In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00291-CR

MADORA SHERIDAN SCHARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Montgomery County, Texas
Trial Cause No. 15-310125

MEMORANDUM OPINION

A jury convicted Madora Sheridan Schard of the offense of driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04(a) (West Supp. 2017). In six issues on appeal, Schard argues the trial court (1) abused its discretion in denying her motion to suppress evidence related to a warrantless blood draw; (2) failed to

properly conduct a hearing under *Daubert*,[1] *Kelly*,[2] and the Texas Rules of Evidence; (3) abused its discretion in admitting business records without the proper foundation by a custodian of those records; (4) erred in refusing to order disclosure of records reviewed by the State's witness in preparation for or testifying under Texas Rules of Evidence 106, 107, 612, and 701; (5) erred in refusing to order disclosure of records testified to by a State witness under Texas Code of Criminal Procedure article 39.14 and Texas Rules of Evidence 106, 107, and 612; and, (6) erred in refusing her request to inspect physical evidence prior to its presentation to the jury and admission into evidence. We affirm the trial court's judgment.

Background

On the evening of November 2, 2015, Schard crashed her vehicle into a light pole. A witness described her vehicle going airborne, tumbling, and coming to rest facing the opposite direction of the flow of traffic. The witness stopped to see if she needed help due to the severity of the crash. When he approached the vehicle, he observed blood coming from Schard's head and was concerned she had an internal head injury. The witness testified that Schard would not cooperate with the police. He also indicated she was slurring her words, but he did not smell any alcohol.

[1] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
[2] *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

A paramedic dispatched to the scene indicated Schard was uncooperative and aggressive. The paramedic also observed blood on Schard's forehead. The paramedic testified that after being cooperative initially, Schard became agitated and swung at them. At this point, the paramedic indicated she was unable to assess Schard further because of her unwillingness to cooperate. The paramedic recalled Schard smelled of alcohol and her speech was slurred. The paramedic's report indicated the side airbags had deployed. For these reasons, the paramedic wanted Schard to go to the hospital for a full evaluation, but Schard refused to allow them to transport her.

Upon arrival at the scene, the DPS trooper observed a vehicle facing westbound in the eastbound lanes of traffic. The trooper indicated that when he arrived, he observed Schard with blood on her head arguing with EMS. The trooper noticed an extreme odor of alcohol emitting from Schard and her speech was slurred, which were signs of intoxication. The trooper testified he did not perform standardized field sobriety tests on Schard for a number of reasons, which included the cut on her head, her inability to follow instructions, and his desire to get her to a hospital to be evaluated. The trooper testified he believed Schard was intoxicated based on a number of factors, and it was his opinion that it was caused by alcohol.

The trooper also testified Schard did not have the normal use of her mental or physical faculties.

The video recording from the trooper's dashboard camera is consistent with the trooper's testimony and reveals Schard slurring her speech throughout, refusing to comply with basic instructions given by the trooper, exhibiting mood swings ranging from hostile to despondent, admitting she was driving the car when it crashed, saying she did not remember the crash shortly thereafter, and refusing to provide a blood sample.

The trooper testified he advised Schard she was being arrested for driving while intoxicated, played the DIC-24 for her, and asked for a blood specimen. Schard refused to provide a blood sample and did not want to go to the hospital. The trooper testified he took Schard to the hospital because the Montgomery County Jail would not accept detainees who had been in a motor vehicle crash where the airbags deployed until they had been taken to the hospital and cleared by a doctor.

The emergency room nurse assigned to Schard on the night in question also testified about Schard's treatment in the ER and explained that the blood draw was ordered by the ER physician on duty. In her testimony, the nurse described the procedure used when taking blood from the patient, and she indicated the hospital provided the tubes for the blood. The nurse testified she took a "rainbow" blood

draw consisting of tubes with many colored tops, which was typical when treating a trauma patient.

