In the Court of Appeals
for the
Fifteenth District of Texas,
Toyahville, Texas

Dixie B. Herbster,
Appellant

versus

The State of Texas,
Appellee

On Appeal from the Luna County Court at Law No. 1
Luna County, Texas
The Honorable Brock Goulett

BEFORE KELLY, J., RUDNICKI, J., AND VOGELSANG, CJ.

VOGELSANG, Chief Justice, in which RUDNICKI, J. joins.

A jury convicted Dixie Herbster of the Class B misdemeanor offense of driving while intoxicated. *See* TEX. PENAL CODE ANN. § 49.04 (West 2003). Punishment was assessed at thirty days' confinement in jail. In two issues on appeal, Herbster asserts that (1) the admission of a laboratory report of her blood test results violated the Confrontation Clause of the United States Constitution,[[1]] and (2) her counsel rendered ineffective assistance. We will affirm the judgment.

BACKGROUND

On the night of December 24, 2009, Dixie Herbster was driving home from a Christmas party when she saw what she believed to be a red-nosed deer standing in the middle of the road. To avoid running into the animal, Herbster had to quickly veer into the opposing lane of traffic and then veer back into her own lane to avoid oncoming vehicles. While she was doing so, she lost control of her vehicle and crashed into a ditch on the side of the road. A witness to the accident called 911, and Officer Jeff Watters of the Luna County Sheriff's Office responded to the call.

[1] [Note to competitors and judges: This issue is based in part on a case out of the New Mexico Supreme Court that is currently pending before the United States Supreme Court. *See State v. Bullcoming*, 147 N.M. 487, 226 P.3d 1 (N.M. 2010), *cert. granted*, 79 U.S.L.W. 3194 (U.S. Sept. 28, 2010) (No. 09-10876). However, for purposes of this competition, teams are to treat the New Mexico case as if certiorari had **not** been requested. If the case is decided by the Supreme Court prior to either the deadline for submission of briefs or the competition itself, teams are **not** to cite or refer to the Supreme Court decision but shall continue to cite and refer to the opinion by the New Mexico Supreme Court as good law.]

Officer Watters testified that he had observed Herbster exhibit several signs of intoxication, including watery, bloodshot eyes, slurred speech, and a strong odor of alcohol on her breath. According to Watters, Herbster denied having had anything to drink at the party. Watters administered the standardized field sobriety tests, all of which, he testified, Herbster failed. Watters then arrested Herbster for DWI and transported her to the police station for booking. At the station, Herbster agreed to take a blood alcohol test.

At trial, the State presented the Report of Blood Alcohol Analysis of Herbster's blood through the testimony of Clint Harbour, chief toxicologist for the Luna County Medical Examiner's Office, who oversees but does not actually conduct the blood-alcohol tests for the County. The analyst who had actually prepared the report, Britney Lindsay, did not testify at Herbster's trial because, according to Harbour, she was "very ill and recently went on extended sick leave." Harbour had been Lindsay's supervisor. On cross, Harbour admitted that Lindsay had some "disciplinary problems" prior to her going on sick leave but that they were not related to her administration of lab tests. In fact, Harbour called Lindsay "the most accurate analyst who has ever worked under me." When asked about the nature of Lindsay's "disciplinary problems," Harbour claimed that on at least two occasions, she had been insubordinate to him. He declined to elaborate on the nature of her alleged insubordination. Harbour also admitted that he and Lindsey had been dating prior to her going on sick leave but that he had recently ended the relationship. When asked why Lindsay was on sick leave, Harbour cited "mental health" issues.

Harbour, who was qualified as an expert witness with respect to laboratory procedures in the Medical Examiner's Office, explained that the instrument used to analyze Herbster's blood was a gas chromatograph machine, which detects the compounds present in the blood sample and prints out the results. The analyst then transcribes the results to the lab report. Harbour testified that he had operated gas chromatograph machines in the past, before he became a supervisor. Thus, he was also qualified as an expert in their operation.

Harbour claimed that recording the results is a simple process of looking at the machine results and writing them on the report. According to Harbour, the analyst is not required to interpret the results, exercise independent judgment, or employ any particular methodology in transcribing the results from the machine to the report. Harbour opined, "Even an idiot can do it." He added, "Nothing can go wrong, assuming the machine is working properly." When asked if there was ever a time that the machine had not worked properly, Harbour answered, "No."

Harbour further testified that after the results of the test are transcribed to the report, the report is given to him for final approval. Although he does not re-test the sample himself, he does ensure that the proper procedures were followed by questioning the analyst who transcribed the results. Harbour claimed that Lindsay had assured him that "proper protocol was followed."

Herbster's retained trial counsel—her ex-husband, Dan Herbster—timely objected to the admission of the report, arguing that it violated the Confrontation Clause of the United States Constitution. The trial court overruled the objection.

The lab report was admitted into evidence as State's Exhibit 1. It is a two-page document containing the results of the analysis; chain of custody information;[2] the date, time, and place of the blood draw; and information on the method used for testing the blood sample and the procedures that must be followed by laboratory personnel. The report was signed by both Lindsey and Harbour. The lab report showed that Herbster's blood alcohol level was .18 gms/100ml. Harbour testified that this was over the legal limit of .08 gms/100ml. Based on the results from the lab report, Harbour concluded that Herbster was intoxicated at the time the sample was taken.

