Memorandum Opinion Dated February 23, 2016 Withdrawn; Affirmed and Substitute Memorandum Opinion filed April 7, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00036-CR

JUSTIN PARKER RUSSELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 207th District Court
Comal County, Texas
Trial Court Cause No. CR2013-379

S U B S T I T U T E M E M O R A N D U M O P I N I O N

We deny the motion for rehearing en banc as moot, withdraw our memorandum opinion dated February 23, 2016, and issue the following substitute memorandum opinion.

Appellant Justin Parker Russell challenges his conviction for third degree felony driving while intoxicated on the grounds that: (1) the trial court abused its discretion by refusing to strike the testimony of police officers who violated the

Rule; (2) the trial court's admission of evidence authenticated by a witness who had perjured himself violated appellant's due process rights; (3) the trial court abused its discretion by permitting the introduction of blood analysis evidence; (4) appellant's constitutional right to confrontation was violated; and (5) the trial court erred by failing to include a Texas Code of Criminal Procedure article 38.23 instruction in the jury charge. We affirm.

I. Background

Appellant's pickup truck, traveling at a high rate of speed on Highway 46 in New Braunfels, Texas, passed Officer Ramos of the Bulverde Police Department (BPD) as Ramos was pulling out of a gas station parking lot in his patrol car in the early morning hours of March 29, 2013. Using his patrol car radar, Ramos clocked appellant's speed at 53 mph in a 35 mph zone. Ramos pursued appellant, and appellant pulled over onto a side street. With no prompting from Ramos, appellant opened the door to his truck as Ramos was approaching his vehicle.

When Ramos arrived at appellant's truck, appellant was using his cell phone to make phone calls. Ramos repeatedly asked appellant to get off his phone, but appellant refused. Appellant provided Ramos with his driver's license and insurance information while still using his cell phone. Ramos smelled an odor of alcohol on appellant and noticed that appellant had slurred speech. When Ramos asked if appellant had been drinking, appellant responded he had had "a few" beers. A back-up officer arrived, and Ramos returned to his patrol car to investigate appellant's information.

Ramos returned to appellant's truck and asked appellant to exit the vehicle. Appellant got out of his truck, but remained on his phone, apparently speaking with his attorney. Ramos observed appellant to be unsteady on his feet when exiting the truck. Appellant also kept putting his hands in his pockets despite

Ramos's instructions that appellant keep his hands out of his pockets. Ramos, concerned that appellant could not safely operate his vehicle due to alcohol intoxication, requested that appellant submit to field sobriety testing.

Appellant remained on his cell phone and did not respond to Ramos's repeated requests that he take field sobriety tests. Instead of responding, appellant asked the person on the other end of his conversation what he should do. Because appellant refused to respond and take the field sobriety tests, Ramos arrested appellant for driving while intoxicated (DWI) because Ramos did not believe it was safe to allow appellant to continue driving. Ramos read appellant the statutory warnings regarding the consequences of, as is relevant here, refusing to submit to breath or blood testing after an arrest for DWI. Appellant did not answer "yes" or "no" when Ramos requested that appellant submit to blood or breath testing; rather, appellant "dodged" the question and refused to answer and did not sign the statutory warning form. Ramos perceived appellant's lack of direct response to be a refusal, placed appellant in his patrol car, and drove to the BPD station so Ramos could draft a search warrant seeking a sample of appellant's blood. Ramos submitted the search warrant to the appropriate magistrate, who approved the warrant.

With the warrant in hand, Ramos transported appellant to a hospital in New Braunfels for the blood draw. At the hospital, Ramos provided the blood kit used to collect appellant's blood specimen; according to Ramos, the blood kit had an expiry date of July 2014 and contained a single sealed vial with an anti-coagulant powder in it. A registered nurse performed the blood draw, first cleaning appellant's arm with a brown colored wipe and then using a new needle to draw appellant's blood into a syringe. The nurse injected appellant's blood into the vial contained in the blood kit, shaking the vial a few times after depositing the blood

into it. Ramos placed tape over the top of the vial, initialed the tape, sealed the blood kit, and initialed the seal. He then transported appellant to the Comal County Jail, where appellant was booked into jail. Ramos returned with the blood kit to the BPD station, and he handed off the blood kit to BPD Lieutenant Rakoski. Rakoski mailed the blood kit to the Department of Public Safety (DPS) lab in Austin for testing. Rakoski also completed internal BPD chain of custody paperwork regarding the handling of the blood kit, which both he and Ramos signed.

