offense was .099. On cross-examination, McGregor admitted she did not know, or consider, Appellant’s characteristics during her retrograde extrapolation calculation, which are relevant to the absorption rate of alcohol—relevant factors such as age, weight, amount of alcohol consumed, and time of consumption.

Trial Record

Voir Dire—Jury Selection

During *voir dire*, neither the State nor Appellant mentioned the use of retrograde extrapolation to the venire pool. The State explained the various ways intoxication is customarily proved by the prosecution—such as by the accused not having the normal use of mental faculties, normal use of physical faculties, or having an alcohol concentration of 0.08 or more. Several jurors expressed needing more than one means for conviction, specifically, a BAC of 0.08, or all three aforementioned ways of proving intoxication. The State discussed the various types of evidence at trial—physical evidence, scientific evidence, testimony, video, and other reports.

Trial—The State

At trial, the State presented the jury with two definitions of intoxication:

² McGregor’s qualification as an expert is not at issue on appeal.

[W]e would ask that you consider, if through the introduction of alcohol, this defendant did not have the normal use of his mental faculties; did not have the normal use of his physical faculties; or if there's an alcohol concentration of .08 or more. The State only needs to prove to you one of those three methods of intoxication.

Opening Statements

Retrograde extrapolation was not mentioned by either party during openings. In the State's opening, the prosecutor stated the jury would learn observations of the investigation, Appellant's admission of having consumed alcohol, and urged that the jury "consider not just that blood test but all of the definitions of intoxication." The State further argued the evidence would prove all elements of intoxication. In the defense's opening statement, defense counsel admitted Appellant ran a red light. Defense counsel asserted Appellant drove normally, spoke normally, appeared to look normal, but was not intoxicated. Defense counsel argued the jury should look for what is normal and by doing so, would determine Appellant was not guilty of the offense.

The State's Evidence

The evidence at trial, other than retrograde extrapolation, included both testimony and video surveillance, specifically the video of the traffic stop and Appellant's SFST performance. The State admitted and tendered the video surveillance to the jury while Officer Munoz testified to its contents. Officer Munoz testified Appellant ran a red light on a public roadway. A traffic stop was conducted, and Appellant pulled his vehicle over on top of a sidewalk, signaling possible intoxication.

Officer Munoz testified Appellant was slow in his responses, had glossy eyes, smelled of alcohol, and had mumbled speech. According to Officer Munoz, Appellant admitted he had just left a party where he had consumed two whiskey drinks.

Regarding the SFSTs, six of six clues on the HGN test were found, which indicated Appellant was intoxicated. While on the stand, Officer Munoz explained Appellant refused to

provide a breath sample, then agreed to a blood sample, but soon after changed his mind and refused both. A warrant was subsequently executed, and a blood sample was drawn from Appellant. Appellant's BAC at the time of the draw was 0.084.

Voir Dire—Witness Testimony

During trial, and before any retrograde extrapolation evidence was presented to the jury, both the State and Appellant questioned McGregor on retrograde extrapolation outside the presence of the jury, and McGregor was also subject to cross-examination.

Witness Testimony to the Jury

During McGregor's testimony in the presence of the jury, she explained Appellant's blood sample was processed through a gas chromatograph to determine the alcohol content. McGregor determined the BAC was 0.084 with an uncertainty of plus or minus 0.004.

McGregor admitted to making several assumptions during the retrograde extrapolation calculation, specifically, Appellant's height, weight, age, and drinking pattern. McGregor explained in conducting a retrograde extrapolation calculation, the assumption is that the subject is in a state of elimination:

Q. So are you able to determine, knowing the time of the blood draw and the time of the offense, are you able to kind of work backwards and do reverse extrapolation to determine what possibly could have been the blood-alcohol concentration at the time of the offense?