The jury found Herbster guilty of DWI. During punishment, the State called two witnesses—Lacey Clark, a Luna County probation officer, and Dr. William Appleby, an alleged expert in the area of assessment and treatment of intoxicated offenders. Both Clark and Appleby recommended against placing Herbster on community supervision.[3] On advice of counsel, Herbster testified in her own defense, claimed that she would never drink and drive again, and begged for probation. The jury subsequently assessed punishment at thirty days in jail. The district court sentenced Herbster accordingly.

Shortly thereafter, Herbster fired her ex-husband and retained new counsel for appeal, Brandy Wingate. Wingate timely filed a motion for new trial, asserting that Herbster's confrontation rights were violated by the admission of the lab report and that Herbster received ineffective assistance of counsel. The district court held a hearing on the motion and received evidence at the hearing, including the testimony of trial counsel. However, the district court ultimately denied the motion. This appeal followed.

DISCUSSION

Confrontation Clause

In her first issue, Herbster claims that the admission of the lab report violated her confrontation rights. Specifically, she claims that the lab report was inadmissible because the analyst who had actually performed the test did not appear in court to be subject to cross-examination. We review this issue de novo. *See Lilly v. Virginia*, 527 U.S. 116, 137 (1999); *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2008). We are also mindful that this is an issue of first impression in this Court.

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[2] There were four individuals in the chain of custody: the nurse who drew Herbster's blood; Officer Watters, who had observed the blood draw and subsequently delivered it to the laboratory; Lindsay, the analyst who had actually prepared the report; and Harbour. Of those four, only Lindsay did not testify at trial.

[3] Relevant excerpts from the punishment hearing may be found in the appendices attached to this opinion.

The Confrontation Clause of the Sixth Amendment to the Constitution of the United States provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Confrontation Clause prohibits the admission of "testimonial statements" unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *See Crawford v. Washington*, 541 U.S. 36, 59 (2004). A statement is testimonial if it was 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.* at 52.

Relying on the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2008), Herbster claims that the lab report results are testimonial in nature. In *Melendez-Diaz*, the trial court admitted into evidence certificates signed by laboratory analysts in which the analysts concluded that certain evidence was cocaine. The analysts who had signed the certificates did not testify at trial, and the defendant argued that this violated his right to be confronted with the witnesses against him. *Id.* at 2531. The Supreme Court agreed, concluding that the certificates were affidavits and thus fell within the "core class of testimonial statements" covered by the Confrontation Clause. *Id.* at 2531-32. Herbster argues that the same analysis applies to the lab report showing her blood alcohol level.

We disagree. In *Melendez-Diaz*, the statements at issue were conclusions by laboratory analysts that a certain substance was cocaine. In this case, the "statement" in question is the assertion that Herbster's blood sample contained alcohol in a certain amount. But this statement was never made by Lindsay. Instead, it was made by the chromatograph machine itself. Lindsay simply transcribed what the machine reported to her. The machine printout is the only source of the statement that Herbster's blood sample contained alcohol. Lindsay could neither have affirmed nor denied independently that the blood contained alcohol because all she could do was to refer to the raw data printed out by the machine. Raw data generated by machines do not constitute statements, and machines are not "declarants." Therefore, no out-of-court statement implicating the Confrontation Clause was admitted into evidence through the lab report. As other courts have held, "we reject the characterization of the raw data generated by the lab's machines as statements of the lab technicians who operated the machines. The raw data generated by the diagnostic machines are the 'statements' of the machines themselves, not their operators." *See, e.g.*, *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009);[4] *United States v. Darden*, 656 F. Supp. 2d 560, 563-64 (D. Md. 2009).

Moreover, even if we were to determine that the lab report was an out-of-court statement by a declarant, we could not conclude on this record that its admission violated the Confrontation Clause. Although Lindsey did not testify at trial, Harbour did. Harbour was qualified as an expert witness with respect to the gas chromatograph

[4] We note that the Supreme Court denied certiorari in *Washington* only four days after it had decided *Melendez-Diaz*.

machine and the laboratory procedures in the medical examiner's office. Harbour provided live, in-court testimony and, thus, was available for cross-examination regarding the operation of the gas chromatograph machine, the results of Herbster's test, the office's established laboratory procedures, and any other subject matter that the defense might deem important.

While this is our Court's first opportunity to address this particular issue, we are not the first court to consider it. In fact, this case is strikingly similar to a recent case decided by the New Mexico Supreme Court. *See generally State v. Bullcoming*, 226 P.3d 1 (N.M. 2010). Although the New Mexico Supreme Court concluded that a lab report showing the defendant's blood test results was testimonial (a conclusion with which we disagree), the court ultimately found no Confrontation Clause violation when the analyst who performed the test was not available to testify, so long as a "qualified analyst" was subject to cross-examination. *See id*. at 8-10. We find the court's reasoning persuasive. We also observe that one of our sister courts has examined a similar issue involving DNA analysis. *See Hamilton v. State*, 300 S.W.3d 14, 19-22 (Tex. App.—San Antonio 2009, pet. ref'd). Although the court found that the results of a DNA test were testimonial (we express no opinion on this particular question), it also concluded that an expert witness who offers his opinion based in part on lab work performed by another does not violate the Confrontation Clause. *See id*. at 21-22. We reach a similar conclusion today.