The blood kit containing appellant's blood specimen arrived at the DPS lab in Austin on April 1 and immediately was placed in refrigerated storage. DPS chemist Jamie Mraz retrieved appellant's blood specimen from storage on April 9 for analysis. Mraz tested two samples of appellant's blood from the vial she retrieved from the blood kit, waiting overnight between the tests. She ran the samples through a gas chromatograph machine and averaged the results. According to Mraz's analysis, which was verified by another DPS analyst, appellant's blood alcohol content (BAC) was 0.146 grams of alcohol per 100 milliliters of blood, well over the legal BAC limit of 0.08 for driving.

In August, a grand jury indicted appellant for DWI with two or more previous convictions, a third degree felony. A year later, in August 2014, a jury found appellant guilty as charged in the indictment. After a pre-sentence investigation was completed, the trial court sentenced appellant to seven years' confinement, but suspended the sentence and placed appellant on community supervision for seven years and imposed a $2,500 fine. This appeal timely followed.

II. Analysis[1]

A. Violation of the Rule

In his first issue, appellant contends that the trial court abused its discretion by failing to strike the testimony of Lieutenant Rakoski after determining that Rakoski and Officer Ramos had violated the Rule. Although appellant refers to this issue as a failure to "strike" Rakoski's testimony, based on his argument and record references, we view this issue as a complaint about the trial court's failure to prevent Rakoski from testifying at all as a sanction for a Rule violation, as occurred following Ramos's testimony on the first day of the State's presentation of its case-in-chief.

Ramos testified, outside the presence of the jury, that during an afternoon break, Rakoski asked Ramos what questions Ramos had been asked by appellant's counsel. Ramos told Rakoski that he'd been asked about the "NHTSA." Ramos said the conversation lasted about thirty seconds and was "a chitchat thing." Appellant's stepmother also testified outside the presence of the jury that she overheard this conversation. She described the conversation as follows:

> I walked out to the hallway and [Ramos] had walked directly to the other two officers [Rakoski and Officer Greenhill] sitting on the bench. They kind of bantered back and forth a little bit, well, we're not done, that kind of thing. It's going to keep dragging on.
>
> Then the officer closest to him sitting on the left asked him what kind of questions have they been asking you. He said, well, they asked me about my qualifications and whether I was certified.

[1] This case was transferred to our court from the Third Court of Appeals by order of the Supreme Court of Texas. Therefore, we must decide the case in accordance with the Third Court's precedent if our decision would be otherwise inconsistent with its precedent. *See* Tex. R. App. P. 41.3.

Appellant's stepmother explained that Ramos saw her and the conversation ended. She agreed it was a very brief conversation.

After a lengthy discussion with counsel, the trial court determined that, despite the apparent Rule violation, Rakoski would be permitted to testify the following day. In making this decision, the trial judge emphasized that there was no indication the officers had discussed the chain of custody of the blood evidence—the subject matter about which Rakoski had been called to testify. The trial judge also specifically stated that appellant's trial counsel would be free to delve into Rakoski's credibility when cross-examining him and that the court would consider sanctions if appropriate.[2] Assuming without deciding that Rakoski violated the Rule by speaking with Ramos about Ramos's testimony,[3] we consider whether the trial court abused its discretion by permitting Rakoski to testify. We begin by reviewing the general principles underlying the Rule and then discuss the appropriate standard of review for an asserted Rule violation. We then apply these principles, under the appropriate standard of review, to the facts of this case.

Texas Rule of Evidence 614, commonly referred to as "the Rule," codifies the witness-sequestration rule. When invoked by either party or the trial court, the Rule mandates, with some exceptions not applicable here, the exclusion of witnesses from the courtroom during trial so they cannot hear the testimony of other witnesses. Tex. R. Evid. 614. The Rule is designed to prevent witnesses from altering their testimony, consciously or not, based on other witnesses'

[2] Appellant asserts in his brief that the trial court "necessarily found Lt. Rakoski and Officer Greenhill to have lied under oath." But the record reference he cites in support of this assertion provides no support for it. And we find nothing elsewhere in the record to support such a finding, implicit or explicit, as is further discussed below in section II.B.

