In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00264-CR

JOSEPH EUGENE HUNT, Appellant

V.

THE STATE OF TEXAS

On Appeal from County Criminal Court No. 4
Tarrant County, Texas
Trial Court No. 1527354

Before Gabriel, Kerr, and Wallach, JJ.
Memorandum Opinion by Justice Gabriel

MEMORANDUM OPINION

Appellant Joseph Eugene Hunt appeals his conviction of driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04. In three issues, Hunt argues that the trial court erred by denying his motion to suppress, by authorizing the jury to convict him under the per se intoxication theory, and by overruling his objections to certain statements made by the prosecutor during closing argument. Because we hold that the trial court did not err by denying Hunt's motion to suppress or by authorizing the jury to convict him under the per se intoxication theory and that, even if it had erred by overruling Hunt's objections to the prosecutor's statements during closing argument, he was not harmed by such error, we affirm.

I. BACKGROUND

On January 6, 2018, Hunt attended a wedding in Fort Worth. By his own admission, he drank two beers at the wedding reception. The reception began winding down around 9:30 or 10:00 p.m., and Hunt, along with several members of the wedding party, decided to meet at a bar. Hunt first went to a bar called Texas Republic, where, according to his own admission, he drank one beer. He then headed to a bar called Whiskey Garden after learning that the members of the wedding party were meeting there. Hunt admitted to drinking another beer at Whiskey Garden. Hunt claims to have lost memory of the night's events shortly after drinking that

beer—he remembers searching for a friend in the bar's restroom after consuming the beer, and the next thing he remembers is waking up in the hospital.[1]

Around 12:30 a.m. on the morning of January 7, 2018, Officer Juan Hernandez of the Fort Worth Police Department saw Hunt driving a truck with what appeared to be vomit on the driver's side door. Hernandez began to follow Hunt, and he witnessed Hunt make a left turn without using a signal and nearly strike a pedestrian walking across a crosswalk. He later observed Hunt make a right turn without using a signal, drive partially in the bike lane for an extended period of time, and change lanes without signaling.[2] Hernandez activated his patrol car's lights and initiated a traffic stop.[3]

When Hernandez approached Hunt's truck, he confirmed that there was vomit on the driver's side door. He also observed that Hunt had bloodshot eyes and was groggy, and the odor of alcohol emanated from Hunt's body. Hernandez asked Hunt about the vomit, and Hunt stated that his friend had vomited on the truck. Hunt also

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[1]At trial, Hunt suggested that someone had "put something" in his beer at Whiskey Garden and that he had been "roofied."

[2]Videos taken from the dashboard camera of Hernandez's patrol car and from his body camera were shown to the jury. Those videos confirmed Hernandez's observations regarding Hunt's failures to signal while turning, Hunt's near striking of a pedestrian at a crosswalk, Hunt's driving for an extending period of time while partially in a bike lane, and Hunt's changing of lanes without signaling.

[3]Hernandez testified and video confirmed that he had to repeatedly use his patrol car's air horn and activate his car's siren before Hunt pulled his truck to the side of the road.

told Hernandez that he had not consumed any alcoholic beverages that night. After some further discussion, Hunt vomited on himself inside the truck.

Hunt later exited the truck and began conversing with Hernandez on the sidewalk. Despite his earlier statement that he had not had any alcoholic beverages that night, Hunt told Hernandez that he had consumed "three or four" beers.[4] Hernandez then began administering the horizontal gaze nystagmus field sobriety test, but Hunt was unable to complete the test because during it, he hunched over, put his hands on his knees, and began dry heaving. Hunt then fell to his hands and knees on the sidewalk. Hernandez tried to help Hunt to his feet, but Hunt lost his balance and fell back to the ground. Hernandez was eventually able to get Hunt to his feet, and he walked Hunt over to his patrol car, where Hunt rested with his stomach and face on the hood of the patrol car.

Hernandez then called for an ambulance, and Hunt was taken to the hospital. At the hospital, Hernandez read Hunt the statutory warning regarding providing a blood sample for alcohol testing. *See* Tex. Transp. Code Ann. § 724.015. During most of the reading of the statutory warning, Hunt had his eyes closed and appeared to be in a deep sleep, despite Hernandez's constant attempts to wake him. Eventually, Hunt was able to wake up long enough to refuse consent to the blood sample. Because of Hunt's refusal, Hernandez sought and obtained a search warrant

[4]During their conversations, Hunt never mentioned to Hernandez his belief that he was drugged.

allowing a sample of Hunt's blood to be drawn. That search warrant authorized the seizure of "samples of the BLOOD from the person of [Hunt]." A nurse at the hospital, Victoria Acker, drew Hunt's blood sample at approximately 3:30 a.m. That sample was later analyzed, and Hunt was found to have a blood-alcohol concentration level of 0.152 percent.

