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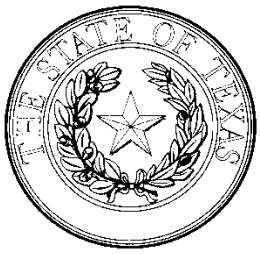

In The

Court of Appeals

For The

First District of Texas

NO. 01-12-00892-CR

RAQUEL PAULETTE MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case No. 11CR1877

MEMORANDUM OPINION

A jury convicted Raquel Paulette Martinez of driving while intoxicated with a child passenger and assessed her punishment at two years' confinement.[1] In five issues on appeal, Martinez contends that (1) the trial court was biased against her

[1] TEX. PENAL CODE ANN. § 49.045 (West 2012).

and infringed upon her right to a fair trial; (2) the trial court erred in denying her request for a jury instruction under article 38.23(a) of the Texas Code of Criminal Procedure; (3) the State made improper comments during closing argument; (4) the trial court erred by admitting evidence regarding her police-ordered blood test; and (5) the trial court erred by admitting evidence that she refused to take a portable breath test. We affirm.

Background

A few hours after midnight, Martinez was driving on interstate 45 in Galveston County, Texas when Department of Public Safety Trooper M. Leighton stopped her SUV. Martinez had five passengers in the car: an adult female and four children under 15-years-old. Leighton suspected Martinez was intoxicated because Martinez failed to drive her car within a single marked traffic lane. A video camera attached to Leighton's patrol car recorded the entire stop.

Martinez stopped her car on the side of the highway and Trooper Leighton asked for her driver's license and proof of insurance. Leighton testified that he noticed that Martinez had slurred speech, bloodshot, watery eyes, and smelled of alcohol. Martinez admitted to drinking three or four beers a few hours earlier that evening. At Leighton's request, Martinez performed three field sobriety tests: a horizontal gaze nystagmus (HGN) test, a one-leg stand test, and a walk-and-turn

test. Martinez failed all three field tests. Leighton also requested, but Martinez refused, a portable breath test.

Leighton arrested Martinez, placed her in his patrol car, and took her to Mainland Medical Center for a mandatory blood draw. Leighton asked a hospital employee, Cynthia Williams, to draw Martinez's blood sample. Martinez told Leighton that she was afraid of needles. Before the blood draw began, Martinez became "very combative," and Leighton and another officer held Martinez down while Williams drew her blood. Leighton completed the paperwork accompanying the blood sample and incorrectly identified Williams as a registered nurse. The blood sample was later analyzed and Martinez's blood alcohol content was 0.19 g/ml.

At trial, Williams testified that she was a trained phlebotomist and that she had previously conducted similar police-ordered blood draws. Martinez objected to Williams's trial testimony, arguing that she did not meet the statutory requirements to administer the blood draw. The trial court overruled her objection, admitted evidence of the blood sample, and permitted Williams to testify. Martinez also objected to evidence of her refusal to take a breath test. The trial court overruled her objection and admitted into evidence the video footage of Martinez refusing the breath test.

A jury convicted Martinez of driving while intoxicated with a child passenger and sentenced her to two years' confinement. Martinez timely appealed.

Judicial Bias

In her first issue, Martinez contends that the trial court disrupted, invaded, and interfered with her attorney-client relationship, infringed upon her Sixth Amendment right to choose her own counsel, and denied her a fair trial. We construe Martinez's arguments as a claim that the trial court infringed upon her due process right to an impartial judge. *See Avilez v. State*, 333 S.W.3d 661, 671 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (reviewing defendant's allegations that trial court was biased against him and noting "[d]ue process requires that a criminal trial be held 'before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (citation omitted)).

A. Standard of review

A criminal defendant has a due process right to a trial before a neutral and detached judge. *Avilez*, 333 S.W.3d at 673; *see Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 59–62, 93 S. Ct. 80, 82–84 (1972). A judge may not have an "actual bias against the defendant or interest in the outcome of his particular case," or assume the role of prosecutor. *Avilez*, 333 S.W.3d at 673; *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S. Ct. 1793, 1797 (1997). However, not every complaint

regarding judicial behavior constitutes a constitutional violation of the right to a fair trial. *Avilez*, 333 S.W.3d at 675.

B. Martinez waived her right to challenge trial court's impartiality

We first consider the State's contention that Martinez waived her right to challenge the trial court's impartiality by not raising any objections at trial.