[3] As discussed in more detail below in section II.B. of this opinion, Lieutenant Rakoski denied discussing the particulars of this case with Officer Rakoski; i.e., Rakoski denied violating the Rule.

testimony. *Routier v. State*, 112 S.W.3d 554, 591 (Tex. Crim. App. 2003) (citing *Webb v. State*, 766 S.W.2d 236, 239 (Tex. Crim. App. 1989)); *see Russell v. State*, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005) ("The purpose of placing witnesses under the [R]ule is to prevent the testimony of one witness from influencing the testimony of another, consciously or not."); *Harris v. State*, 122 S.W.3d 871, 882 (Tex. App.—Fort Worth 2003, pet. ref'd) ("The purpose of the Rule is to prevent corroboration, contradiction, and the influencing of witnesses."). When the Rule is invoked, a witness should not hear testimony in the case or talk to any other person about the case without the court's permission. *Harris*, 122 S.W.3d at 882; *see* Tex. Code Crim. Proc. arts. 36.05 (witnesses under Rule are not allowed to hear any testimony in case), 36.06 (trial court required to instruct witnesses under Rule not to converse with each other or with any other person about case).

Although a trial court must exclude witnesses covered by the Rule, "the court's decision to allow testimony from a witness who has violated the rule is a discretionary matter." *Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996) (per curiam). We review such a decision for an abuse of discretion. *Id.* To determine whether the trial court abused its discretion, we perform a two-step analysis. *Guerra v. State*, 771 S.W.2d 453, 476 (Tex. Crim. App. 1988); *Minor v. State*, 91 S.W.3d 824, 829 (Tex. App.—Fort Worth 2002, pet. ref'd). In the first step, we consider whether the witness who violated the Rule (1) was sworn in or listed as a witness in the case, or (2) was a person not intended to be a witness and was not connected with the State's or defendant's case-in-chief but who, because of events during trial, became a necessary witness. *Minor*, 91 S.W.3d at 829. Here, Rakoski was a designated witness by the State; thus, we turn to the next step of the analysis.

In the next step of our analysis, we consider whether the defendant was harmed or prejudiced by the witness's violation. *Bell*, 938 S.W.2d at 50; *see also*

Minor, 91 S.W.3d at 829. Two criteria guide our analysis of harm: first, whether the witness actually conferred with another witnesses, and second, whether the witness's testimony corroborated the testimony of the witness with whom he had conferred. *See Bell*, 938 S.W.2d at 50; *see also Guerra*, 771 S.W.2d at 476.

We presume, again solely for purposes of our analysis, that Ramos and Rakoski actually conferred. We thus turn to whether Rakoski's testimony corroborated Ramos's testimony. We begin that analysis by reviewing the nature of Ramos's testimony: he was the State's principal witness against appellant. He was the officer who stopped appellant for speeding, arrested appellant for DWI, obtained the warrant to draw appellant's blood, transported appellant to the hospital where appellant's blood was drawn, drove appellant to the Comal County jail, and then handed off the blood kit to Rakoski. Rakoski, on the other hand, testified that he took the kit from Ramos and mailed it to the DPS lab. Rakoski could not recall, until he examined the kit itself, whether he had closed and initialed the kit or whether Ramos had. Thus, Rakoski's brief testimony only overlapped Ramos's testimony to the extent that Rakoski verified that Ramos had handed off the kit to him and that Rakoski had mailed the kit to the DPS lab—matters that were virtually undisputed and immaterial to appellant's conviction.[4]

Under these circumstances, we cannot say the trial court abused its discretion in allowing Rakoski to testify regarding the chain of custody of the blood kit. *See Bell*, 938 S.W.2d at 50 (trial court did not err in permitting officer who violated Rule to testify because Rule violation did not "color" witness's testimony). We overrule appellant's first issue.

[4] Moreover, defense counsel cross-examined Rakoski about the alleged violation of the Rule, and the jury was free to determine Rakoski's credibility and consider the weight to be given his testimony. *See Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012).

B. Due Process Violation

In his second issue, appellant urges that admission[5] of the blood evidence, authenticated by the testimony of Rakoski despite his alleged perjury,[6] violated his federal and state due process rights.

To preserve error for appellate review, an appellant must present a timely objection to the trial court, state the specific grounds for the objection, and obtain a ruling. *See* Tex. R. App. P. 33.1(a). If a party fails to property object, even constitutional errors may be waived. *See Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014); *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990). Appellant has not directed this court to any objection to the admission of

[5] The record does not reflect that appellant's blood evidence was admitted during Rakoski's testimony.