Hunt was later tried for driving while intoxicated. Prior to trial, Hunt moved to suppress the results of the analysis performed on his blood sample. Hunt argued that the warrant did not authorize the blood analysis but only authorized the seizure of his blood, and, therefore, the analysis should be suppressed. The trial court denied Hunt's motion to suppress, and the results from the analysis were admitted into evidence. A jury later convicted Hunt of driving while intoxicated, and the trial court sentenced him to 180 days' confinement, suspended for twenty months with community supervision. This appeal followed.

II. HUNT'S MOTION TO SUPPRESS

In his first issue, Hunt argues that the trial court erred by denying his motion to suppress. More specifically, Hunt contends that the search warrant only authorized the blood draw but did not authorize the subsequent analysis of his blood.

A. STANDARD OF REVIEW

We apply a bifurcated standard of review to a trial court's ruling on a motion to suppress evidence. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We defer almost totally to

a trial court's rulings on questions of historical fact and application-of-law-to-fact questions that turn on evaluating credibility and demeanor, but we review de novo application-of-law-to-fact questions that do not turn on credibility and demeanor. *Amador*, 221 S.W.3d at 673; *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005); *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002).

B. ANALYSIS

Hunt points to *State v. Martinez*, 570 S.W.3d 278, 290 (Tex. Crim. App. 2019) in support of his argument that evidence of the analysis of his blood should have been suppressed because the warrant only authorized the seizure of his blood. In *Martinez*, the defendant was involved in a car accident and had his blood drawn at the hospital for medical purposes. *Id.* at 281. The State later took possession of the blood sample pursuant to a grand jury subpoena and submitted it for testing without having obtained a warrant to permit the testing. *Id.* The defendant was charged with intoxication manslaughter and moved to suppress the subsequent testing of his blood. *Id.* The trial court granted the motion to suppress, and on appeal, the Court of Criminal Appeals determined that the motion to suppress had been properly granted, holding that "there is a Fourth Amendment privacy interest in blood that has already been drawn for medical purposes" and that "the State's subsequent testing of the [defendant's] blood was a Fourth Amendment search separate and apart from the seizure of the blood by the State." *Id.* at 292.

We recently addressed the exact issue Hunt raises here in *Jacobson v. State*—whether *Martinez* requires a separate search warrant to analyze a blood sample drawn pursuant to another warrant. No. 02-19-00307-CR, --- S.W.3d ----, 2020 WL 1949622 (Tex. App.—Fort Worth April 23, 2020, no pet. h.). The facts in *Jacobson* largely mirror the facts presented here. In that case, Jacobson was stopped by police after violating traffic laws. *Id.* at *1. He evidenced signs of intoxication, and the arresting officers obtained a warrant authorizing a blood draw and transported him to a hospital where a blood sample was obtained. *Id.* Testing of that sample revealed that Jacobson had a blood-alcohol concentration over the legal limit. *Id.* Jacobson moved to suppress evidence of that testing, arguing that "the search warrant only allow[ed] the officer to obtain the [blood sample]" but did not authorize the subsequent analysis of the sample. *Id.* The trial court denied the motion to suppress, and on appeal, Jacobson argued that *Martinez* required that a second warrant be obtained in order to analyze the blood-alcohol concentration of his blood sample. *Id.* at *1–3.