A. Yes. As long as you assume that the person was in the elimination phase.

On cross-examination, McGregor testified people differ in elimination and absorption rates and admitted she did not have information about Appellant, such as his personal characteristics or specific alcohol consumption, to aid in her retrograde analysis:

Q. And then you agreed that elimination and absorption rates actually vary from person to person, right?

A. That is correct.

Q. And, in fact, you testified, I believe on direct as well, that there is no range for the absorption rate, correct?

A. There's no known absorption rate.

Q. Okay. And earlier you also testified that you don't really know what he drank that night?

A. That is correct.

Q. And you don't know when he had his last drink?

A. That's correct.

Q. Now earlier you agreed that the absorption rate depends on a number of factors, right?

A. Yes.

Q. So in other words for every single individual the absorption rate can vary based on their personal characteristics?

A. Yes.

Q. Now, the characteristics include the presence and type of food in the stomach, the person's gender, the person's weight, the person's age, the person's mental state, the drinking pattern -- how often they drink. For example, how much on a daily basis -- the type of beverage consumed, the amount consumed, and the time period during which the alcohol was consumed, you know, prior to the test. Is that correct?

A. I'm familiar with all of those except the mental state one.

Q. Okay. Did you know any of those characteristics regarding Carlos Perez when you did your retrograde analysis?

A. No, I did not.

On redirect-examination, McGregor stated she used a conservative 0.01 elimination rate with an adjusted two-hour absorption time, which led her to Appellant's BAC retrograde

extrapolation calculation of 0.094. On recross-examination, McGregor admitted the calculations were based on assumptions because she did not know Appellant's individual characteristics.

Appellant's Evidence

Appellant rested without presenting any evidence.

Jury Charge

The trial court's charge to the jury included both definitions of intoxication from Section 49.04 of the Texas Penal Code: (1) impairment of mental or physical faculties; or (2) BAC of 0.08 or more. The trial court did not include a retrograde extrapolation instruction in the jury charge.

Appellant's Closing Argument

Appellant's closing argument on retrograde extrapolation emphasized McGregor made many assumptions, gave averages as numbers, and ultimately guessed Appellant's alcohol concentration. Appellant's argument at trial is as follows:

Now, as far as intoxication goes, the State has to prove that Mr. Perez was intoxicated when he was driving. Okay? Now, what we've got is we've got blood tests that are taken several hours later. Okay? And then we have Ms. McGregor who was, you know, giving us some averages as numbers and some assumptions and saying, Well, based on these assumptions, using these averages and using all these things, and making assumptions, I would guess that at the time his alcohol level is that.

We're here talking about proof beyond a reasonable doubt. Okay? And we're being offered averages, assumptions, guesses. We're not being given proof beyond a reasonable doubt that Mr. Perez was intoxicated at the time he was driving.

Appellant also stressed McGregor's admission alcohol absorption rates differ depending on the subject's personal characteristics, which were unknown and not considered in Appellant's case.

At the end of his closing argument, Appellant claimed McGregor made assumptions and that guessing was insufficient to support a guilty verdict.

And then, finally, the expert herself is trying to tell you that she knows he was intoxicated at the time of the offense based on assumptions that she also tells you

she knows are not necessarily true of him. And she also tells you that every individual is different. All she can do is ask you to guess Mr. Perez guilty. And that's something you cannot do.

The State's Closing Argument

In the State's closing remarks, it reiterated that the jurors did not have to agree on which definition of intoxication to use in reaching its verdict. At one point, the State did reference retrograde extrapolation, asserting the retrograde extrapolation calculations were conservative assumptions. The State summarized its case by reviewing the definitions of intoxication and the evidence presented at trial, such as the SFSTs, video surveillance, the officer's testimony, Appellant's initial consent then subsequent refusal to provide breath and blood samples, and Appellant's own admissions. The State contended (not necessarily in the following order):

We have three different definitions for intoxication because there are many factors that affect the body's ability to handle alcohol.

. . .

We use a lot of averages. We use a lot of assumptions. And we talked a lot about conservative assumptions. Every conservative assumption and calculation she gave you was over .08. Three hours later, over .08. Common sense. More time probably eliminating. But we have her testifying to her experience, her expert knowledge, her expertise, all of which is beyond what we deal with probably on an everyday basis. It's a lot of words I don't understand. But I know what the result means, and she explained to us what the result means. And we had to bring you intoxication. So if you don't believe mental or physical faculties, we've got you the .08.

. . .

He [officer] didn't arrest him because he smelled like alcohol, had bloodshot eyes, because he failed one test. He gave him three.

. . .