[6] During Rakoski's testimony, Rakoski stated that he had not discussed the testimony in this case with Ramos during Ramos's break. Appellant's counsel asked the trial court to send the jury out. After the jury was excused, counsel for appellant stated, "Your Honor, I would just ask that he [Rakoski] be admonished about the law on perjury and that he be afforded the opportunity to have legal counsel before he answers any more of my questions under oath." The trial court instructed Rakoski that he could have legal counsel if he wanted it and that perjury could be a felony; Rakoski stated he understood. Appellant's counsel then questioned Rakoski about his conversation with Ramos and challenged Rakoski on their differing descriptions of what had occurred, including informing Rakoski that another witness had overheard their discussion. Rakoski again stated that he had not discussed the case with Ramos; instead, Rakoski testified that he and Ramos had spoken generally about how the case "was going," and that when Ramos started to discuss DWI cases in general, Rakoski instructed Ramos to stop discussing those matters because others might think they were discussing this case. After Rakoski testified outside the presence of the jury, appellant's counsel made no objections to Rakoski's testimony, including seeking in any way to have his testimony struck or suggesting to the trial court that Rakoski had committed perjury. And after Rakoski completed his testimony, he was released by appellant's counsel, without being subject to recall. Further, the other officer who was present when Rakoski and Ramos were conversing, Officer Greenhill, also testified under oath (and outside the presence of the jury) that he did not hear Rakoski and Ramos talking about the testimony Ramos had given in this case. Finally, although the State may not obtain a conviction through the knowing use of perjured testimony, the appellant bears the burden of showing that the testimony used by the State was in fact perjured; "[d]iscrepancies in testimony alone do not make out a case of perjury." *Losada v. State*, 721 S.W.2d 305, 311–12 (Tex. Crim. App. 1986).

the blood evidence, to any due process objections, or to any objections to allegedly perjured testimony.[7]

In light of the foregoing, we overrule appellant's second issue.

C. Admission of Blood Analysis Evidence

In issue three, appellant challenges the trial court's admission of the analysis of appellant's blood, asserting that the State failed to meet the third prong of *Kelly*. *See Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) ("As a matter of common sense, evidence derived from a scientific theory, to be considered reliable, must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) *the technique must have been properly applied on the occasion in question*." (emphasis added)). The State responds that appellant failed to preserve this issue for our review. We agree.

When the State moved to admit the blood analysis evidence during the testimony of DPS analyst Jamie Mraz, appellant's trial counsel lodged the following objection: "I'll object to all — Exhibits 8, 9, 10, 11 and 12. The proper foundation has not been laid for the blood itself.[] The nurse that made the drawing has not been in the courtroom. Confrontation objection all of these exhibits." Counsel reiterated the objection by stating, "Objection, foundation, confrontation as well," and, "My objection is Diaz versus United States Supreme

[7] Appellant claims he "moved for a mistrial and a running objection on the basis of the Rule violation and its adverse consequences on the trial," yet his record citation does not support this contention. Although appellant's trial counsel sought and was denied a mistrial on the alleged Rule violation, he neither requested nor obtained a running objection to any testimony or evidence. And at the time his counsel moved for a mistrial, Rakoski had not yet testified; thus, the fact that Rakoski had a differing recollection regarding his conversation with Ramos was not yet apparent—i.e., the basis for appellant's claim that Rakoski committed perjury had not yet arisen.

Court [sic], confrontation." Finally, when asked what his *Melendez-Diaz*[8] objection was "precisely," appellant's counsel explained, "That the whole foundation of the blood itself is coming in through the draw from the nurse. I have not had an opportunity to question the nurse."

As noted above, to preserve error, an appellant must present a timely objection to the trial court, state the specific grounds for the objection, and obtain a ruling. Tex. R. App. P. 33.1(a); *see Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). The error alleged on appeal must comport with the objection submitted to the trial court. *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004) ("The legal basis of a complaint raised on appeal cannot vary from that raised at trial"). As is clear from these excerpts, the objection appellant made to the blood analysis evidence was that he had not had an opportunity to confront the nurse who had drawn the blood from whom the "whole foundation" of the "blood itself" was coming. This objection may be construed as a Confrontation Clause objection and perhaps that the proper foundation had not been laid to the admission of the blood.[9] There is nothing to indicate that appellant was objecting to the scientific bases of the blood draw under *Kelly* at all.[10] Because the objection at

[8] *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309–12, 329 (2009) (holding that Confrontation Clause objection to admission of forensic analysis reports was erroneously overruled when analysts who prepared affidavits were not present to testify).