On appeal, we noted the distinction between *Martinez*, where the defendant "had an expectation of privacy in a blood sample that had been drawn for medical purposes, i.e., without a warrant," and Jacobson, whose blood had been "drawn pursuant to a warrant based on probable cause to believe that he was guilty of the offense of driving while intoxicated"—what we described as Jacobson "blindly pounding on the square peg of *Martinez* . . . into the round hole of his facts." *Id.* at *1–2. After noting that several of our sister courts had rejected Jacobson's reading of

Martinez,[5] and after noting that "[a] litany of cases from other jurisdictions holds that a second warrant is not required under the circumstances presented here,"[6] we affirmed the trial court's judgment. *Id.* at *3–4, 6. In explaining our rationale for that decision, we stated:

> [T]he bright-line rule, which Appellant sees in *Martinez* as mandating a second warrant, does not exist. *Martinez* does state that multiple searches occur in the sequence of drawing and testing blood and that in the context of its facts, an expectation of privacy was incident to the draw and the test. But what it does not address is when a prior step in the process removes the expectation of privacy in a subsequent step. The expectation of privacy in the blood sample was not removed before the testing in *Martinez* because no legal authority was obtained to draw the blood. The appellant in *Martinez* retained the expectation that blood drawn for a medical purpose would not be turned over to law enforcement without law enforcement's protecting his Fourth Amendment rights and providing a justification for why that blood should be searched to obtain evidence to prosecute him. That step has already occurred in this case. The State has provided the justification and has been given the means of obtaining the blood to use as evidence against Appellant.

Id. at *5.

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[5] *See State v. Staton*, No. 05-19-00661-CR, --- S.W.3d ----, 2020 WL 1503125, at *2–3 (Tex. App.—Dallas Mar. 30, 2020, no pet. h.); *Hyland v. State*, 595 S.W.3d 256, 257 (Tex. App.—Corpus Christi–Edinburg 2019, no pet.) (op. on remand); *Crider v. State*, No. 04-18-00856-CR, 2019 WL 4178633, at *2 (Tex. App.—San Antonio Sept. 4, 2019, pet. granted) (mem. op., not designated for publication).

[6] *See United States v. Snyder*, 852 F.2d 471, 473–74 (9th Cir. 1988); *State v. Hauge*, 79 P.3d 131, 144 (2003); *State v. Frescoln*, 911 N.W.2d 450, 456 (Iowa Ct. App. 2017); *State v. Fawcett*, 877 N.W.2d 555, 561 (Minn. Ct. App.), *aff'd*, 884 N.W.2d 380 (Minn. 2016); *State v. Swartz*, 517 S.W.3d 40, 48–50 (Mo. Ct. App. 2017); *People v. King*, 663 N.Y.S.2d 610, 614 (1997); *State v. Price*, 270 P.3d 527, 529 (Utah 2012); *State v. Martines*, 355 P.3d 1111, 1116 (2015); *State v. Sanders*, Nos. 93-2284-CR, 93-2286-CR, 1994 WL 481723, at *5 (Wis. Ct. App. Sept. 8, 1994) (not designated for publication).

In light of our holding in *Jacobson*, and in light of that decision's rejection of the arguments Hunt now makes on appeal, we overrule Hunt's first issue.[7]

III. HUNT'S COMPLAINT REGARDING THE JURY CHARGE

In his second issue, Hunt argues that the trial court erred by authorizing the jury to convict him under the per se theory of intoxication.

A. STANDARD OF REVIEW

We must review all alleged jury-charge error regardless of preservation in the trial court. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012); *Knight v. State*, 504 S.W.3d 524, 527 (Tex. App.—Fort Worth 2016, pet. ref'd). In reviewing a jury charge, we must first determine whether error occurred; if not, our analysis ends. *Kirsch*, 357 S.W.3d at 649; *Knight*, 504 S.W.3d at 527.

B. THE LAW

The trial court is required to give the jury a written charge "setting forth the law applicable to the case." Tex. Code Crim. Proc. Ann. art. 36.14. The Penal Code

[7]Within his first issue, Hunt also argues that if the search warrant authorizing the drawing of his blood can be read as authorizing the analysis of that blood, then the warrant is nothing more than a general warrant, and it lacks the particularity required by the Fourth Amendment. *See State v. Powell*, 306 S.W.3d 761, 765 (Tex. Crim. App. 2010) ("The Fourth Amendment's 'particularity' requirement is primarily meant to prevent general searches and the seizure of one thing under a warrant that describes another thing to be seized."). We rejected this same argument in *Jacobson*, and we likewise reject it here. *See Jacobson*, 2020 WL 1949622, at *6 ("The warrant in this case hardly sanctions a general rummaging through Appellant's property. . . . His argument that the warrant was too general is merely a shade and phase of Appellant's two-warrant argument that we have rejected.").

provides two definitions for "intoxicated." *See* Tex. Penal Code Ann. § 49.01(2). Under the first definition—what is referred to as the "impairment" theory—"intoxicated" is defined as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body." *Id.* Under the second definition—what is referred to as the "per se" theory—"intoxicated" is defined as "having an alcohol concentration of 0.08 or more." *Id.*; *see Kirsch v. State*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010) (discussing impairment and per se theories). The impairment and per se theories are not mutually exclusive; if there is evidence that would support both definitions, both theories may be submitted in the jury charge. *Kirsch*, 306 S.W.3d at 743.