The logical inference of a refusal would be more time. More time is a lower BAC, the more time the alcohol is going to get out of my system. And in this case you have a refusal not once but twice.

The State argued Appellant ran a red light at around 2:55 a.m., had glossy eyes, an odor of alcohol, and admitted to consuming a few whiskey drinks. Appellant was slow in responding to questions and was swaying during the administered SFSTs; Appellant's poor performance on the SFSTs was also emphasized by the State. The State further stressed Appellant's two refusals to consent to obtaining his alcohol concentration and calculated a total of twenty-eight pieces of evidence that proved Appellant's intoxication.

Jury Deliberations

The record does not indicate the jury tendered any questions or notes on the subject of retrograde extrapolation.

Procedural History

The jury found Appellant guilty of driving while intoxicated, and the trial court sentenced him to 180 days in the County Jail. This appeal followed.

ISSUES ON APPEAL

In two issues, Appellant challenges the admission of evidence. In his first issue, Appellant argues the trial court erred in admitting expert testimony on retrograde extrapolation, and in his second issue, challenges the admission of his BAC test results.

DISCUSSION

Issue One

In his first issue on appeal, Appellant argues he was harmed by the admission of retrograde extrapolation testimony, thereby prejudicing the jury. The State concedes error in its expert testimony regarding retrograde extrapolation.

Standard of Review & Applicable Law

A reviewing court evaluates a trial court's admissibility decision under an abuse of discretion standard. *Powell v. State*, 63 S.W.3d 435, 438 (Tex.Crim.App. 2001). Because trial courts are in the best position to make calls on questions of admissibility, we will uphold a trial court's admission of evidence if it falls within the zone of reasonable disagreement, and we afford great deference to a trial court in its evidentiary decision. *Martinez v. State*, No. 08-17-00165-CR, 2019 WL 4127261, at *7 (Tex.App.—El Paso Aug. 30, 2019, no pet.)(not designated for publication).

Retrograde extrapolation is a method of computation for blood alcohol levels at the time of the arrest. *Mata v. State*, 46 S.W.3d 902, 908-09 (Tex.Crim.App. 2001). A driver's blood alcohol tested during the absorption phase can reflect a BAC result, at the time of the blood draw, higher than the BAC at the time of the offense. *Id.* at 909. During the alcohol elimination phase, a BAC test result could be lower than the actual BAC at the time of the offense and is dependent upon whether absorption levels have reached a peak. *Id.* Retrograde extrapolation may be reliable under certain conditions, such as the expert clearly applying the science, the number of tests given, the length of time between each test indicating credibility, and whether and to what extent any individual characteristics of the defendant were known to the expert in providing his extrapolation. *Id.* at 916.

The State concedes this case suffers from several defects in the ultimate retrograde extrapolation calculation admitted at trial. First, the expert provided inconsistent testimony; second, only one blood sample was drawn; third, the three-hour time difference between the traffic stop and the blood draw; and fourth, the calculation did not include any of Appellant's personal characteristics.

We agree with the State and find error. In applying the *Mata* factors, the expert's retrograde extrapolation testimony fails to meet the threshold admissibility criteria because the State admitted only one administered blood test, the length of time between the offense and blood test was excessive, and the BAC calculation in this case required, at minimum, the expert's knowledge of Appellant's personal characteristics.

Harmless Error Analysis

Finding error, we must now conduct a harm analysis to determine whether the admitted evidence constitutes reversible error. The erroneous admission of retrograde extrapolation evidence is non-constitutional error and is subject to a harm analysis. *Bagheri v. State*, 119 S.W.3d 755, 762–63 (Tex.Crim.App. 2003); *see also Coffey v. State*, No. 08-17-00107-CR, 2019 WL 3940968, at *6 (Tex.App.—El Paso Aug. 21, 2019, no pet.)(mem. op., not designated for publication). A reviewing court must disregard the error unless appellant's substantial rights are affected. *See* TEX.R.APP.P. 44.2(b)(other than constitutional error, any error “that does not affect substantial rights must be disregarded”). A reviewing court must disregard the error if “after examining the record as a whole, [the court] has fair assurance that the error did not influence the jury, or had but a slight effect.” *Solomon v. State*, 49 S.W.3d 356, 365 (Tex.Crim.App. 2001).