[9] The blood kit itself, containing appellant's blood evidence, was in State's Exhibit 6. State's Exhibits 8, 9, 10, 11, and 12, objected to here, were comprised of the reports and analysis of appellant's blood. The State did not seek to introduce appellant's blood evidence through this witness; instead, the record reflects that State's Exhibit 6 had been offered and admitted earlier, during testimony from a hospital representative. Thus, any "foundation" objection, including a *Kelly* objection to the scientific bases of the blood draw, should have been made when State's Exhibit 6 containing the blood evidence was offered.

[10] In fact, appellant's trial counsel later requested a Texas Rule of Evidence 702 hearing before Mraz was permitted to testify about the effects of alcohol on the human body. During that hearing, the State questioned Mraz about the scientific theories of tolerance and masking. In response, appellant's counsel specifically referenced *Kelly*. After he questioned Mraz, the trial

trial does not comport with his argument on appeal,[11] appellant has waived this issue for our review.

Accordingly, we overrule appellant's third issue.

D. Confrontation Clause Violation

In his fourth issue, appellant complains that his constitutional right to confrontation was violated because the nurse who drew his blood was not available to testify at trial and he never had the opportunity to cross examine him. The State presented the analyst who performed the blood analysis in its case-in-chief. As noted above, at the time the State offered the BAC test results, appellant objected and argued that his right to confrontation had been violated because the nurse who had drawn his blood was not present to testify.[12]

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court stated, "[W]e can generally talk about tolerance and masking, but *there's no way to apply it to this defendant*." (emphasis added). Thus, our record reflects that appellant's trial counsel was both familiar with *Kelly* and aware of how to properly invoke it, i.e., through a Rule 702 hearing. *See Kelly*, 824 S.W.2d at 572–73 & n.10 (noting that, under the Rules of Evidence, including Rule 702, the criteria for admission must be proven to the trial court outside the presence of the jury).

[11] Appellant asserts in his reply brief that his *Kelly* objection was apparent from the context. We disagree; the context of his objection is that described above.

[12] On appeal, appellant asserts that the nurse's actions in drawing his blood "can be just as testimonial as the words used to describe them. In this sense, the nurse's actions in taking the blood do not merely certify that a blood sample was taken, but also that it was taken in a way that will result in a forensically viable sample for chromatography testing." Appellant likens this concept to the "act of production doctrine," and cites *United States v. Doe*, 465 U.S. 605, 612–13 (1984), as support for his argument. The act-of-production doctrine acknowledges that the act of producing a document may be a testimonial act subject to Fifth Amendment protection against self-incrimination if compelled. *See id.* The nurse's blood draw affidavit in this case was not admitted into evidence, so there was no document produced here. But appellant appears to urge by analogy to the act-of-production doctrine that the act of drawing appellant's blood–i.e., the collection of evidence–rendered the nurse a witness against appellant. But it is the forensic reports that courts have labeled testimonial, not the evidence upon which the reports are generated. *See, e.g., Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011). Appellant does not cite and we have not found any case extending *Bullcoming* so dramatically. Appellant's argument about potential contamination in collection, if accepted, would deem as testimonial the acts of every technician in the chain of custody of not only forensic evidence, but also those

The Confrontation Clause provides a criminal defendant the right to confront the witnesses against him. U.S. Const. amend. VI; *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013). Testimonial evidence is inadmissible unless (1) the witness appears at trial and is cross-examined or (2) the witness is unavailable and the defense had an opportunity to cross-examine. *Burch*, 401 S.W.3d at 636. "[T]estimonial statements are those 'that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)). As discussed below, forensic reports are generally testimonial statements subject to the Confrontation Clause.

In *Bullcoming v. New Mexico*, the prosecution provided a forensic lab report demonstrating that the defendant's BAC exceeded the legal limit. *See* 131 S. Ct. 2705, 2709 (2011). Instead of calling the analyst who tested the defendant's blood and certified the report, the prosecution called a surrogate analyst to testify. *Id.* The Supreme Court held that the lab report constituted a testimonial statement by the analyst who tested the sample, and the Confrontation Clause required that the defendant have an opportunity to cross-examine that analyst. *See id.* at 2710 ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial to cross-examine that particular scientist.").