The trooper indicated he was able to get the blood the next day from the hospital by obtaining a grand jury subpoena, which was not uncommon. The blood was then delivered directly to the DPS lab in Houston. The blood was tested solely for alcohol content by DPS forensic scientist, Yen-Jun Ho. At trial, Ho testified that he prepared a report regarding his results, which was admitted into evidence. Ho indicated the alcohol concentration in Schard's blood sample was 0.268 grams of alcohol per 100 milliliters of blood, which is higher than Texas's legal limit of 0.08.

The State stipulated the blood draw was warrantless. The primary question at trial became whether or not the blood was taken for purposes of medical treatment.

Schard was charged by information for the offense of driving while intoxicated. At trial, the jury charge contained jury instructions pursuant to article 38.23 regarding consent and an unlawful blood draw. The jury convicted Schard of driving while intoxicated. This appeal ensued.

Issue One: Motion to Suppress

Schard first argues that the trial court abused its discretion in denying her motion to suppress evidence related to the warrantless blood draw. She contends the blood draw violated the Fourth Amendment and article 38.23 of the Texas Code of

Criminal Procedure, because it constituted an assault by hospital personnel. *See generally* Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2005).

We review a trial court's ruling on a motion to suppress under a bifurcated standard. *See Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) (citing *Ford v. State*, 158 S.W.3d 488, 493 (Tex. Crim. App. 2005)). In doing so, we give almost total deference to a trial court's determination of historical facts and review the court's application of the law *de novo*. *See Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000).

Prior to trial, Schard filed her Motion to Suppress Physical Evidence (Warrantless Search & Oral Statements). At trial, Schard argued the trial court should suppress anything stemming from the blood sample, because it was a warrantless blood draw. The trial judge held a hearing on Schard's motion to suppress outside the jury's presence, and Schard re-urged her objection multiple times throughout the trial.

During the hearing on the motion to suppress and outside the presence of the jury, the trooper and ER nurse testified. At the hearing, the trooper testified that Schard refused to consent to a blood draw after he placed her under arrest. He also indicated the jail would not take her with a cut on her head after a crash during which

the air bags deployed; so, he knew he would have to take her to the hospital to have her cleared by a doctor and that he would try to get a blood sample at that time. The trooper testified that the hospital obtained a blood sample, but he did not request it.

The nurse also testified at the hearing that the ER doctor ordered the blood to be drawn and tested for Schard's alcohol level. The nurse confirmed Schard received medical treatment on the evening in question and that the blood draw was part of that treatment. Specifically, the nurse testified that Schard was considered a trauma patient because she had been in a motor vehicle accident, and the blood was drawn for medical purposes. Following the hearing, the trial court denied the motion to suppress.

Also, during the hearing on the motion to suppress, the nurse revealed that she had examined Schard's medical records on her own initiative at the hospital prior to testifying. She indicated the records provided by the hospital in response to the State's subpoena were incomplete. She explained during later testimony that the records given to her at trial did not contain some of her nurse's notes, unlike the records she reviewed at the hospital.

Following the testimony of the ER nurse in front of the jury, Schard re-urged the motion to suppress arguing the blood was forcibly taken in violation of HIPAA, the United States Constitution, and *Missouri v. McNeely*, 569 U.S. 141 (2013). The

trial judge again denied the motion. Schard's trial counsel then requested findings of fact and conclusions of law. The trial court issued the following findings of fact in support of its ruling: (1) the blood was drawn for medical reasons as ordered by the doctor; (2) the trooper was credible in his testimony that his understanding of the jail's policy would not allow for Schard to be admitted into jail without medical clearance and that was why he took her to the hospital; (3) the hospital admitted her for medical reasons and the trooper did not request that the blood be taken, and it was standard medical practice for blood to be drawn for medical purposes; and (4) the trooper obtained a valid grand jury subpoena for medical records and vials of blood that were submitted to the lab.