In *Kirsch v. State*, the Court of Criminal Appeals held that evidence is sufficient to support a jury charge on the per se theory of intoxication if it includes evidence of a blood-alcohol concentration of 0.08 or more and either (1) expert testimony of retrograde extrapolation, or (2) other evidence of intoxication that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test. *Id.* at 745–46. In *Kirsch*, no extrapolation evidence was presented. *Id.* at 746. The Court of Criminal Appeals nevertheless held that evidence was sufficient to support the per se theory of intoxication because evidence had been presented supporting an inference that the defendant was intoxicated at the time of driving as well as the time of the taking of the test. *Id.* The Court relied on the following evidence: (1) the defendant's driving almost twenty miles per hour over the

speed limit prior to the subject car accident; (2) his failure to see and avoid hitting an 18-wheeler that was turning a substantial distance ahead of him; (3) his failure to brake until less than one second before impact; (4) his unconsciousness immediately after the accident, "which precluded any inference that he drank alcohol and became intoxicated after he was driving"; (5) the odor of alcohol on the defendant; (6) the presence of vodka bottle caps in the patrol car; (7) his belligerence at the hospital and other behavior consistent with intoxication; and (8) his "obviously intoxicated" appearance at the emergency room according to hospital personnel. *Id.* The Court determined that this evidence, in addition to the blood-alcohol concentration results, supported the submission of the jury charge under the per se theory of intoxication. *Id.*

C. APPLICATION OF THE LAW TO THE FACTS

Here, Hunt objected to the trial court's inclusion of the per se theory of intoxication in the jury charge. The trial court overruled that objection. On appeal, Hunt argues that the inclusion of the per se instruction was improper because there was no expert testimony of retrograde extrapolation and no other evidence of intoxication that would support an inference that Hunt was intoxicated at the time of driving as well as the time of taking the test. While the State did not present expert testimony of retrograde extrapolation, it argues that there was evidence of intoxication that would support an inference that Hunt was intoxicated at both the time of driving as well as the time of taking the test. We agree with the State. The following evidence

was presented that supported the inclusion of the per se theory of intoxication within the jury charge:

- Hunt nearly struck a pedestrian walking across a crosswalk;
- Hunt repeatedly failed to signal while making turns, failed to signal when changing lanes, and drove his vehicle partially in the bike lane for an extended period;
- after activating his patrol car's lights, Hernandez had to repeatedly use his car's air horn and activate his car's siren before Hunt pulled his truck over;
- there was vomit on the driver's side door of Hunt's truck;
- Hernandez testified that during the stop, Hunt had bloodshot eyes, was groggy, and the odor of alcohol emanated from Hunt's body;
- during the stop, Hunt vomited on himself;
- Hunt admitted to Hernandez that he drank "three or four" beers on the subject evening, and he testified at trial that he drank four beers on the subject evening;
- Hunt was unable to complete the horizontal nystagmus gaze field sobriety test because during it, he hunched over, put his hands on his knees, and began dry heaving;
- following that failed test, Hunt fell to his hands and knees on the sidewalk, and he lost his balance when Hernandez tried to help him up, later to be allowed to rest on Hernandez's patrol car;
- Hunt had his eyes closed and appeared to be in a deep sleep while Hernandez read him the statutory warning, despite Hernandez's repeated attempts to wake him;

- Victoria Acker, the nurse at the hospital, testified that Hunt was "slurring his words," and while he was "oriented to time, person, [and] place," he was "not acting like [one] would normally act"; and

- Acker further testified that Hunt was "inebriated."[8]

Hunt further contends that the time period between the subject stop, occurring around 12:36 a.m., and the drawing of Hunt's blood, occurring around 3:30 a.m., was unreasonable. While we agree with Hunt that many, if not most, of the cases involving blood draws concern draws that take place closer in time to the subject stop than what occurred here, we are not persuaded, given our review of the record, that the time period between the stop and the blood draw was unreasonable. *See State v. Jordan*, 342 S.W.3d 565, 572 (Tex. Crim. App. 2011) ("Given the symptoms of intoxication described in the affidavit, we hold that the magistrate had a substantial basis to determine that evidence of intoxication would probably be found in the appellee's blood within four hours of the stop."); *Flores v. State*, No. 01-15-00487-CR, 2016 WL 3362065, at *4–5 (Tex. App.—Houston [1st Dist.] June 16, 2016, pet. ref'd)