In *Burch*, the trial court admitted a lab report that the State had offered certifying that a substance found in the defendant's possession was cocaine. 401 S.W.3d at 635. The State called the person who reviewed the report but not the person who tested or analyzed the substance. Although the reviewer had signed

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technicians charged with sterilizing any instrument that comes into contact with such potential evidence. We reject appellant's invitation to expand our Confrontation Clause jurisprudence to include those who collect evidence.

off on the report, "there was no indication that she actually saw the tests being performed or participated in them." *Id.* at 635–36. The Court of Criminal Appeals held that the defendant's Confrontation Clause right was violated because the evidence was testimonial and the defendant did not have an opportunity to confront the analyst who made the testimonial statement. *Id.* at 637–38 ("Without having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way to explore the types of corruption and missteps the Confrontation Clause was designed to protect against.").

In *Adkins v. State*, the trial court admitted a blood test report certifying the defendant's BAC after his arrest. 418 S.W.3d 856, 859–60 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). At trial, the State called the analyst who performed the test and the officer that witnessed the blood draw; however, the defendant argued that this was insufficient under the Confrontation Clause because the State failed to call the nurse who actually drew the blood. *Id.* at 861. This court held that the Confrontation Clause was not violated because "[t]he analyst who tested [the defendant's] blood and signed the report testified at trial and was subjected to cross-examination." *Id.* at 862.

In *State v. Guzman*, the trial court granted the defendant's motion to suppress after the State offered into evidence blood test results without giving the defense an opportunity to confront the nurse who performed the blood draw. 439 S.W.3d 482, 484–85 (Tex. App.—San Antonio 2014, no pet.). The San Antonio Court of Appeals, however, reversed, holding that the decision in *Bullcoming* does not extend "to a person who only performs a blood draw and has no other involvement in the analysis or testing of a blood sample." *Id.* at 488 (noting that the nurse performed only the blood draw, was not involved in the analysis or

testing of the blood sample, and did not provide any statement appearing within or accompanying the blood test results).

As established by the foregoing authority, appellant's inability to cross-examine the nurse who drew his blood did not violate his right to confrontation; rather, the opportunity to cross-examine the analyst who performed the tests and provided the testimonial statements—the blood test results—is all that is necessary to satisfy the Confrontation Clause. The nurse in this case, like the nurses in *Adkins* and *Guzman*, was not involved in the analysis of appellant's blood specimen, nor did he provide any statement that appeared within or accompanied the blood test results. *See Guzman*, 439 S.W.3d at 484–85; *Adkins*, 418 S.W.3d at 862. In *Adkins* and *Guzman*, this court and the San Antonio court focused on the availability of the analyst who certified the forensic reports to determine whether or not the defendant's right to confrontation had been violated. *See Guzman*, 439 S.W.3d at 484–85; *Adkins*, 418 S.W.3d at 862. Likewise, here, DPS analyst Mraz analyzed appellant's blood sample, testified at trial regarding the accuracy of the blood test results, and provided a detailed explanation of the blood-testing procedure. Thus, it was Mraz, not the nurse who drew appellant's blood, who had "personal knowledge about whether the test [was] done correctly or whether the . . . results [were fabricated]."[13] *See Adkins*, 418 S.W.3d at 862.

[13] Appellant attempts to distinguish *Adkins* on the basis that the blood in this case could have been contaminated with candida albicans, a yeast or bacteria that can, under certain conditions, create alcohol in a blood sample. Mraz acknowledged there was no way her lab equipment could discern between alcohol in blood caused by consumption or produced by candida albicans. However, she further testified about the conditions under which candida albicans had been shown to increase BAC in vials of blood—largely exposure to high temperatures. Mraz explained that even in studies in which a large amount of candida albicans was introduced into a blood sample and the blood sample was deliberately exposed to conditions in an effort to change the BAC, those running the studies were unable to significantly increase the BAC and, in fact, in one study, the BAC actually decreased. And importantly, nothing in our

Because appellant's fourth issue lacks merit, we overrule it.

E. Article 38.23 Instruction

In appellant's fifth and final issue, he argues that the trial court erred in denying his request for an article 38.23 instruction. He suggests that the jury could have found that Ramos's detention and subsequent arrest of appellant was "unlawful," thus bringing into question the legality of the evidence—i.e., appellant's blood—acquired as a result of appellant's arrest.