To preserve a complaint for appellate review, a party must make a timely request, objection, or motion with sufficient specificity to apprise the trial court of the complaint and to afford the trial court an opportunity to rule on the objection. TEX. R. APP. P. 33.1(a)(1)(A); *see Saldano v. State*, 70 S.W.3d 873, 886–87 (Tex. Crim. App. 2002); *Pipkin v. State*, 329 S.W.3d 65, 69 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

Martinez did not allege trial court bias at any time during trial, nor did she move for the judge's recusal.[2] *See* TEX. R. CIV. P. 18b (establishing grounds for recusal including personal bias or prejudice concerning subject matter or party); *see, e.g.*, *Celis v. State*, 354 S.W.3d 7, 22–23 (Tex. App.—Corpus Christi 2011), *aff'd*, 416 S.W.3d 419 (Tex. Crim. App. 2013). Martinez, therefore, waived her right to appellate review unless the error constituted "fundamental error." *Avilez*, 333 S.W.3d at 671–72.

[2] A Texas judge may be recused from presiding over a case if the judge is (1) constitutionally disqualified, (2) subject to a statutory strike, or (3) subject to statutory disqualification or recusal under Texas Supreme Court rules. *Gaal v. State*, 332 S.W.3d 448, 452 (Tex. Crim. App. 2011).

Assuming without deciding that Martinez's complaint, if valid, implicates fundamental error that we may address for the first time on appeal, we consider whether the trial court's actions violated Martinez's "due process right to an impartial judge." *Id*. at 672; *Brumit v. State*, 206 S.W.3d 639, 644–45 (Tex. Crim. App. 2006); *see also Washington v. State*, No. 01-11-00093-CR, 2013 WL 5604715, at *9 (Tex. App.—Houston [1st Dist.] Oct. 10, 2013, no pet. h.) (mem. op.).

C. Trial court did not infringe upon Martinez's right to a fair trial

Martinez argues that she was denied a fair trial because the trial court was biased against her attorney and violated the Code of Judicial Conduct by asking "are you on drugs or something" when she sought to clarify counsel's assertion that Martinez was eligible for probation. After that statement, the following exchange between the trial court and Martinez occurred:

TRIAL COURT:	Do you want to proceed with this lawyer, or what do you want to do?
MARTINEZ:	Do I have to decide right now?
TRIAL COURT:	You can come back on Wednesday and tell me. Come back Wednesday morning at 9:00 o'clock, and then you can tell me if you want him to be your lawyer.

"[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do

not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994) (distinguishing actual judicial bias from judicial prejudice that requires recusal under section 455(a) of Title 28 of the United States Code); *see Potier v. State*, 68 S.W.3d 657, 666 (Tex. Crim. App. 2002) (holding judicial rulings on evidence did not deny due process or other constitutional rights). A trial court's opinions or judgments based on the pending case violate a defendant's constitutional rights when the trial court injects herself into the role of prosecutor, destroys the neutral atmosphere of the courtroom, or prejudices the jury against the defendant. *Blue v. State*, 41 S.W.3d 129, 132–33 (Tex. Crim. App. 2000) (citing *United States v. Lanham*, 416 F.2d 1140 (5th Cir. 1969)); *United States v. Haywood*, 411 F.2d 555 (5th Cir. 1969) (holding trial judge violated due process by interrupting charge and prejudicing jury against defendant).

Martinez relies on a civil case, *Shaw v. Greater Hous. Transp. Co.*, 791 S.W.2d 204 (Tex. App.—Corpus Christi 1990, no writ), to support her argument that the trial court's behavior was so "egregious" that it violated her due process right to a fair trial. In *Shaw*, the court of appeals held that the trial court demonstrated bias and prejudice, describing the case as "fraught with problems and at times got out of control." 791 S.W.2d at 211. The trial court committed several reversible errors, including requesting that opposing counsel donate to her favorite charity, telling the attorney to "shut up," and compelling the attorney to apologize

to opposing counsel and the jury for "improperly requesting documents during the trial." *Id*. Furthermore, at one point, the trial court left the bench and "threatened to strike all of the pleadings in the case." *Id*. The trial court also brought her sick son to court for two days during trial. *Id*. The court of appeals held that the trial court's conduct, while largely outside the jury's presence, was "improper and disruptive," and violative of the Code of Judicial Conduct. *Id*.

The facts in this case are distinguishable from *Shaw*. The instances of alleged bias occurred only twice. More importantly, they occurred before trial began and the discussion occurred at the bench, not before an empaneled jury. Further, the record does not demonstrate that the trial court had any pecuniary or personal interest in the case comparable to a demand for a donation to a favorite charity. We conclude that the trial court in this case did not behave in such an improper or disruptive manner as to deprive Martinez of her due process right to a fair trial.