[8]Hunt contends that Acker's testimony is insufficient to establish intoxication at the time of the test because, according to him, "Acker consistently testified she could not remember whether her recollections about Hunt were from the time he first arrived at the hospital or hours later when she drew his blood." We disagree. Our review of the record reflects that while Acker could not specifically pinpoint the exact times she saw Hunt, she testified that she drew Hunt's blood, that he was "memorable," that she remembered seeing him, that he was "slurring his words," and that he was "inebriated." From that testimony, the jury could reasonably infer that Acker's observations regarding Hunt occurred at the time of the blood draw.

(mem. op., not designated for publication) (holding that trial court properly included per se instruction within jury charge in case involving blood draw that took place three hours after car accident).

Because we have determined that the evidence presented was sufficient to support an inclusion of the per se theory of intoxication within the jury charge, we hold that the trial court did not err in including that theory within the jury charge, and we thus overrule Hunt's second issue.[9] *See Kirsch*, 306 S.W.3d at 746.

IV. HUNT'S COMPLAINT REGARDING CERTAIN STATEMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT

In his third issue, Hunt argues that the trial court erred by overruling his objections to statements made by the prosecutor during closing argument that referenced a venireperson's father being killed in a drunk driving fatality.

[9]While Hunt devotes the bulk of his second issue to his complaint regarding the inclusion of the per se intoxication theory within the jury charge, he also briefly complains that the trial court refused his request for a limiting instruction asking the trial court to limit the jury's consideration of the blood test results to the limited purpose of whether Hunt consumed alcohol on the night in question and for no other purpose. As stated in *Kirsch*, "[t]here is . . . no Texas statute, rule of evidence, or judicial precedent that limits the jury's consideration of an otherwise admissible BAC-test result." 306 S.W.3d at 747. We therefore hold that the trial court did not err in refusing Hunt's requested limiting instruction. *See id.* ("Absent a statute that requires the jury to be instructed about the sufficiency of certain evidence, jurors are not instructed on such issues or limited in their consideration of evidence otherwise fully admissible.").

A. THE COMPLAINED-OF STATEMENTS

During voir dire, a venireperson stated that her father had been killed by a drunk driver. Both sides later agreed to excuse that venireperson from the jury panel, and the trial court did so, noting that the venireperson had "had a tissue in her hand the whole time." During closing argument, the following exchange occurred relating to the death of the venireperson's father:

> [Prosecutor]: During voir dire, we heard from [Venireperson]. We all sat here in silence as she teared up and she choked on her words that she had to share with the jury panel—
>
> [Defense Counsel]: Objection, Your Honor. She's arguing facts not in evidence.
>
> [Trial Court]: The jury will recall the evidence.
>
> [Defense Counsel]: Your Honor, we would need our objection ruled upon.
>
> [Trial Court]: Overruled.
>
> [Prosecutor]: You heard [Venireperson] say that her father was killed because of a drunk driver—
>
> [Defense Counsel]: Your Honor, this is absolutely more prejudicial than probative. It has nothing to do with Joseph Hunt. Objection. It's a violation of due process.
>
> [Trial Court]: Overruled.
>
> [Prosecutor]: They're going to keep objecting because they don't want you to hear this—
>
> [Defense Counsel]: Your Honor.
>
> [Prosecutor]: —because—

> [Defense Counsel]: Your Honor, we object. She's attacking the defendant over the shoulders of his counsel now and arguing outside the record. This is absolutely improper.
>
> [Trial Court]: Overruled.
>
> [Defense Counsel]: If we could have a running objection?
>
> [Trial Court]: You may.
>
> [Prosecutor]: They don't want you to hear this, folks. They want to distract you from the fact that this law—that these laws—DWIs are put in place to protect people like us.

Later on in the closing argument, the prosecutor told the jury to "[s]end a message that you cannot drive into Tarrant County, put countless lives at risk—because this happens, folks. This isn't sober mode. This happened to [Venireperson's] father. This happens all the time because of people like [Hunt]."