When a losing party on a motion to suppress requests findings of fact and conclusions of law, the trial court must issue them so that the appellate court may properly review the trial court's ruling. *State v. Cullen*, 195 S.W.3d 696, 698–99 (Tex. Crim. App. 2006). When a trial court issues findings of fact with its ruling on a motion to suppress, we do not engage in our own factual review, but rather, we determine only whether the record supports the trial court's factual findings. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

Schard argues the trial court should have suppressed evidence relating to the blood draw because the blood draw violated the Fourth Amendment of the United States Constitution. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fourth Amendment exists "to safeguard an individual's legitimate expectation of privacy from unreasonable governmental intrusions." *Richardson v. State,* 865 S.W.2d 944, 948 (Tex. Crim. App. 1993). Compulsory administration of a blood test involves the wide reach of a search and seizure under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966). Moreover, Texas Code of Criminal Procedure article 38.23 extends the protections against intrusion beyond government actors and mandates that evidence obtained by any person in violation of the Constitution or laws of the State of Texas or of the Constitution or laws of the United States of America shall not be admitted into evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.23(a). However, subpoenaed blood test results where the tests were performed by hospital personnel for medical purposes does not violate the Fourth Amendment. *State v. Hardy,* 963 S.W.2d 516, 527 (Tex. Crim. App. 1997).

Schard complains that the trial court's findings of fact were not supported by the record. We disagree.

The trooper testified Schard had a cut on her head and would not allow EMS to examine her, so he needed to get her to a hospital to make certain she was okay. Moreover, the trooper testified Montgomery County Jail would not accept detainees who had been in an accident where the airbags deployed unless they were checked by a doctor at a hospital. Finally, there was an email produced at trial outlining this policy of the Montgomery County Jail, which was consistent with the trooper's understanding. The trial court found the trooper's testimony credible in this regard, which is supported by the record.

The trial court further found the blood was drawn for medical reasons as ordered by the doctor, the hospital admitted Schard for medical reasons, the trooper did not request that the blood be taken, and it was standard medical practice for blood to be drawn for medical purposes. These findings are also supported by the record. During the hearing on Schard's motion to suppress, the ER nurse was questioned outside the presence of the jury. She testified that Schard received medical treatment, and the blood draw was part of that treatment. The nurse testified Schard was admitted as a trauma patient because she had been in a motor vehicle accident. It was their practice to draw a "rainbow" blood panel on any trauma patient that came

in, which consisted of collection tubes with various colored tops used for various tests. Although the nurse could not provide the exact time the blood draw was ordered, she testified that the emergency room doctor ordered the blood draw, which was also supported by the medical records.

Schard relies on the court of appeals ruling in *Hailey v. State*, to support her argument that the blood specimen was obtained illegally from Schard over her objection. 50 S.W.3d 636 (Tex. App.—Waco 2001). Schard's reliance upon the case is misplaced as the Texas Court of Criminal Appeals reversed. *Hailey v. State*, 87 S.W.3d 118, 122 (Tex. Crim. App. 2002), *cert. denied*, 538 U.S. 1060 (2003). In so doing, the Court explained that a majority of the intermediate appellate courts had determined the police did not seize the appellant's blood in violation of the Fourth Amendment or the Texas Transportation Code because the hospital worker was not acting at the behest of law enforcement. *Id.* at 121. The Court noted however, the court of appeals decided that the results of appellant's blood-alcohol test should be suppressed because the hospital worker's blood draw was without appellant's consent and constituted an unlawful assault. *Id.* at 121; *see also Hailey*, 50 S.W.3d at 639–640. The Court of Criminal Appeals reversed the intermediate appellate court's decision. *Hailey*, 87 S.W.3d at 121–122. In reversing the lower court's decision, the Court of Criminal Appeals reasoned that the intermediate court of

appeals based its decision on a theory not presented to the trial court and upon which the trial court had no opportunity to rule. *Id.* at 121–22. Therefore, *Hailey* does not support Schard's argument.