Because Harbour was a qualified analyst who provided live, in-court testimony, we conclude that the admission of Exhibit 1 did not violate the Confrontation Clause.

We overrule Herbster's first issue.

Ineffective assistance

In her second issue, Herbster asserts that she received ineffective assistance of counsel during trial. The right to the assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. See U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence that: (1) counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Ex parte Ellis*, 233 S.W.3d 324, 330 (Tex. Crim. App. 2007); *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986). Unless the defendant makes both showings, it cannot be said that her conviction is rendered unreliable by a breakdown in the adversarial process. *Strickland*, 466 U.S. at 687.

To establish deficient performance, a defendant must show that "counsel was not acting as 'a reasonably competent attorney,' and his advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Ex parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005) (quoting *Strickland*, 466 U.S. at 687). She must overcome the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.'" *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim.

App. 1999). She must also "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Ellis*, 233 S.W.3d at 330 (citing *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992)). In other words, the defendant must show that "no reasonable trial strategy could justify the trial counsel's conduct." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). "We determine the reasonableness of counsel's challenged conduct in context, and view it as of the time of counsel's conduct." *Id.* at 101.

To satisfy the second prong of the *Strickland* test, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

We review a trial court's denial of a motion for new trial for abuse of discretion. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004), *superseded in part on other grounds by* TEX. R. APP. P. 21.8(b), *as recognized in State v. Herndon*, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007). This includes motions for new trial based on claims of ineffective assistance of counsel. *State v. Gill*, 967 S.W.2d 540, 541 (Tex. App.—Austin 1998, pet. ref'd). Accordingly, in this case, we do not apply the aforementioned *Strickland* test de novo. *Id.* at 542. Rather, we review the trial court's application of the *Strickland* test under the abuse-of-discretion standard. *Id.* "We do not substitute our judgment for that of the trial court, but rather we decide whether the trial court's decision was arbitrary or unreasonable." *Charles*, 146 S.W.3d at 208. "We must view the evidence in the light most favorable to the trial court's ruling and presume that all reasonable factual findings that could have been made against the losing party were made against that losing party." *Id.* "Thus, a trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling." *Id.*

Herbster's attorney during trial was her ex-husband, Dan Herbster. They had been married and divorced twice already. At the time of the trial, according to Dan, they were not living together but were, in Dan's words, "friends with benefits." Dan was a litigator whose experience was mostly in civil matters. Dixie had hired Dan because, in her opinion, Dan was "the best trial attorney in Luna County," regardless of his lack of experience with criminal law.

In fact, before Dixie's trial, Dan had tried only one criminal case, and it had been, in Dan's words, "a total disaster." Approximately two years prior to Dixie's trial, Dan had represented Willy Redbeard, a long-time acquaintance of the Herbsters, in Redbeard's trial for intoxication manslaughter. The State alleged that Redbeard had been driving while intoxicated and had killed a pedestrian. The jury convicted Redbeard, and he received a twenty-year prison sentence. On appeal before this Court, Redbeard argued ineffective assistance of counsel. However, we found that the record on direct appeal was inadequate to establish deficient performance and affirmed Redbeard's conviction.

While he was in prison, Redbeard filed a grievance against Dan with the Office of the Chief Disciplinary Counsel of the State Bar of Texas (CDC).[5] The grievance alleged multiple violations of the Texas Disciplinary Rules of Professional Conduct, including accepting employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, neglecting a legal matter entrusted to the lawyer, and failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a), (b), 1.03(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West 2005) (Tex. State Bar R. art. X, § 9). The CDC proceeded to investigate the grievance.

The findings of the CDC can be summarized as follows. When Redbeard first approached Dan about representing him, Dan declined. Dan explained to Redbeard that he had no experience representing criminal defendants and that an intoxication-manslaughter charge was "too complicated and serious" for a lawyer "inexperienced in criminal matters" such as himself to handle. "A simple DWI would be a different story," Dan added, "But you're facing a charge that you killed someone." Nevertheless, Redbeard begged Dan to take his case because Dan had an "excellent reputation in the community as a trial lawyer" and because, in Redbeard's opinion, "the criminal defense attorneys in this county are horrible." Dan eventually agreed to represent Redbeard. When asked by the CDC why he took the case, Dan admitted, "At the time, I was a struggling solo practitioner with bills to pay and wasn't in a position to turn away paying clients. Redbeard's family had a lot of money, and I needed it."

On the first day of Redbeard's trial, shortly before jury selection began, Dan filed a written motion for continuance stating that he needed more time to investigate the case and interview witnesses. When asked why, Dan replied, "I've been very busy with my civil cases, Your Honor." The trial court denied the motion. Dan then announced that he was "not ready for trial," declared that he would "be unable to effectively represent [his] client," and refused to participate in the trial. The trial court admonished Dan, "If you do that, I'll haul you before the State Bar myself." Dan then agreed to participate in the trial.