B. THE LAW

To be permissible, the State's jury argument must fall within one of the following four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) pleas for law enforcement. *Felder v. State*, 848 S.W.2d 85, 94–95 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 829 (1993); *Primes v. State*, 154 S.W.3d 813, 814 (Tex. App.—Fort Worth 2004, no pet.).

Even when the State's jury argument is improper, we will not reverse a trial court's erroneous overruling of a defense objection to the improper jury argument

unless the error affected the defendant's substantial rights.[10] Tex. R. App. P. 44.2(b); *Martinez*, 17 S.W.3d at 692–93. To determine if a defendant's substantial rights were affected and if he therefore suffered harm from an improper jury argument, we consider the following factors: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of the verdict absent the misconduct (the strength of the evidence supporting the conviction). *Martinez*, 17 S.W.3d at 692–93; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998); *Guy v. State*, 160 S.W.3d 606, 617 (Tex. App.—Fort Worth 2005, pet. ref'd).

C. APPLICATION OF THE LAW TO THE FACTS

We assume without deciding that the trial court erred by overruling Hunt's objections to the statements made by the prosecutor during closing argument. We thus turn to whether Hunt was harmed by the prosecutor's statements.

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[10]Hunt argues that the trial court's overruling of his objections to the prosecutor's statements amounted to constitutional error. We disagree. The Court of Criminal Appeals has held that "improper-argument error of this type is non-constitutional in nature, and a non-constitutional error 'that does not affect substantial rights must be disregarded.'" *Brown v. State*, 270 S.W.3d 564, 572 (Tex. Crim. App. 2008); *see Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000) ("Comments upon matters outside the record, while outside the permissible areas of jury argument, do not appear to raise any unique concerns that would require us to assign constitutional status. We shall therefore apply the standard of harm for nonconstitutional errors.").

As to the first factor we are to consider in our harm analysis—the severity of the misconduct—we note that the complained-of statements made up only a small portion of the prosecutor's closing argument. The prosecutor's closing argument took up over eleven pages of the reporter's record, while the prosecutor's statements referencing the venireperson's father amounted to only a handful of sentences. The main theme of the prosecutor's closing argument was Hunt's excuses for his intoxication, not the death of the venireperson's father. This factor weighs against a finding of harm.

As to the second factor we are to consider in our harm analysis—the measures adopted to cure the misconduct—we note that the trial court repeatedly overruled Hunt's objections to the prosecutor's statements, and the prosecutor continued to reference the death of the venireperson's father after the objections were overruled. As we held in *Coleman v. State*, "[w]hen a trial court overrules an objection to an improper argument, it implicitly places its 'imprimatur' on the argument, thereby magnifying the harm." 577 S.W.3d 623, 640 (Tex. App.—Fort Worth 2019, no pet.). In discussing this factor in *Coleman*, we also held that "[b]ecause the prosecutor repeatedly emphasized th[e] improper argument, it [was] likely the jury placed substantial weight on th[e] argument in their deliberations." *Id.* This factor weighs in favor of a finding of harm.

As to the third factor we are to consider in our harm analysis—the certainty of the conviction absent the misconduct—we note that the evidence in support of

Hunt's conviction was overwhelming. As more fully detailed in our discussion of the evidence above, the jury received testimony and video evidence detailing that Hunt almost struck a pedestrian while driving, threw up during the traffic stop, fell over during Hernandez's attempt to perform field sobriety tests, and demonstrated many of the telltale signs of alcohol intoxication. The jury further heard and saw Hunt's intoxicated state when Hernandez read the statutory warning, heard Acker's testimony that Hunt was "inebriated" and was "slurring his words" at the hospital, heard Hunt admit at trial that he had consumed four beers, and heard testimony that Hunt's blood-alcohol concentration level was 0.152. This factor weighs against a finding of harm.

Based on our consideration of these factors, we cannot say that Hunt's substantial rights were affected by the prosecutor's statements regarding the venireperson's father. *See Martinez*, 17 S.W.3d at 692–93; *Mosley*, 983 S.W.2d at 259. We thus overrule Hunt's third issue.

V. CONCLUSION

Having overruled Hunt's three issues, we affirm the trial court's judgment.

/s/ Lee Gabriel

Lee Gabriel
Justice

Do Not Publish
Tex. R. App. P. 47.2(b)

Delivered: June 4, 2020