In evaluating jury influence, courts should consider the entire record including testimony, physical evidence, jury instructions, the State's theories and any defensive theories, closing arguments, and *voir dire*. *Bagheri*, 119 S.W.3d at 763. Other important factors to consider are the character of the alleged error and its connection with other evidence, the State's emphasis on the error, cumulative nature of the error, and if the error was obtained from an expert. *Id.* Additionally, the “BAC-test results, even absent expert retrograde extrapolation testimony, are often highly

probative to prove both per se and impairment intoxication.” *Kirsch v. State*, 306 S.W.3d 738, 745 (Tex.Crim.App. 2010).

Appellant asserts the evidence of intoxication was not overwhelming, and the State needed the retrograde extrapolation testimony to bolster the BAC, thereby causing harm by its introduction. We believe the issue is whether the retrograde extrapolation testimony might have substantially affected and influenced the jury’s deliberations. The jury needed to believe either the BAC was 0.08 or more, *or* that Appellant did not have control over his mental or physical faculties while driving. Based on the entire record, we believe the testimony had some effect, but did not substantially influence jury deliberations to the degree that it constitutes reversible harm under a non-constitutional error standard.

First, the extensive testimony in question regarding retrograde extrapolation, though elicited by an expert, occurred outside the presence of the jury during trial. The record shows no mention of retrograde extrapolation in opening statements, and the jury was not questioned about retrograde extrapolation during *voir dire*. The record does not reflect the jury was predisposed to retrograde extrapolation as evidence of guilt.

Second, the State introduced retrograde extrapolation, but emphasized the officer’s testimony and observations, video surveillance, SFSTs, and Appellant’s admissions under its theory of intoxication by impairment. During *voir dire*, the State’s list of evidence did not include retrograde extrapolation, but rather, physical and scientific evidence, testimony, video surveillance, and other reports. During trial, the jury heard the BAC range from retrograde extrapolation as only one of several other factors for identifying intoxication (odor of alcohol, glossy eyes, mumbled speech, failed SFSTs). The jury watched video surveillance of Appellant

running the red light, the vehicle stopping on the sidewalk, the poorly performed sobriety tests, and Appellant's admission of alcohol consumption.

Furthermore, McGregor, the expert, admitted to using numerous assumptions in determining Appellant's BAC through retrograde extrapolation analysis. Although the State's closing argument referenced retrograde extrapolation, it was a minor reference. Also admitted into evidence was Appellant's BAC, which was over the legal limit, that did not incorporate the use of retrograde extrapolation. The State may have used retrograde extrapolation testimony in its introduction of Appellant's BAC result, but emphasized other evidence. The record shows the retrograde extrapolation testimony was cumulative in that the State provided significant other evidence of Appellant's intoxication.

Third, Appellant's defensive theories include: the retrograde extrapolation calculation was unreliable, the BAC was improper, and the officer's administration of SFSTs was faulty. Appellant argued the State offered averages, assumptions, and guesses, which were all insufficient as proof beyond a reasonable doubt. Appellant rested without presenting evidence.

Much of the State's *voir dire* focused on behavior and physical observations proving intoxication. The State explained intoxication could be proved by either definition of intoxication. Some venire members during *voir dire* expressed that in order to convict Appellant, they needed a BAC of 0.08; those potential jurors were dismissed. Venire members also expressed they understood there were other behavioral responses to alcohol, such as the failure to obey traffic laws.

The State's opening included statements of all the elements of intoxication would be proved. The State spent most of its time on Officer Munoz's observations and investigation, relying on the impairment evidence. The State presented the jury with all definitions of intoxication

without committing to only one theory. The State used its closing argument to review the definitions of intoxication and other evidence such as the SFSTs, video surveillance, Officer Munoz's observations, Appellant's initial consent then refusal to provide a blood sample, and Appellant's admission to consuming alcohol.

Furthermore, the trial court's jury instructions included both definitions of intoxication from Section 49.04 of the Texas Penal Code: (1) impairment of mental or physical faculties; or (2) a BAC of 0.08 or more. The jury had the option to convict Appellant based on either definition of intoxication that the trial court provided in the jury charge. Because the retrograde extrapolation information was not submitted in the jury charge, the trial court did not expressly influence the jury. Additionally, during jury deliberations, the jury posed no questions or notes on the subject of retrograde extrapolation. Our review of the record leads us to conclude the emphasis on retrograde extrapolation was slight.