Here, the medical records are consistent with the trial court's finding that Schard was admitted to the hospital for medical reasons. Specifically, the records indicate Schard's condition was "[e]mergent," she was in a rollover collision with a contusion to the head, she complained of pain in her head since the accident, and a CT scan and ECG were ordered "Stat" to rule out the possibility of an intracranial injury. The testimony of the trooper and the nurse support the trial court's finding that the trooper did not request the blood draw. The record shows hospital personnel were not acting as agents for the State when the blood specimen was drawn.

In *Hardy*, the Texas Court of Criminal Appeals held that the State's subpoena of the results of blood tests conducted by private medical personnel solely for medical purposes did not violate the Fourth Amendment. 963 S.W.2d at 527. There have been other similar cases in which appellate courts concluded the blood test results were admissible when a defendant was transported for emergency medical treatment and the sample was obtained by hospital personnel in the course of treatment. *See Owens v. State*, 417 S.W.3d 115, 118 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Spebar v. State*, 121 S.W.3d 61, 65 (Tex. App.—San Antonio 2003,

no pet.); *State v. Spencer*, No. 05-13-01210-CR, 2014 WL 2810475, at *4 (Tex. App.—Dallas June 23, 2014, no pet.) (mem. op., not designated for publication).

Indeed, there is no evidence in the record to indicate law enforcement ordered the blood draw, was acting in concert with hospital staff, or that the blood was taken for any reason other than medical treatment. Accordingly, we conclude the trial court's findings of fact were supported by the record, and it did not abuse its discretion in denying the motion to suppress. We overrule Schard's first issue.

Issue Two: Hearing under *Daubert/Kelly* and Texas Rules of Evidence

In her second issue, Schard complains the trial court failed to properly conduct a hearing under the *Daubert/Kelly* cases and Texas Rules of Evidence 701 *et seq*. "We review a trial court's decision to admit or exclude scientific expert testimony under an abuse of discretion standard." *Sexton v. State*, 93 S.W.3d 96, 99 (Tex. Crim. App. 2002). We will not overturn the trial court's ruling unless it falls outside the zone of reasonable disagreement. *Id.* The Texas Rules of Evidence and *Kelly* require that in a criminal case, before an expert provides an opinion or discloses underlying facts or data, an adverse party must be permitted to examine the expert about the underlying facts or data outside the presence of the jury. Tex. R. Evid. 705(b); *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992). A trial court's responsibility under 702 is to determine whether the scientific evidence is sufficiently reliable and

relevant to assist the jury. *Kelly*, 824 S.W.2d at 573; *see also Jordan v. State*, 928 S.W.2d 550, 554–55 (Tex. Crim. App. 1996). "The adjective 'scientific' implies a grounding in the methods and procedures of science." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993). Schard does not argue she was denied a gatekeeper hearing altogether, rather she complains about how and when the hearings were conducted. Indeed, the record shows the trial judge advised Schard's trial counsel that he would be given a 702 hearing prior to the introduction of the results of the blood test. When the State called the ER nurse to testify and Schard again requested a 701/702 hearing, the trial court asked if counsel wanted to voir dire the witness. Schard's trial counsel indicated he did not want to voir dire the witness, but he wanted a hearing outside the presence of the jury. The nurse testified in front of the jury regarding her background and qualifications, but prior to her testimony in front of the jury about the blood, the judge allowed a *Daubert/Kelly* hearing outside the presence of the jury.

The judge advised that the scope of the hearing was only to go into her qualifications as an expert in nursing and her qualifications to draw blood. The judge ruled that Schard's trial counsel could ask questions about how the nurse took the blood in this instance during cross-examination. When the State offered the medical records as evidence, Schard objected and asked to take the nurse on voir dire and

was allowed to do so. Prior to the nurse's testimony in front of the jury, the trial court advised the State it had to make a decision regarding whether it wanted to exclude the records, redact the lab results from the records, or be prepared to go forward with a 701/702 hearing on the admissibility of the lab results. Ultimately, the medical records from the hospital showing the blood test results and diagnosis were redacted, the nurse did not testify about those results, and Schard agreed at trial that the redactions were correct.

