



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-13-00744-CR

Arturo **NORIEGA**,  
Appellant

v.

The **STATE** of Texas,  
Appellee

From the 175th Judicial District Court, Bexar County, Texas  
Trial Court No. 2013CR4087  
Honorable Dick Alcala, Judge Presiding

Opinion by: Sandee Bryan Marion, Justice

Sitting: Karen Angelini, Justice  
Sandee Bryan Marion, Justice  
Marialyn Barnard, Justice

Delivered and Filed: December 23, 2014

**AFFIRMED**

Appellant pled guilty to felony murder, and a jury assessed punishment at life in prison. On appeal, appellant asserts (1) the trial court erred by not suppressing evidence obtained from a warrantless blood draw, and (2) his conviction violates due process because he pled guilty to conduct that did not constitute an offense. We affirm.

**MOTION TO SUPPRESS**

At approximately 5:24 p.m. on Sunday, September 4, 2011, appellant ran a red light and crashed into a car driven by the complainant, Richard Casas. Both appellant and Casas were

transported to nearby hospitals. Casas later died as a result of his injuries. While at the hospital, appellant had his blood drawn twice: the first time by emergency room personnel in the ordinary course of evaluating and treating him, and later at the direction of law enforcement pursuant to the terms of Texas Transportation Code section 724.012(b). In his motion to suppress and on appeal, appellant argued the section 724.012 warrantless blood draw was unreasonable because no exigent circumstances existed as an exception to the Fourth Amendment's warrant requirement and section 724.012 does not provide an exception to the warrant requirement. Therefore, appellant concludes, the statutory blood draw violated his rights under the Fourth Amendment. The State counters that exigent circumstances existed for a warrantless blood draw and, in any event, Transportation Code section 724.012(b) dispenses with search warrants.

After this appeal was filed and the parties had briefed the issues, the Texas Court of Criminal Appeals issued its opinion in *State v. Villarreal*, No. 0306-14, 2014 WL 6734178 (Tex. Crim. App. Nov. 26, 2014). The *Villarreal* Court held that “a nonconsensual search of a DWI suspect's blood conducted pursuant to the mandatory-blood-draw and implied-consent provisions in the Transportation Code, when undertaken in the absence of a warrant or any applicable exception to the warrant requirement, violates the Fourth Amendment.” *Id.* \*21. Therefore, under *Villarreal*, we reject the State's argument that section 724.012(b) dispenses with search warrants. As to the State's argument that exigent circumstances existed for a warrantless blood draw, we do not address the merits of this argument because we conclude that, even if the trial court erred in denying appellant's motion to suppress the results of the statutory blood draw based on the existence of exigent circumstances, appellant was not harmed.<sup>1</sup>

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<sup>1</sup> We are aware that a panel of this Court did not believe a traditional harm analysis was mandated when a plea of guilty follows the denial of a motion to suppress. *See McNeil v. State*, 443 S.W.3d 295, 303 (Tex. App.—San Antonio 2014, pet. filed). We distinguish the circumstances of that case because, in *McNeil*, there is no indication appellant's punishment was assessed by a jury, as in this case. Nor is there any indication that the *McNeil* appellant argued, as

We review the harm resulting from a trial court's erroneous denial of a motion to suppress and subsequent admission of evidence obtained in violation of the Fourth Amendment under the harmless error standard found in Texas Rule of Appellate Procedure 44.2(a). *See* TEX. R. APP. P. 44.2(a) (setting forth standard for reversible constitutional error). We must reverse unless we can conclude beyond a reasonable doubt that the error did not contribute to appellant's punishment. *Id.* We consider (1) the nature of the error, (2) the extent it was emphasized by the State, (3) the probable implications of the error, and (4) the weight the jury likely would have assigned to it in the course of deliberations. *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011). These factors are not exclusive; other considerations may logically inform our harm analysis. *Id.* The *Snowden* Court emphasized, "At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.'" *Id.* (quoting TEX. R. APP. P. 44.2(a)).

Appellant asserts the erroneous admission of the statutory blood draw results contributed to his punishment because it "quantified how very drunk [he] was and cast suspicion on his testimony regarding the actual number of beers that he admitted to drinking." As a result, appellant concludes, the jury returned the maximum punishment of life in prison. We disagree. We will assume, without deciding, that the nature of the error was the improper admission of the results of the statutory blood draw. However, during closing arguments, the State did not mention appellant's blood alcohol level. Instead, the State reminded the jury that appellant had three prior convictions for driving while intoxicated. Defense counsel conceded appellant was an alcoholic.

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here, that the improperly admitted evidence contributed to his punishment. Therefore, in this case, we believe a harm analysis is appropriate.

We do not believe the jury would have assigned much weight to the statutory blood draw evidence in view of the other evidence of the extent of defendant's intoxication while he was driving. We first note that evidence that logically raises an inference that a defendant was intoxicated at the time he drove, "includes, inter alia, erratic driving, post-driving behavior such as stumbling, swaying, slurring or mumbling words, inability to perform field sobriety tests or follow directions, bloodshot eyes, any admissions by the defendant concerning what, when, and how much he had been drinking—in short, any and all of the usual indicia of intoxication." *Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010); see *Cotton v. State*, 686 S.W.2d 140, 142-43 n.3 (Tex. Crim. App. 1985) (noting that characteristics of intoxication may include slurred speech, bloodshot or glassy eyes, unsteady balance, staggered gait, and odor of alcohol on the person or the person's breath). An officer's testimony that a person is intoxicated may also provide sufficient evidence to establish the intoxication element for the offense of DWI. *Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979). A driver's failure to brake also provides some evidence the accident was caused by intoxication. *Kuciemba v. State*, 310 S.W.3d 460, 463 (Tex. Crim. App. 2010). This same circumstantial evidence may also support a finding on the extent of a defendant's intoxication. See *Jones v. State*, 795 S.W.2d 171, 175 (Tex. Crim. App. 1990) ("A jury may use the quality of the suspect's speech [on the audio portion of sobriety test video] as evidence of her degree of intoxication.").