Moreover, other evidence supported the jury's verdict: (1) the failed field sobriety tests; (2) testimony of Appellant's poor driving and failure to obey traffic laws—running a red light and stopping on top of a sidewalk; (3) Appellant's admission of driving from a party and prior consumption of two whiskey drinks; (4) the officer's observations of Appellant's mumbled speech, glossy eyes, and odor of alcohol on his breath; (5) the actual BAC result indicating 0.084 at the time of the blood draw; and (6) Appellant's refusal to provide a breath sample, then agreeing to the blood draw, and then later refusing blood draw, which required the execution of a warrant, thereby unnecessarily increasing the time difference between the offense and administered blood draw.

Based on the ample evidence, it was reasonable for the jury to convict Appellant on either a BAC of 0.08 or more, *or* the belief that Appellant did not have control over his mental or physical

faculties while driving. We find Appellant's substantial rights were not affected and we must therefore disregard the error. Review of the record as a whole has fairly assured us the admission of retrograde extrapolation testimony had, at most, a slight effect on the jury's deliberations. The error is harmless.

Issue One is overruled.

Issue Two

In Issue Two, Appellant contends that irrespective of the expert witness's retrograde extrapolation testimony, admission of the BAC result was improper under Rule 403 of the Texas Rules of Evidence because the test result was more prejudicial than probative. Appellant further asserts that the BAC, taken three hours after the traffic stop, was only slightly probative, that the expert's testimony bolstered the BAC, and the BAC caused an irrational impression on the jury. We disagree.

Standard of Review and Applicable Law

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex.Crim.App. 2016) A reviewing court reverses a trial court's decision if it is outside the zone of reasonable disagreement. *Id.* at 83. The language of Rule 403 implies that trial courts have inherent, broad discretion in ruling on 403 objections, and relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” *State v. Mechler*, 153 S.W.3d 435, 439 (Tex.Crim.App. 2005). Relevant evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. *See* TEX.R.EVID. 403. “Probative value” refers to the “inherent probative force of an item of

evidence”—the force of it making more or less probable the existence of a fact of consequence—coupled with the proponent’s need for the complained-of evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex.Crim.App. 2006). “Unfair prejudice” refers to the tendency to suggest a decision on an improper bias, commonly, an emotional one. *Id.*

When undertaking a Rule 403 analysis, a trial court must balance: (1) the inherent probative force of the proffered item of evidence along with (2) the proponent’s need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Id.* at 641-42; TEX.R.EVID. 403.

In the instant case, the BAC results are highly probative under both the per se and impairment definitions of intoxication, even absent retrograde extrapolation. *Kirsch*, 306 S.W.3d at 745; *see also Stewart v. State*, 129 S.W.3d 93, 97 (Tex.Crim.App. 2004)(retrograde extrapolation testimony is not required to link the defendant’s intoxication and his driving); *see also Mechler*, 153 S.W.3d at 440 (intoxilyzer results are probative under both definitions of intoxication and admissible at trial without retrograde extrapolation testimony); *see also Stewart*, 129 S.W.3d at 97 (breath test results are admissible without retrograde extrapolation when considered with other evidence of intoxication to determine if defendant was intoxicated at the time of driving). However, BAC alone is insufficient to prove intoxication at the time of the traffic stop; the record must include other evidence to support that inference, such as erratic driving or post-driving behavior—stumbling, swaying, slurred or mumbled speech, inability to perform field

sobriety tests or follow directions, bloodshot eyes, and admissions by the driver. *Kirsch*, 306 S.W.3d at 745.

As articulated in *Mechler*, a proper Rule 403 analysis includes, but is not limited to, four factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Mechler*, 153 S.W.3d at 440.