Despite the fact that the court and defense counsel refer to the nurse as "an expert," her testimony was grounded in the facts of what occurred when Schard was under her care, including how she drew the blood. The nurse testified concerning the procedure she normally uses for drawing blood, who ordered the blood specimen, and the care she provided to Schard on the evening in question. The testimony she gave was not that of an expert addressing scientific knowledge beyond a juror's common experience. Rather, it was that of a fact witness identifying the blood tested and the method of collection. Thus, Rules 702 and 705 were not implicated. *See* Tex. R. Evid. 702, 705; *see also Halbirt v. State*, No. 09-12-00120-CR, 2013 WL 5658371, at *4 (Tex. App.—Beaumont Oct. 16, 2013, no pet.) (mem. op., not designated for publication). The trial court reasonably could have concluded her testimony was admissible.

Schard also complains that she was "denied a proper hearing" under 701, 702, 705, *Daubert*, and *Kelly* by the parameters the judge placed on the hearing regarding the expert testimony of DPS forensic scientist, Yen-Jun Ho. Schard contends the reliability of the testing procedures in this matter could not be verified because the trial court limited the areas of inquiry at the hearing. Schard does not argue that the DPS failed to follow procedures when it tested the blood in question. Instead, she argues about the parameters of the hearing.

The trial court conducted a hearing on Ho's qualifications. However, the trial judge advised that counsel could only go into whether Ho was qualified to testify, but counsel would not be allowed to go into the whole testing of this particular case. Ho was questioned about his qualifications to testify as an expert, his training, whether he had testified before, and his use of a gas chromatograph when he tests blood for the DPS.

In the hearing, Ho testified that he used a gas chromatograph, which is accepted in the scientific community to test blood. The trial judge noted on the record that Ho testified in her court approximately one month earlier and based on the questions outside the presence of the jury, the court found Ho qualified as an expert witness in the field of chemistry and would be allowed to testify as an expert regarding analysis of blood alcohol content and blood samples in this case. The trial

court must conduct a hearing outside of the jury's presence to determine whether the proponent has established by clear and convincing evidence that (1) the underlying scientific theory is valid; (2) the technique applying the theory is valid; and (3) the technique was properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. If the evidence is in fact reliable, the trial court's failure to hold a gatekeeping hearing will be harmless. *See Jackson v. State*, 17 S.W.3d 664, 672 (Tex. Crim. App. 2000).

A gatekeeper hearing is not always required. *See Hernandez v. State*, 116 S.W.3d 26, 28–29 (Tex. Crim. App. 2003); *Holmes v. State*, 135 S.W.3d 178, 185–86 (Tex. App.—Waco 2004, no pet.). "It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown gatekeeping hearings under *Kelly*." *Holmes*, 135 S.W.3d at 185. If courts have already determined the validity of a certain scientific theory or technique, then the party offering the testimony need not satisfy *Kelly's* first two criteria. *Hernandez*, 116 S.W.3d at 28–29. The Texas Court of Criminal Appeals has held that gas chromatography testing is generally accepted by the scientific community and generally reliable and admissible. *Bekendam v. State*, 441 S.W.3d 295, 302–04 (Tex. Crim. App. 2014). Because gas chromatography testing for blood alcohol content is widely accepted in the scientific community and is generally reliable and admissible,

the only *Kelly* prong remaining was whether the technique was applied correctly on the occasion in question. *See Kelly*, 824 S.W.2d at 573; *Bekendam*, 441 S.W.3d at 302–04; *Hernandez*, 116 S.W.3d at 28–29.

Although Schard was not allowed to question Ho about the technique applied in this particular case outside the presence of the jury, Ho provided testimony in front of the jury indicating he used a gas chromatograph, how the machine is maintained, the quality control measures, and confirmed the machine worked properly when he tested Schard's blood sample. Even if the trial court erred by not allowing Schard to question Ho regarding the technique applied in this case outside the presence of the jury, it was not shown to be harmful. *See Jackson*, 17 S.W.3d at 672. We overrule Schard's second issue.