Martinez also argues that the trial court interfered with her Sixth Amendment right to be represented by counsel of her choosing and interfered with her attorney-client relationship. Again, Martinez did not object at trial to the trial court's behavior. We will assume, however, that such interference implicates fundamental error. *Avilez*, 333 S.W.3d at 671–72.

The Sixth Amendment of the United States Constitution and the Texas Constitution guarantee a criminal defendant the right to assistance of counsel of her choosing. *See* U.S. CONST., amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. 1.05 (West 2005); *see Gonzalez v. State*, 117 S.W.3d 831, 836–37 (Tex. Crim. App. 2003). The Sixth Amendment contemplates the defendant's right to choose his counsel—but the right to do so is not absolute. *Gonzalez*, 117 S.W.3d at 837; *see also Wheat v. U.S.*, 486 U.S. 153, 158–59, 108 S. Ct. 1692, 1697–98 (1988) ("[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."). For example, a defendant may not choose an advocate who is not a member of the bar, an attorney whom she cannot afford or declines to represent her, or an attorney who has a previous or ongoing relationship with an opposing party. *Gonzalez*, 117 S.W.3d at 837.

The defendant's right must also be balanced against "other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice." *Id.*; *see also United States v. Gonzalez–Lopez*, 548 U.S. 140, 152, 126 S. Ct. 2557, 2566–67 (2006) ("We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs

of fairness and against the demands of its calendar.") (citations omitted); *Ex parte Windham*, 634 S.W.2d 718, 720 (Tex. Crim. App. 1982) (listing factors to be weighed in balancing defendant's right to counsel of choice against trial court's need for prompt and efficient administration of justice). A trial court violates a criminal defendant's constitutional rights when this balancing reveals that the court unreasonably or arbitrarily interfered with a defendant's right to counsel. *Gonzalez*, 117 S.W.3d at 837.

Martinez again relies upon *Gonzalez* as well as *Davis v. State*, 268 S.W.3d 683 (Tex. App.—Fort Worth 2008, pet. ref'd), to support her contention that the trial court unconstitutionally interfered with her right to choose her counsel. Neither supports her position.

In *Gonzalez*, the Court of Criminal Appeals considered when counsel is disqualified because he is a potential trial witness. 117 S.W.3d at 837. The trial court recognized the presumption favoring a defendant's right to retain counsel of his choice, but the Court determined that the trial court reasonably believed that there was a "real possibility" that counsel would be called as a witness and therefore properly disqualified him as defendant's counsel. *Id*. at 838, 844. Under those circumstances, the interest of preventing counsel from serving in the "dual role of advocate-witness" trumped the presumption that a defendant should be able to be represented by counsel of his own choosing. *Id*. at 837.

Gonzalez is distinguishable from this case. Most significantly, there is nothing in the record to suggest that Martinez's attorney was a potential trial witness. Furthermore, the trial court did not remove Martinez's attorney from the court or require Martinez to choose a different attorney. Because the facts here are too different from those in *Gonzalez*, the court's analysis is inapplicable.

Martinez also relies on *Davis v. State*, arguing that the law prohibiting "improper prosecutorial character attacks on defense counsel" should be extended to shield defendants from "improper judicial attacks on defense counsel." A prosecutor strikes the defendant over counsel's shoulders when it "attempt[s] to prejudice the jury against the defendant." *Acosta v. State*, 411 S.W.3d 76, 93 (Tex. App.—Houston [1st Dist.] 2013, no pet.). While it is well-established that the State may not improperly strike the defendant over counsel's shoulders, that rule has no application to comments made outside of the jury's presence.

Davis is also distinguishable from this case: there is no evidence that the trial court's behavior constituted a judicial equivalent of striking over counsel's shoulder. *See, e.g.*, *Bethany v. State*, 814 S.W.2d 455, 461 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (holding trial court "abandoned its neutral status and took up the role of an advocate [for the State]" when it accused defendant of perjury, suggested defense counsel induced the perjury, and *sua sponte* interrupted appellant's attorney during closing argument); *but see Avilez*, 333 S.W.3d at 672

(holding defendant's due process rights not violated when trial court admonished defendant 18 times in front of jury, *sua sponte* instructed jury to disregard defendant's testimony, and held defendant in contempt of court). The trial court's statements were made outside of the jury's presence during a pretrial hearing. The trial court's statements, therefore, did not rise to the level of prejudice found in *Bethany*.