Article 38.23 prevents the use of any evidence against the accused that was obtained in violation of federal or state constitutions or laws. Tex. Code Crim. Proc. art. 38.23(a). "To be entitled to an Article 38.23 jury instruction, three predicates must be met: (1) the evidence heard by the jury must raise an issue of fact, (2) the evidence on that fact must be affirmatively contested, and (3) the contested factual issue must be material to the lawfulness of the challenged conduct." *Hamal v. State*, 390 S.W.3d 302, 307 (Tex. Crim. App. 2012).

Regarding appellant's first complaint—a disputed fact issue about whether he was speeding—appellant requested an article 38.23 instruction on this basis. The trial court determined that there was no factual dispute about whether appellant had been speeding; rather there was only a question about whether Ramos's radar unit was on or plugged into the internal video unit on Ramos's patrol vehicle. We agree.

"There must be some affirmative evidence of 'did not speed' in the record before there is a disputed fact issue" regarding whether an appellant was speeding in a traffic stop predicated on a speeding offense. *Madden v. State*, 242 S.W.3d 504, 514 (Tex. Crim. App. 2007). Here, Ramos testified that he observed appellant

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record indicates that appellant's blood was subjected to the conditions under which candida albicans has been shown to increase BAC.

drive by at a "high rate of speed" and then clocked his speed on his radar at "53 in a 35 mph zone." Ramos also testified that appellant increased his speed when Ramos attempted to catch up with appellant's vehicle. Although appellant's counsel extensively cross-examined Ramos about his radar malfunctioning and the possibility that Ramos had not activated the in-car system that calibrates the radar, none of this testimony creates a disputed fact issue about whether appellant was speeding. *See Gutierrez v. State*, 327 S.W.3d 257, 264 (Tex. App.—San Antonio 2010, no pet.) (appellant not entitled to article 38.23 instruction because "[t]here was no affirmative testimony from any source that [he] was not speeding" despite vigorous cross examination on whether officer's radar equipment was capable of accurately measuring speed of vehicle; officer "never wavered" in assertion that appellant's vehicle appeared to be traveling above posted speed limit when he first noticed vehicle).

Appellant also asserts that he "denied speeding" and directs us to cross examination of Ramos in which appellant's counsel read part of the interaction between appellant and Ramos to Ramos:

> [Trial Counsel]: [Appellant] said, I wasn't doing anything wrong.
>
> Well, actually you did, because you were speeding and that's why you're being stopped.
>
> *Okay*.
>
> You understand you were going 53 in a 35?
>
> *Okay*.

(emphasis added). First, we note that a cross-examiner's questions do not create a conflict in the evidence. *See Oursbourn v. State*, 259 S.W.3d 159, 177 (Tex. 2008). But even considering the video admitted into evidence that reflects this portion of the interaction between appellant and Ramos, it is not affirmative evidence of "did not speed." Although appellant stated he hadn't done "anything

wrong," when Ramos informed appellant Ramos stopped appellant for speeding, appellant simply said, "okay"—twice. He never denied he was speeding or stated he "did not speed." *See Madden*, 242 S.W.3d at 514. Thus, the trial court did not err by refusing to give an article 38.23 instruction because there was no factual dispute about whether appellant was speeding.

Whether Ramos's arrest of appellant was unlawful, appellant's second ground for an article 38.23 instruction, is a question about the *legal effect* of certain facts rather than a dispute about the facts themselves. "Where the issue raised by the evidence at trial does not involve controverted historical facts, but only the proper application of the law to undisputed facts, the issue is properly left to the determination of the trial court." *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012); *see also McRae v. State*, 152 S.W.3d 739, 747–48 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (legality of search or arrest in DWI was question of law when essential facts concerning search or arrest were not in dispute). Thus, the trial court did not err by refusing to give an article 38.23 instruction on this basis. *Robinson*, 377 S.W.3d at 719; *McRae*, 152 S.W.3d at 748.

In sum, the trial court did not err by refusing to include an article 38.23 instruction in the jury charge. We overrule appellant's fifth and final issue.

III. Conclusion

Having overruled each of appellant's issues, we affirm the trial court's judgment.

/s/ Sharon McCally
Justice

Panel consists of Justices Jamison, McCally, and Wise.
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