Issues Three and Four: Disclosure and Admission of Records

In issues three and four, Schard complains that the trial court erred by not requiring disclosure of records reviewed by the ER nurse and by admitting the hospital medical records as business records. We will examine these issues together.

We review a trial court's decision to admit evidence over an objection under an abuse of discretion standard and will not reverse its decision absent a clear abuse of discretion. *See Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Trial courts have broad discretion in their evidentiary rulings and are usually in the

best position to ascertain whether certain evidence should be admitted. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Id.* We will not disturb a trial court's evidentiary ruling it if is correct on any theory applicable to the case. *See De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Specifically, Schard argues the medical records lacked the proper foundation, and therefore, should not have been admitted as business records. The crux of Schard's argument is that the ER nurse was not the custodian of records and she testified the records provided by the hospital were missing a nurse's note. Texas Rule of Evidence 803(6) allows the foundation for the introduction of business records to be laid by the testimony of a custodian of records or *another qualified witness*. *See* Tex. R. Evid. 803(6)(D) (emphasis added). The ER nurse testified that the medical records were kept in the regular course of business by Memorial Hermann Hospital. The nurse also testified her data provided a portion of what was included in the medical records, the records concerning the events with Schard were made at the time the events were recorded, and whoever made the entries for Memorial Hermann had actual knowledge of the events. Schard was given the opportunity to take the witness on voir dire in front of the jury regarding the records, eliciting testimony that the nurse was not the records custodian and it was not a

complete set of records. Her objections to the foundation were overruled prior to the admission of the medical records. We conclude the nurse's testimony provided the requisite foundation for the admission of documents as business records pursuant to rule 803(6), making the issue of compliance with rule 902(10) moot. *See* Tex. R. Evid. 803(6); 902(10). Schard further argues the trial court erred in failing to require disclosure of records reviewed by the State's witness because she had a right to the materials upon proper request for effective cross-examination. At trial, Schard objected based on "optional completeness." The Texas Rules of Evidence provide that if a party introduces all or part of a document or writing, an adverse party may introduce any other part or inquire into any other part on the same subject. Tex. R. Evid. 106, 107. Pursuant to rule 612, when a witness reviews a writing to refresh their recollection before testifying in a criminal case, the adverse party is entitled to have the writing produced for inspection and cross-examination. Tex. R. Evid. 612. If the writing is not produced or delivered as ordered, the court may issue any appropriate order. *Id.*

The ER nurse testified outside the presence of the jury that she took it upon herself to review the medical records at the hospital to prepare for her testimony. In her brief, Schard argues that she requested production of the records reviewed by the nurse to further cross-examine the witness and asserts the request was denied. This

is inaccurate. Schard did not simply request the production of documents. Rather, she requested the nurse's testimony be stricken. It was the request to strike testimony that the trial court denied. The trial court also indicated she was taking Schard's request for the records "under advisement." The medical records in this case were subpoenaed by the State. In addition, in response to the nurse's testimony and Schard's objections, the trial judge sent an order to the hospital mid-trial, requiring the production of records again. Indeed, the trial court recessed the proceedings to give Schard an opportunity to review the records subpoenaed mid-trial before the nurse testified. The records obtained during trial were the same as the records subpoenaed earlier by the State. While the nurse acknowledged a note was missing, Schard never inquired as to the content of the note or whether the information contained in the note contradicted anything in the medical records that were admitted. Contrary to Schard's assertion that she was stripped of her right of cross-examination, she was given ample opportunity to question the nurse about the records and point out to the jury a note was missing. Furthermore, rule 705 was not implicated, because the nurse's testimony was not scientific in nature. *See* Tex. R. Evid. 705 (providing the disclosure requirement pertaining to the underlying facts and data relied upon by an expert). We overrule issues three and four.