We conclude that Martinez has not identified any evidence that the trial court's actions constituted fundamental error.

Accordingly, we overrule her first issue.

Alleged Prosecutorial Misconduct

In her third issue, Martinez contends that the State made "numerous unwarranted, improper and prejudicial comments" during its closing argument and the cumulative effect of these statements denied her right to a fair trial.

A. Standard of review

The law requires a fair trial, free from improper argument by the State. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). There are four general areas of permissible jury argument: (1) summation of the evidence presented at trial, (2) a reasonable deduction drawn from that evidence, (3) an answer to the opposing counsel's argument, or (4) a plea for law enforcement. *Ex parte Lane*, 303 S.W.3d 702, 711 (Tex. Crim. App. 2009); *Carmen v. State*, 358 S.W.3d 285, 300 (Tex.

App.—Houston [1st Dist.] 2011, pet. ref'd). When determining whether a jury argument falls into one of these categories, we consider the argument in light of the entire record. *Carmen*, 358 S.W.3d at 300. A jury argument that exceeds the permissible bounds constitutes reversible error when, in light of the record as a whole, the argument is extreme, manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Sandoval v. State*, 52 S.W.3d 851, 857 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd.).

B. Martinez forfeited her right to challenge the prosecutor's closing argument

The State argues that Martinez failed to request further relief after the trial court sustained her objections to the prosecutor's statements during closing argument and she waived her right to challenge those statements on appeal.

To preserve error for appeal, a defendant must object to any erroneous jury argument, request an instruction to disregard, and receive an adverse ruling. TEX. R. APP. P. 33.1(a)(1)(A); *see Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *Acosta*, 411 S.W.3d at 95. By timely objection, the defendant provides the trial court an opportunity to rule on the specific, alleged improper violation. *Id*. If the trial court sustains the objections, the defendant must request an instruction to disregard, and if granted, additionally move for a mistrial. *Washington v. State*, 127 S.W.3d 111, 115–16 (Tex. App. Houston [1st Dist.] 2003, no pet.). If a

defendant fails to object or fails to pursue the issue until the trial court makes an adverse ruling, she forfeits her right to challenge the alleged errors on appeal. *Id*.; *see also Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012) (noting that failure to object at trial forfeits right to appeal, including due process rights).

Martinez concedes that the trial court sustained several of her objections. She complains that the cumulative effect of the objectionable content was so prejudicial that it denied her right to a fair trial. We hold Martinez forfeited her right to complain about any portion of the State's jury argument for which she did not obtain an adverse ruling. *Clark*, 365 S.W.3d at 339.

While the trial court sustained several objections during closing argument, there was one line of questions to which Martinez objected and moved for mistrial; but, for those questions, the trial court did not make a ruling on the mistrial motion:

PROSECUTOR:	So you know at least she had four beers. She also refused to give a specimen when the trooper offered her that portable breath test. That was her first opportunity to show you what her level of intoxication was.
DEFENSE ATTORNEY:	Objection, Your Honor. That's outside the evidence.
TRIAL COURT:	Sustained. Move on.
DEFENSE ATTORNEY:	That's not an admissible test.

PROSECUTOR: She refused to give you that portable breath test results. Then later he read her the DIC-24 form.

* * *

(At the bench)

DEFENSE ATTORNEY: Your Honor, at this time I would ask for a mistrial based on the prosecutor's statement that she wouldn't give a result on the portable breath test. That's evidence that's not admissible. It's something that was not testified to. It denies my client the right to a fair trial. It denies her the right to cross-examine and confront witnesses concerning a result. The results weren't allowed to be testified about. I believe the court made that comment that no results could be—in fact, the State said, she testified as to results. Now they bring it up in final argument that there could have been a result there.

TRIAL COURT: Go ahead.

PROSECUTOR: Well, Your Honor, what I was talking about was there was a refusal, so there would be no result at all, not that –

THE COURT: Just clear it up.

(Jury present)

PROSECUTOR: So the defendant, when offered a portable blood breath test, refused to give a breath specimen . . . .

Martinez's failure to obtain a ruling from the court on her motion for mistrial waives any error. *Clark*, 365 S.W.3d at 339.

We overrule Martinez's third issue.