The CDC found that Dan had represented Redbeard "to the best of his ability," but that his ability had been "terribly deficient at the time." The CDC found that Dan had done an "adequate" job questioning and selecting jurors but that after that, "it all fell apart." Dan was unable to effectively cross-examine any of the State's witnesses, including its expert witness on intoxication, he was unable to present a consistent theory of the defense, he did not interview or call any defense witnesses, and his closing argument "completely ignored a key piece of evidence in the State's case, specifically Redbeard's admission to authorities during the investigation that he had been drinking on the night of the accident." The CDC attributed Dan's shortcomings during trial solely to his lack of criminal-law experience. The CDC also found it significant that although Dan was current on his continuing legal education (CLE) requirements, he had never taken

[5] [For purposes of this problem, competitors are to assume the CDC is responsible for the entire disciplinary process.]

any CLE courses involving criminal law. Based on his lack of competence in that area of the law, the CDC concluded that Dan "certainly should not have taken the case."

However, the CDC also found that during the punishment hearing, Dan had performed "reasonably well." Dan had called Redbeard's wife and two children to the stand, and had painted a relatively sympathetic picture of the defendant for the jury. Although the punishment assessed was twenty years' imprisonment, the maximum sentence for a second-degree felony, the CDC found that the sentence was more a result of Redbeard's "shady history" and "questionable moral character" than anything that Dan had done or failed to do during punishment. The CDC also found that throughout the proceedings, Dan had sufficiently explained the case to the extent reasonably necessary to permit Redbeard to make informed decisions regarding the representation.

The CDC concluded that Dan had violated Rule 1.01(a) by accepting employment in a felony criminal case when he had no prior experience practicing criminal law and Rule 1.01(b) by failing to adequately investigate the case and interview witnesses. The CDC further concluded that Dan had not violated Rule 1.03(b). The CDC also found that Dan's primary motivation for taking the case—financial gain—made his conduct particularly egregious. Following the investigation, the CDC suspended Dan from the practice of law for a period of two years. The CDC had apparently considered disbarment but ultimately concluded that such a sanction was too harsh for an isolated incident, especially in light of Dan's past accomplishments as a litigator (he had won several jury trials over the years) and his positive reputation in the Luna County legal community.

Notice of the suspension was sent by certified mail on May 3, 2010 and was received at Dan's office address on May 6. However, Dan did not open his mail because he was preparing for Dixie's trial, which took place on May 10 and 11. Dan remained unaware of his suspension until he was personally served on May 13. The notice provided that the suspension would begin on May 5.

Herbster argues that Dan was ineffective in two ways. First, she argues that Dan's suspension rendered him ineffective during trial as a matter of law. Second, Herbster complains of Dan's actual performance during trial. Specifically, Herbster claims that trial counsel did not sufficiently cross-examine Dr. Appleby, the State's expert witness; failed to adequately investigate the methods Dr. Appleby had used in reaching his conclusions regarding the suitability of probation for Herbster; and failed to subpoena the analyst who actually performed the lab work on Herbster's blood.

We first address Dan's suspension prior to Dixie's trial. The Texas Court of Criminal Appeals has rejected a per se rule that a suspended or disbarred counsel constitutes an automatic Sixth Amendment violation. *See Cantu v. State*, 930 S.W.2d 594, 601 (Tex. Crim. App. 1996). Instead, the court has adopted a "case-by-case approach," in which a "suspended or disbarred attorney is incompetent as a matter of law if the reasons for the discipline imposed reflect so poorly upon the attorney's competence that it may reasonably be inferred that the attorney was incompetent to represent the

defendant in the proceeding in question." *Id*. at 602. Factors to consider in the analysis include:

> (1) the severity of the sanction (suspension versus disbarment; length of suspension), (2) the reasons for the discipline, (3) whether the discipline was based upon an isolated incident or a pattern of conduct, (4) similarities between the type of proceeding resulting in discipline and the type of proceeding in question, (5) similarities between kinds of conduct resulting in the attorney's discipline and any duties or responsibilities the attorney had in connection with the proceeding in question, (6) temporal proximity between the conduct for which the attorney was disciplined and the proceeding in question, and (7) the nature and extent of the attorney's professional experience and accomplishments.

Id. at 602-03.

This issue has not been heavily litigated by Texas courts. *See, e.g.*, *Smith v. State*, 243 S.W.3d 722, 724-25 (Tex. App.—Texarkana 2007, no pet.); *Hudson v. State*, 128 S.W.3d 367, 378-80 (Tex. App.—Texarkana 2004, no pet.); *see also Sarabia v. State*, No. 01-09-00893-CR, 2010 Tex. App. LEXIS 10155 (Tex. App.—Houston [1st Dist. Dec. 23, 2010, no pet. h.) (mem. op., not designated for publication). However, when considering the above factors in light of cases from other jurisdictions that have analyzed this issue, we simply cannot conclude that trial counsel was incompetent as a matter of law. *See, e.g.*, *Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (2d Cir. 1988); *United States v. Merritt*, 528 F.2d 650, 651 (7th Cir. 1976) (per curiam); *State v. Smith*, 476 N.W.2d 511, 513 (Minn. 1991). *People v. Allen*, 580 N.E.2d 1291, 1297-1300 (Ill. App. 1991); *Commonwealth v. Thibeault*, 556 N.E.2d 403, 407-08 (Mass. App. 1990). Trial counsel was not disbarred, the case for which he was disciplined was too dissimilar from the present case, and he has considerable experience as a trial attorney, albeit in civil cases. Nor does trial counsel's lack of experience in criminal law necessarily render him ineffective. *See United States v. Lewis*, 786 F.2d 1278, 1281 (5th Cir. 1986).