In evaluating Rule 403, Appellant purports the BAC results were more prejudicial than probative because: (1) the test was taken three hours after the stop, which nulls the probative value because the uncertainty value is 0.004 and makes the retrograde extrapolation “bogus” considering the three hour delay; (2) the retrograde extrapolation testimony left an irrational impression on the jury because it “relate[s] directly to the charged offense,” implying that a BAC of 0.084 after three hours would render a higher rate while driving; (3) the expert testimony was more than half the length of the trial; and (4) the State needed the BAC evidence because of the arresting officer's poor administration of SFSTs. Appellant agrees the question is not whether the BAC taken some time after an offense is admissible in the absence of retrograde extrapolation testimony, but rather, whether the trial court abused its discretion in admitting evidence of the BAC. Appellant further contends the proper analysis requires an arbitrary or unreasonable standard.

Rule 403 – Mechler Factor Analysis

As discussed in Issue One, the retrograde extrapolation testimony was non-constitutional, harmless error. Based on the first *Mechler* factor, we find the BAC is probative and weighs in favor of admissibility because a BAC test result is indicative of alcohol concentration at a particular time. *See Kirsch*, 306 S.W.3d at 745. Regarding the second *Mechler* factor, we believe though the BAC is prejudicial, it is not *unfairly* prejudicial, and the jury's impression was not

irrational. The State instructed the jury that it must prove the defendant was intoxicated while driving. *Mechler*, 153 S.W.3d at 440. The State and the trial court’s jury charge appropriately instructed the jury on defining intoxication. Additionally, unfair prejudice persuades a jury to find guilt on a basis other than the charged offense. *Id.* However, the BAC relates directly to intoxication for a DWI offense and would not have the potential to greatly impress the jury in an irrational way. As for the third *Mechler* factor, undue time was not an issue because much of the retrograde extrapolation explanation occurred outside the presence of the jury and omitting retrograde extrapolation had little bearing on the BAC. Furthermore, because the BAC cannot be distanced from the charged offense, the jury would not be distracted irrespective of the time spent to present the results. Regarding the fourth *Mechler* factor, the State presented Officer Munoz’s testimony, video surveillance, the SFST results, Appellant’s admission of alcohol consumption, the delay in the blood draw (refusing the breath test, then agreeing to the blood draw, then refusing the blood draw), and evidence that Appellant ran the red light and parked on the sidewalk when he pulled over. Though we find the State does not have a great need for the evidence, the BAC test result is part of the State’s second theory of proving the offense, which was submitted to the jury for consideration, and the sum of the factors favor its admissibility.³

Furthermore, we recognize that absent a contaminated or compromised blood specimen, the BAC, even after three hours, was 0.084—above the legal limit. Appellant offered no evidence to counter the State’s claims, such as proof he consumed more alcohol after the initial traffic stop

³ We believe the actual BAC test is not tied to admitting the expert’s testimony. Irrespective of the calculated retrograde extrapolation, the actual BAC at the time of the blood draw was identified as 0.084 with uncertainty at +/- 0.004. We held in *Coffey* that even with BAC of 0.73, a defendant could be convicted of DWI and that retrograde extrapolation is not necessary to show intoxication. *Coffey*, 2019 WL 3940968, at *2; see *Straker v. State*, No. 08-14-00112-CR, 2016 WL 5845825, at *6 (Tex.App.—El Paso Sept. 30, 2016, no pet.)(not designated for publication)(retrograde extrapolation testimony is not required to admit test results). The BAC results without extrapolation evidence are often “probative to prove both per se and impairment intoxication.” *Straker*, 2016 WL 5845825, at *5 (citing *Kirsch*, 306 S.W.3d at 745). We held in *Straker* that the BAC test results after three hours were highly probative and admissible in applying Rule 403. *Straker*, 2016 WL 5845825, at *2, *6.

or while in custody. The fact finder was free to reasonably deduce the BAC taken after three hours would be at a decline even with a more conservative elimination approach. The State used the BAC as part of its DWI evidence, but the record shows other ample evidence to sustain a conviction when considering either definition of intoxication: (1) either BAC of 0.08 or more, or (2) lack of control in mental or physical faculties.

We hold the sum of the factors weigh in favor of admissibility. Per our Rule 403 analysis, the trial court reasonably concluded the probative value of the BAC was substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion in admitting the BAC test result.

Issue Two is overruled.

CONCLUSION

Having overruled both issues, we affirm the judgment of the trial court.

August 23, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

(Do Not Publish)