In this case, on the morning of the accident, appellant was in a bunkhouse shared with other men on his oil field crew. Appellant admitted he started drinking Natural Light "tall boys" (either the sixteen- or twenty-four-ounce size) at about 9:00 a.m. After he finished his first beer, he drank a second beer, and then a third. Appellant said that at about 11:45 a.m., he left the bunkhouse to buy a twelve-pack of Bud Light beer for himself. Appellant could not remember if he put the beer into the refrigerator, but he did remember drinking at least one can, after which he used cocaine.

Appellant could not remember what time he left the bunkhouse to drive back to San Antonio, but he thought it was in the afternoon. Appellant said the beer was in the back of his truck, and the only beer can in the cab of the truck was the one empty Bud Light can he had taken with him from the bunkhouse. Appellant did not remember drinking any more than four beers. Appellant admitted he was intoxicated, but not to what extent.

Dr. John Eastridge, the emergency room physician who treated appellant when he was brought to the hospital, testified about the blood draw that was taken from appellant as part of an initial physical evaluation. Eastridge said appellant tested positive for both alcohol and cocaine. Although Eastridge could not quantify the cocaine results, he said appellant's blood results showed an alcohol concentration at three times the legal limit. The accident happened at 5:24 p.m., and this blood draw was taken at 6:53 p.m., approximately ninety minutes after the accident.

The jury heard five different witnesses who testified they smelled alcohol on appellant's breath immediately after the accident. Four of these witnesses also stated they saw anywhere from two to five empty beer cans inside appellant's vehicle. One of the paramedics who treated appellant at the scene said appellant admitted to drinking three beers before the accident. Several witnesses stated appellant's speech was slurred, and he was uncooperative and belligerent with the first responders. Other drivers at the scene said appellant was driving at a high rate of speed and two drivers who were behind appellant said he never braked before running the red light.

One of the paramedics, Saul Obregon, testified appellant knew he had been in an accident, but did not know what happened. Obregon said that during the ride to the hospital in the ambulance, appellant was uncooperative, attempted to remove the cardiac monitor electrodes, did not want the blood pressure cuff on his arm, and attempted to pull out the IV. Obregon did not believe appellant's behavior was consistent with having drunk only the three beers appellant admitted to drinking. Clint Fallen, a San Antonio police officer dispatched to the scene of the

accident, said he first approached appellant while EMS was attending to him. Fallen said appellant was “very belligerent,” did not want anyone to touch him, was flailing his arms about, and was cussing. When Fallen asked appellant what happened, appellant said “that f\*\*king idiot pulled in front of him.” When Fallen asked appellant if he was aware of the other driver’s condition and when told how badly the other driver was injured, appellant said “I don’t f\*\*king care.”

We conclude the jury could infer the degree of appellant’s intoxication from this circumstantial evidence and thereby assess the appropriate level of punishment. Therefore, on this record, we can conclude beyond a reasonable doubt that the alleged error did not contribute to appellant’s punishment.

### **DUE PROCESS**

Appellant asserts his due process rights were violated because he pled guilty to conduct that did not constitute a crime. Appellant pled guilty to the following indictment:

[Appellant] did then and there commit a felony, to-wit: driving while intoxicated, and after having been previously convicted two times of the offense of driving while intoxicated and in the course of and in furtherance of the commission of said felony he committed an act clearly dangerous to human life, to-wit: driving through and disregarding a red light/traffic signal, failing to brake, failing to keep a proper lookout, and failing to take adequate evasive action prior to striking a motor vehicle occupied by Richard Casas, thereby causing the death of Richard Casas.

Felony murder is committed when a person “commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit *an act* clearly dangerous to human life that causes the death of an individual.” TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2011) (emphasis added). An “act” “means a bodily movement, whether voluntary or involuntary, and includes speech.” *Id.* § 1.07(a)(1) (West Supp. 2014). An “omission” “means failure to act.” *Id.* § 1.07(34). Appellant contends the indictment alleged a series of “omissions”; therefore, he pled guilty to omissions and not affirmative acts as required

under the Penal Code. Therefore, appellant concludes, his plea cannot provide the basis for a guilty verdict.

Texas Rule of Appellate Procedure 33.1(a) provides in part that, as a prerequisite to presenting a complaint for appellate review, a timely request, objection, or motion must be made and ruled upon by the trial court. TEX. R. APP. P. 33.1(a). A defendant “may not, for the first time on appeal, urge error not raised at trial.” *Nelson v. State*, 607 S.W.2d 554, 555 (Tex. Crim. App. 1980). This requirement applies even when the issue on appeal alleges a deprivation of due process. *Cole v. State*, 931 S.W.2d 578, 580 (Tex. App.—Dallas 1995, pet. ref’d) (stating “the defendant waives any due process complaint when he does not object to the punishment or to the failure to consider the evidence”);

Appellant did not raise this argument in a motion to quash the indictment, an objection to the indictment at any time during the trial, or otherwise with the trial court. He, therefore, failed to preserve this issue for appellate review. *See* TEX. R. APP. P. 33.1(a); TEX. CODE CRIM. PROC. art. 1.14(b) (West 2005) (“If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.”); *Teal v. State*, 230 S.W.3d 172, 176–77, 182 (Tex. Crim. App. 2007) (discussing article 1.14(b) and holding that defendant waived right to object to indictment defects).

### CONCLUSION

We overrule appellant’s issues on appeal and affirm the trial court’s judgment.

Sandee Bryan Marion, Justice

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