Because trial counsel's suspension did not render him ineffective as a matter of law, we turn to the usual *Strickland* analysis in assessing counsel's effectiveness. Herbster first argues that counsel was ineffective in failing to subpoena the analyst who actually performed the lab work on her blood. However, at the hearing on the motion for new trial, counsel explained the reasons for this decision, and we believe this decision was a reasonable trial strategy under the circumstances of this case.

Herbster next claims that counsel was ineffective in failing to sufficiently investigate the claims made by the State's expert witness during punishment, Dr. Appleby, who testified that Herbster should not be placed on probation because, in Dr. Appleby's opinion, she likely would continue to drink and drive while on probation. Dr. Appleby testified that he had based his opinion on the results of a "Cain Assessment" that he had administered to Herbster.

However, unbeknownst to counsel, three weeks prior to trial, there had been two articles published on the Cain Assessment demonstrating that the test was flawed and unreliable, and there was also an unpublished opinion out of this Court holding that the admission of evidence relating to the results of the Cain Assessment was reversible error.[6] Herbster faults trial counsel for being unaware of this information and not bringing it to the trial court's attention during trial. *See Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (quoting the rule announced in *Strickland* that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments"). Herbster also asserts that trial counsel's cross-examination of Appleby was "woefully inadequate."[7]

We do not believe that trial counsel's investigation of Appleby was unreasonable under the circumstances. He testified that he had independently researched the test, found a study that supported the test, had spoken to Appleby himself, and had interviewed others in the community regarding the test. While perhaps more thorough research on counsel's part would have revealed the articles that had criticized the test, the right to counsel is a right to reasonably effective representation—not flawless or perfect representation. We are cognizant of the time constraints confronting counsel. He had only weeks to prepare for this trial, not months. Additionally, he had other cases on his plate and limited experience in criminal law. Given the circumstances, we believe counsel performed reasonably well.

We also do not believe that trial counsel was deficient in his cross-examination of Appleby. At the hearing on the motion for new trial, Dan testified that he had made a strategic decision to not give Appleby a chance to "rehabilitate himself" on cross. We were not at the trial and cannot judge Dan's cross-examination in hindsight. Dan was in the best position to gauge the jury's reaction to Appleby and proceed accordingly. We are not to second-guess the strategic decisions of trial counsel. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("We will not second-guess legitimate strategic or tactical decisions made by counsel in the midst of trial.") (citing *Strickland*, 466 U.S. at 689).

Moreover, even if trial counsel's performance was deficient, we could not conclude on this record that Herbster was prejudiced by that performance. Dr. Appleby was not the State's only witness during punishment. Lacey Clark also testified that Herbster should not have been placed on probation.[8] We also observe that the State mentioned Appleby only once in its closing argument, and instead emphasized the blood

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[6] *See* Appendix D for relevant excerpts from this opinion.

[7] *See* Appendix A for the trial transcript of Dr. Appleby's testimony.

[8] *See* Appendix B for the trial transcript of Clark's testimony.

test results and the testimony of Clark.[9] Trial counsel, in his closing argument, mentioned Appleby only once, noting Appleby's testimony on cross that "treatment plans" were available for recovering alcoholics. We believe this demonstrates that both sides had concluded that the jury did not place much weight on Appleby's testimony. Additionally, although Herbster did not receive community supervision, she did receive a relatively light sentence of thirty days in jail. Therefore, even if counsel had succeeded in excluding Appleby's testimony, we cannot say that there is a reasonable probability that Herbster was prejudiced by that performance.

We overrule Herbster's second issue.

CONCLUSION

Having concluded that the district court did not err in admitting the lab report of the blood test results and that the district court did not abuse its discretion in concluding that Herbster was not denied her right to the effective assistance of counsel, we affirm the judgment of the district court.

KELLY, Justice (Dissenting)

I would reverse the judgment of the district court and remand for a new trial that complies with the Sixth Amendment guarantees of confrontation and the effective assistance of counsel.

Regarding Herbster's first issue, I believe the Confrontation Clause was clearly violated by the admission of the lab report. As an initial matter, it is ridiculous to assert, as the majority does, that lab reports are not testimonial in nature. The lab report in this case, like the evidence at issue in *Melendez-Diaz*, is "formalized testimonial material" in that it was made "for the purpose of establishing or proving some fact." *See Melendez-Diaz*, 129 S.Ct. at 2532 (internal quotation marks and citation omitted). Specifically, it was offered to prove Herbster's blood-alcohol level, the critical fact in the case. I believe it is patently absurd to claim, as the majority does, that *Melendez-Diaz* does not apply to machine-generated test results.