Evidence of Blood Test

In her second and fourth issues, Martinez contends that the person who drew her blood sample was unqualified to do so and, therefore, the trial court committed harmful error by admitting evidence regarding the blood test's administration and results. She also argues that she had a right to an article 38.23(a) jury instruction because evidence of the blood test "raise[d] a contested issue of material fact as to the lawfulness of obtaining the evidence."

A. Standard of review

We review the trial court's evidentiary rulings for an abuse of discretion. *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006); *Walker v. State*, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd). Unless the trial court's decision was outside the "zone of reasonable disagreement," we will uphold the ruling. *Oprean*, 201 S.W.3d at 726; *Walker*, 321 S.W.3d at 22. We defer to a trial court's findings of fact "based on an evaluation of credibility and demeanor." *Oprean*, 201 S.W.3d at 726; *Walker*, 321 S.W.3d at 22. If the trial court does not enter written or oral findings of fact, we "view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made

implicit findings of fact that support its ruling as long as those findings are supported by the record." *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000); *Walker*, 321 S.W.3d at 22.

B. Testimony and evidence of the blood test was admissible

Martinez argues that the State failed to meet its burden of proving that the person who drew her blood satisfied the requirements of section 724.017 of the Texas Transportation Code[3] and that the trial court erred by admitting evidence of her blood test results. The State responds that the person who conducted Martinez's blood draw, Cynthia Williams, was a qualified technician.

Section 724.017(a) of the Texas Transportation Code lists five categories of people who are qualified to draw blood at the request of a police officer, the second of which is in dispute here. The list includes a (1) physician, (2) qualified technician, (3) registered professional nurse, (4) licensed vocational nurse, and (5) licensed or certified emergency medical technician-intermediate or emergency medical technician-paramedic authorized to take a blood specimen. TEX. TRANSP. CODE ANN. § 724.017 (West Supp. 2013).

Williams testified that she was employed as a phlebotomist responsible for drawing blood. Phlebotomists are not per se qualified to draw blood, but may be qualified based on their job duties or experience. *See State v. Bingham*, 921

[3] *See* TEX. TRANSP. CODE. ANN. 724.017 (West Supp. 2013).

S.W.2d 494, 495–96 (Tex. App.—Waco 1996, pet. ref'd) (holding "qualified technician" includes a phlebotomist or person employed for job of venesection or phlebotomoy); *Torres v. State*, 109 S.W.3d 602, 605 (Tex. App.—Fort Worth 2003, no pet.) (affirming phlebotomist was qualified based on her duties, training, and experience); *but see Cavazos v. State*, 969 S.W.2d 454, 456 (Tex. App.—Corpus Christi 1998, pet. ref'd) (holding State did not meet burden of showing phlebotomist was qualified).

We first consider whether the trial court abused its discretion in finding that Williams, by virtue of her job title, experience, and duties, satisfied the Transportation Code requirements for a "qualified technician."[4] At trial, Williams testified that her title was "phlebotomist," she was trained as a medical assistant, and her responsibilities include drawing blood. The hospital had employed her in that capacity for over one year and she also had three-and-a-half years' experience drawing blood for a physician. She also had prior experience conducting police-ordered blood draws. Williams described the procedure for conducting a police-ordered blood sample and the importance of not using alcohol when drawing blood for a blood-alcohol analysis. Williams, following police protocol, also signed her name on the tube containing Martinez's blood. Viewing the evidence in the light most favorable to the trial court's ruling, we hold that the trial court did not abuse

[4] TEX. TRANSP. CODE ANN. § 724.017 (listing "qualified technician" as eligible to draw blood at a police officer's request).

its discretion in finding that Williams was qualified to draw Martinez's blood. *See Bingham*, 921 S.W.2d at 496; *Torres*, 109 S.W.3d at 605.

C. Martinez did not have a right to jury instruction

In spite of the trial court's finding that Williams was qualified, Martinez argues that the evidence regarding her qualifications raises an issue of material fact regarding the lawfulness of obtaining the evidence. She argues that she had a right to an article 38.23(a) jury instruction and there was a question of material fact that gave rise to a constitutional or statutory violation that would render the blood test evidence inadmissible. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005); *see Madden v. State*, 242 S.W.3d 504, 509–11 (Tex. Crim. App. 2007) (noting that "the disputed fact must be an essential one in deciding the lawfulness of the challenged conduct"). The State responds that the trial court did not err in denying the instruction because there were no disputed factual issues regarding Williams's qualifications.