Issue Five: Disclosure of Records Testified to by the State's Witness

In her fifth issue, Schard argues that the trial judge erred in failing to order the disclosure of records testified to by the trooper, including the policy of Montgomery County Jail requiring detainees to be cleared by a doctor. Schard also complains that the State did not produce the hospital paperwork clearing her, which the trooper testified he would have turned it in to the jail. Schard also complains that the "trial court erred in refusing to order disclosure of the records."

The record in this case reflects that the court noted if such policies or procedures existed requiring detainees who had been in a motor vehicle accident to be cleared by a doctor, the State would be required to produce them. The trial court further ordered the State to visit with booking at the jail to see if such policies existed. Indeed, such a policy was memorialized in an email, provided by the State, and admitted into evidence. During trial, Schard requested the medical clearance documentation the trooper provided to the jail, and the record reflects there was a discussion with the trial judge regarding the arrest records. However, it is unclear from the record whether the judge denied this request or ordered them produced "if there are any records." There is no evidence the trooper looked at any such documents to refresh his recollection before testifying, therefore rule 612 is not applicable. *See* Tex. R. Evid. 612. Moreover, there was no writing produced or an

"optional completeness" objection made for these documents pursuant to rules 106 or 107. *See* Tex. R. Evid. 106, 107. Finally, Texas Code of Criminal Procedure article 39.14 provides the State shall produce documents "as soon as practicable after receiving *a timely request* from the defendant . . . ." Tex. Code Crim. Proc. Ann. art. 39.14(a) (West Supp. 2017) (emphasis added). The trial court specifically noted that the discovery request was not timely. We overrule Schard's fifth point of error.

Issue Six: Refusal of Appellant's Request to Inspect Physical Evidence Prior to its Presentation to the Jury and Admission into Evidence

In her sixth and last issue on appeal, Schard argues the trial court refused her request to inspect physical evidence, specifically the blood kit, prior to trial in violation of 39.14. *See id.* Schard asserts she had not seen the blood kit until the trooper brought it into a pretrial hearing. The trial judge denied her request to examine the blood at that time. During the trooper's testimony in front of the jury, Schard's trial counsel again complained that he had not had the opportunity to examine the blood kit. The judge overruled the objection. Shortly thereafter, outside the presence of the jury, Schard's trial counsel again complained about not being able to inspect the blood kit, the judge allowed the examination of the kit at that point.

Despite Schard's assertion that she properly requested discovery under 39.14, the record is devoid of any discovery request or request for inspection of the blood

evidence prior to trial. Pursuant to article 39.14, the State "as soon as [is] practicable after receiving *a timely request*[,]" shall permit the inspection of the evidence. *Id.* (emphasis added). Furthermore, the discovery order in this case provides that Schard shall have "[a]n opportunity [to] . . . visually inspect . . . the sample(s) and kit . . .[i]f [Schard] wants such an inspection, [and] it shall be at a time mutually agreed upon by the parties and the laboratory." Schard had notice blood samples existed prior to trial. The address of the lab where the samples were sent is contained on the first page of the discovery order, which was filed on February 2, 2016, more than six months before trial commenced. The record does not establish that Schard sent a timely request. *See id.* We overrule issue six.

Conclusion

Based on our analysis above, we conclude the trial court did not abuse its discretion in denying Schard's motion to suppress, and the trial court conducted proper *Daubert*/*Kelly* hearings outside the presence of the jury. We further conclude the trial court did not abuse its discretion in admitting hospital records as business records, because the proper foundation was laid by a testifying witness. The trial court did not fail to order disclosure of records and therefore, did not err as Schard asserts in issues four and five. Finally, we conclude Schard did not timely request inspection of physical evidence prior to trial under article 39.14. Therefore, Schard

has failed to show the trial court erred in refusing to allow inspection of the blood kit. Having overruled all of her issues, the judgment of the trial court is affirmed.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on December 4, 2017
Opinion Delivered April 4, 2018
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.