The closer question, in my opinion, is whether the analyst who actually performed the test needs to be subject to cross-examination. However, I would answer that question in the affirmative, for several reasons. First, to not require the testimony of the particular witness who had performed the test would contravene the history and purpose of the right to confrontation. The Confrontation Clause envisions a "personal examination" of "the witness," "subjecting him to the ordeal of cross-examination." *See Mattox v. United States*, 156 U.S. 237, 242, 244 (1895). Subjecting someone else to cross-examination obviously is not a substitute for such "personal" questioning. *See Davis v. Washington*,

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[9] The prosecutor's sole reference to Appleby was the following: "Don't forget about what Dr. Appleby told you." The prosecutor did not refer to Appleby's actual testimony.

547 U.S. 813, 826 (2006) (finding violation of Confrontation Clause when "a note-taking policeman recite[d] the unsworn hearsay testimony of the declarant"). For many reasons, cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks and citation omitted). By not requiring the particular analyst who performed the blood test to testify in court, the majority deprives Herbster and other defendants of that invaluable right.

There is simply no exception to the Confrontation Clause's prohibition against surrogate testimony for cases in which a court believes that a defendant's ability to question a testifying witness about a nontestifying witness's testimonial statements provides a meaningful opportunity for cross-examination. This is because there are other benefits of confrontation other than cross-examination, including the giving of testimony under oath, the jury's observation of the demeanor of the witness, and the physical presence of the defendant during the witness's testimony. *See Maryland v. Craig*, 497 U.S. 836, 846 (1990). Allowing a "surrogate witness" to testify in place of the actual witness undermines these benefits.

I am also concerned by a rule that allows a surrogate witness to testify simply because the actual witness is unavailable for any reason the State chooses, such as being "on sick leave." Such a rule encourages abuse and provides no limit to when a surrogate witness may testify in place of an actual witness. I understand the State not wanting critical evidence to be per se excluded whenever the analyst is unavailable to testify. However, to the extent the State wished Harbour, instead of Lindsay, to be the forensic analyst whom it presented at trial for purposes of proving petitioner's blood alcohol content, it had the option of using him while complying with the Confrontation Clause. All the State had to do was have Harbour retest the part of petitioner's blood sample that the lab had retained.

I do not share the majority's apparent faith in forensic analysis. As the Supreme Court noted in *Melendez-Diaz*, lab reports face the same "risk of manipulation" and error, 129 S. Ct. at 2536, as other evidence. Moreover, "[a] forensic analyst responding to a request from a law enforcement official may," like any other witness, "feel pressure–or have an incentive–to alter the evidence in a manner favorable to the prosecution." *Id*. at 2536. An analyst could also simply make mistakes while preparing a sample for testing, or in transcribing the numbers that the machine generates. Even when machines are involved, human errors occur. This concern is especially evident in this case, given the analyst's apparent "mental health" issues and history of "insubordination." Harbour could not have testified to how Lindsey conducted the testing because, by his own admission, he did not observe Lindsey conduct the test.

In summary, I believe the rule announced by the majority is simply wrong. Allowing any "qualified analyst" to testify to the lab test results violates the Confrontation Clause. I would sustain Herbster's first issue.

I would also sustain Herbster's second issue. I would conclude that trial counsel's suspension rendered him ineffective as a matter of law. But even if it did not, I would nevertheless conclude that his performance was deficient and prejudiced Herbster.

The majority downplays the seriousness of trial counsel's actions in the Redbeard trial. Counsel clearly was not ready for trial when it was scheduled to begin. Then, when he was denied a continuance, he threatened to not participate in the trial. This outrageous behavior was similar to conduct that the court of criminal appeals concluded was ineffective in *Cannon v. State*, 252 S.W.3d 342 (Tex. Crim. App. 2008). When counsel finally decided to participate, under apparent duress, the record demonstrates that he did a lousy job representing his client. And, perhaps most appalling, counsel accepted a case he was unqualified to handle primarily because he *needed the money*. The CDC may have only suspended counsel, but it had, for good reason, considered disbarring him. The majority disregards that fact. The majority also overlooks the similarities between the offenses of which Redbeard and Dixie were charged.

Admittedly, there are few cases finding suspended counsel to be ineffective as a matter of law. *See, e.g.*, *Commonwealth v. Grant*, 992 A.2d 152, 160-62 (Pa. Super. 2010); *State v. Newcome*, 577 N.E.2d 125, 126 (Ohio App. 1989); *People v. Hinkley*, 238 Cal. Rptr. 272 (Cal. App. 1987); *People v. Williams*, 444 N.E.2d 136, 142-43 (Ill. 1982); *see also People v. Pubrat*, 548 N.W.2d 595, 601-03 (Mich. 1986) (Mallet, J., dissenting). However, I find some of the reasoning in those cases applicable here. Indeed, I believe the facts of this case practically cry out for a finding of ineffective assistance.

However, even ignoring trial counsel's suspension, I believe his performance during trial was deficient. His decision not to subpoena the analyst who performed the blood test on his client was inexcusable. I do not find counsel's "strategic reasons" compelling. Moreover, counsel's decision "invited error" into his client's trial.