It is a trial court's duty to determine whether the predicate facts for the admissibility of evidence have been satisfied. TEX. R. EVID. 104(a); *see Casillas v. State*, 733 S.W.2d 158, 168 (Tex. Crim. App. 1986) (under rule 104(a), trial judge alone determines admissibility of evidence); *but see* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 6 (West Supp. 2013) (requiring jury instruction depending on whether accused's confession was voluntary). Under article 38.23(a), a jury instruction on

the predicates for admissibility is required only when there is an issue on the legality of the evidence—not its admissibility. When a fact issue exists as to whether evidence was obtained in violation of the Constitutions or laws of the United States or the State of Texas, "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of [the] Article, then . . . the jury shall disregard any such evidence so obtained." TEX. CODE CRIM. PROC. ANN. art. 38.23(a).

Even if we assume that the person who draws blood falls within the category of issue that requires a preliminary determination by a trial judge and a second determination by the jury, there must be a genuine dispute about a material issue of fact before an article 38.23 instruction is warranted. *Madden*, 242 S.W.3d at 510–11 (Tex. Crim. App. 2007). A defendant must demonstrate that: (1) the evidence heard by the jury raises an issue of fact, (2) the evidence on that fact is affirmatively contested, and (3) the contested factual issue is material to the lawfulness of the challenged conduct in obtaining the evidence. *Id*. at 511; *Mbugua v. State*, 312 S.W.3d 657, 669 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Evidence that controverts the facts relied upon to establish probable cause creates a material factual dispute. *See Garza v. State*, 126 S.W.3d 79, 85–88 (Tex. Crim. App. 2004). If there is no disputed issue of material fact, however, the legality of

the challenged conduct is a question of law for the trial court. *Madden*, 242 S.W.3d at 510; *Mbugua*, 312 S.W.3d at 669.

At trial, Trooper Leighton admitted that he made a mistake in completing the paperwork accompanying the blood sample by incorrectly identifying Williams as a registered nurse. Other evidence, including Williams's own testimony, provided her correct title, job description, training and responsibilities. We have already held that the trial court did not abuse its discretion in admitting evidence of the blood test. We conclude that there were no issues of genuine fact for the jury to reconcile and that the trial court did not err in refusing Martinez's request for a jury instruction.

We overrule Martinez's second and fourth issues.

Refusal of Portable Breath Test

In her fifth issue, Martinez contends that the trial court erred by admitting evidence of her refusal to take a field breath test. Specifically, she argues the trial court should not have admitted portions of a video showing her refusing to take the portable blood test.

Even assuming a suspect's refusal to submit to a breath test is not admissible under Texas Transportation Code § 724.061 and that the trial court erred in admitting Martinez's refusal of the breath test, we conclude any error was harmless. Any error in an evidentiary ruling would be a non-constitutional error

subject to analysis under Texas Rule of Appellate Procedure 44.2(b). *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *Kamen v. State*, 305 S.W.3d 192, 197 (Tex. App.—Houston [1st Dist.] 2009, pet ref'd) (applying non-constitutional analysis of trial court's admission of HGN sobriety test).

Under rule 44.2(b), we must disregard a non-constitutional error that does not affect substantial rights. TEX. R. APP. P. 44.2(b); *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). We will not overturn a conviction if, having examined the entire record, we have fair assurance that the error did not influence the jury, or had but a slight effect. *Cobb v. State*, 85 S.W.3d 258, 272 (Tex. Crim. App. 2002). When considering whether the error affected the jury's decision, we consider the entire record, including testimony, physical evidence, the nature of the evidence supporting the jury's verdict, and the character of the alleged error and how it might have been considered in light of other evidence. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

The video footage of Martinez's refusal of the breath test was only a very small part of the evidence offered to prove that Martinez was driving while intoxicated. In addition to references to the refused breath test, Trooper Leighton conducted other field sobriety tests, including a walk-and-turn test, a HGN test,

and a one-leg stand test. Leighton testified that Martinez failed each of these three tests. Martinez slurred her speech, had bloodshot, watery eyes, and Leighton smelled alcohol "coming from or on her person." Martinez also admitted that she drank three or four beers earlier in the day. The most important evidence, however, was Martinez's blood test results of .19 g/ml, more than twice the legal limit in Texas for intoxication. Based on this evidence, we conclude that evidence of Martinez's breath test refusal was not injurious.

We conclude that any error in the admission of Martinez's refusal to take a breath test did not affect her substantial rights and any error was harmless in the context of the record as a whole.

We overrule Martinez's fifth issue.

Conclusion

Having overruled all of Martinez's issues, we affirm.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).