Counsel's performance during the punishment hearing was also deficient. No matter how little time counsel may have had in preparing for trial, he had an obligation to investigate the case, including the issues during punishment. *See McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996). Even a minimum investigation by counsel would have revealed that the Cain Assessment was not accepted in the scientific community. Had counsel adequately prepared for Dr. Appleby's testimony by simply reviewing that articles on which Dr. Appleby told him he would rely, or recognized that the validity of such tests might differ when given to females as opposed to males, counsel could have easily prevented the testimony from being admitted under Texas Rule of Evidence 702. At the very least, counsel could have called his own expert to refute Appleby's testimony. *See Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005) ("Defense counsel's lack of preparation and failure to challenge the credibility of the key prosecution witness could not be based on a sound trial strategy, and it was an unreasonable application of *Strickland* for the [trial court] to hold otherwise."). As for counsel's cross-examination of Appleby, it was perfunctory at best. I realize that cross-examination is an art and not a science, but counsel's cross of Appleby was grossly inadequate.

I believe the prejudice from counsel's deficient performance is clear. Dr. Appleby was one of only two punishment witnesses called by the State. He was also qualified as an expert witness, which likely made the jury more likely to believe his claims. I do not find it significant that Appleby's testimony was downplayed during closing arguments. His testimony was already out there; the damage had been done.

For the above reasons, I respectfully dissent.

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APPENDIX A: Trial testimony of Dr. William Fudge Appleby, in its entirety, including voir dire examination outside the presence of the jury

WILLIAM FUDGE APPLEBY
Having been previously sworn, testified as follows:

VOIR DIRE EXAMINATION

By Mr. Herbster, Attorney for the Defendant:

Q: Dr. Appleby, what do you do for a living?

A: Several things. I'm the Program Director of the Substance Abuse Treatment Program at the Luna County V.A. Hospital, where I'm also the Acting Chief of Psychology. I'm also in private practice working primarily with recovering alcoholics.

Q: Do you know Dixie Herbster?

A: Yes, I do.

Q: Do you remember the first time you met her?

A: I believe it was October 30, for the evaluation that I did on her.

Q: At the time, did you inform her of the nature of the evaluation?

A: Yes.

Q: Did you inform her of her *Miranda* rights?

A: What I did is I told her I was going to be conducting an evaluation for the court and that the information that we discussed during the interview, as well as the test information, would be shared with the court, as well as her attorney.

Q: But you didn't read her the *Miranda* warnings?

A: I'm not sure I understand what you mean. I did tell her about the limits of confidentiality and the potential uses of the information.

Q: Oh, let's just move on. What kind of test did you perform on her?

A: I did the Cain Assessment and the Cain Questionnaire.

Q: Would you briefly tell us what that is?

A: The Cain Assessment is composed of both an objective part and then a questionnaire. The objective part of the test is where the individual sits in a room by him or herself and looks at a number of slides of different alcoholic and non-alcoholic beverages, and it really measures one's response time, how one looks at the various slides in comparison to other slides. The results are computerized and sent to Austin, where the test is scored and then sent back to me. The premise of the test is that if one is an alcoholic, she will look longer at the alcoholic beverages than the non-alcoholic beverages.

Q: Tell us about the questionnaire.

A: The subject answers open-ended questions related to drinking and driving, such as, "After how many bottles of beer do you think it is still acceptable to drive?" and "How much drinking do you do, on average, at social gatherings?" The subject's answers give me an indication of how likely she is to drink and drive.

Q: Is this test accepted in the scientific community as a test that's able to predict those people who are likely to drink and drive?

A: Sure.

Q: And I take it by your answer earlier, you're familiar with the underlying scientific theory?

A: Yep.

Q: Would you tell us about the existence of any literature supporting or rejecting this underlying scientific theory?

A: There are, of course, several articles written by the test's creator, Adam Cain and his colleagues. Also, researchers at the University of South Central Texas have established the reliability of the instrument and the classification accuracy of the instrument.

Q: Interesting. Any potential rate of error in the technique?

A: It depends on the gender of the subject. For females, the accuracy rate is 85%. For males, the accuracy rate is 91%.

Mr. Herbster: Nothing further, Your Honor.

By Ms. Humphrey, Attorney for the State:

Q: Dr. Appleby, what is your educational background?

A: I have a Doctorate in Counseling Psychology from the University of South Central Texas. I'm also a licensed psychologist here in Texas.

Q: How long have you been licensed?

A: For over 20 years now.

Q: Can you tell us approximately how many alcoholics you have counseled over the years?

A: I'm more involved in the assessment end, i.e., assessing intoxicated offenders. I probably have assessed about thirty people who have been accused of driving while intoxicated and have provided treatment to probably several; more in a group setting than on an individual basis.

Q: Have you ever published any literature?

A: Yes. I recently published a book entitled, "How to Stop Drinking, Permanently: Get Yourself Sent to Jail!"

Q: Have you previously testified as an expert here in Luna County?

A: Yes, on many occasions.

Ms. Humphrey: Your Honor, the State would ask at this time that this witness be qualified as an expert to answer certain hypotheticals and offer opinion testimony in the field of psychology and intoxicated offender treatment.

Mr. Herbster: Your Honor, we agree that he's an expert in his field, but we still have objections beyond that.

The Court: Such as?

Mr. Herbster: Your Honor, my objection to his testimony would be that this test, the Cain Assessment, the error rate is too high. 15% error for females and 9% for males is just too high. I don't think that's sufficiently reliable under Rule 702. Also, he didn't tell my client about her *Miranda* rights. That's just wrong. That, plus the unreliability of the test is a big deal.

The Court: Do you have any case law to support your position?

Mr. Herbster: I tried to find some cases, Your Honor, but no, I do not.

Ms. Humphrey: The error rate isn't that bad, Your Honor. As far as the defendant not being admonished, Dr. Appleby is not a police officer, so *Miranda* doesn't apply to him. And besides, Dr. Appleby did inform her that the results would be released to the Court.

The Court: I'm going to overrule your objections, Mr. Herbster. And I'm also going to rule that Dr. Appleby will be allowed to testify as an expert in the field of assessment and treatment of intoxicated offenders and will be allowed to give opinion testimony and answer hypothetical questions in that regard. Let's bring the jury in.

(Jury is present)

DIRECT EXAMINATION

By Ms. Humphrey:

Q: Good morning, Dr. Appleby. Would you state your full name for the record?

A: I'm Dr. William Fudge Appleby.

Q: Dr. Appleby, how are you employed?

A: I'm currently the Program Director of the Substance Abuse Treatment Program at the Luna County V.A. Hospital, where I'm also the Acting Chief of Psychology. I'm also in private practice working primarily with recovering alcoholics.

Q: Please tell the jury about your educational background.

A: I received my Doctorate in Counseling Psychology for the University of South central Texas in 1985. I did my internship at the V.A. Hospital here in Luna County. I worked five years for the Texas Department of Corrections, and then returned to the V.A. Hospital.

Q: Are you board certified?

A: No, but I'm licensed in the State of Texas. I received my license in 1985.

Q: What's your area of expertise?

A: Drug and alcohol abuse assessment and treatment. I would say that represents 80% of my practice.

Ms. Humphrey: The State would ask at this time that this witness be qualified as an expert and allowed to give opinion testimony and answer certain hypotheticals, Your Honor, in the area of drug and alcohol abuse assessment and treatment.

Mr. Herbster: No objections, Your Honor, other than those I previously mentioned.

The Court: All right. Dr. Appleby is so recognized.

Q: Dr. Appleby, have you testified in prior courts in Luna County as an expert?

A: Yes, I have.

Q: Did you have an opportunity to meet Dixie Herbster?

A: Yes.

Q: Do you recognize her in the courtroom today?

A: Yes. Right there (indicating), in the red blouse, short skirt and long jacket. Cute little thing.

Ms. Humphrey: May the record reflect that the witness has identified the defendant?

The Court: The record will so reflect.

Q: Do you recall when you met Dixie Herbster?

A: I believe it was October 30 of this year, for an assessment.

Q: Please describe the process during the assessment.

A: Well, I first tell the patient about the lack of confidentiality. I told Ms. Herbster that the assessment was requested by Luna County and would possibly be presented to Court and could possibly be used against her.

Q: What happens next?

A: Then I explain to the patient what the assessment consists of. There is a clinical interview and a Cain Assessment.

Q: What is a Cain Assessment?

A: It measures one's interest in, attitudes toward, and behaviors regarding drinking, and it attempts to determine the likelihood that the subject will drink and drive in the future.

Q: How does it do that?

A: Well, the Cain Assessment is composed of both an objective part and then a questionnaire. The objective part of the test is where the individual sits in a room by him or herself and looks at a number of slides of different alcoholic and non-alcoholic beverages, and it really measures one's response time, how one looks at the various slides in comparison to other slides. The results are computerized and sent to Austin, where the test is scored and then sent back to me. The premise of the test is that if one is an alcoholic, she will look longer at the alcoholic beverages than the non-alcoholic beverages.

The Court: Excuse me, counsel. It looks as if some of the jurors are falling asleep. Ladies and gentlemen, you must remain attentive during all testimony presented. Counsel, you may continue.

Q: Thank you, Your Honor. Dr. Appleby, please tell us about the questionnaire.

A: The subject answers open-ended questions related to drinking and driving, such as, "After how many bottles of beer do you think it is still acceptable to drive?" and "How much drinking do you engage in, on average, at social gatherings?" The subject's answers give me an indication of how likely she is to drink and drive.

Q: Do you consider this an accurate test?

A: Absolutely, although more so for males than females. It's 85% accurate in females and 91% accurate in males.

Q: How common is this test?

A: It's used throughout the nation. It's a very new test, but it's catching on like wildfire.

Q: Is this test recognized in the scientific community as being reliable?

A: I believe so.

Q: You say that the Cain Assessment has both an objective and subjective component. Could you please elaborate some more on that?

A: Certainly. The slides are objective in the sense that they measure reaction time, and that is a lot more difficult to falsify. The questionnaire is subjective in that it is a lot easier for a subject to present herself in a favorable way when she is answering questions.

Q: And both of those were given to Dixie Herbster, in addition to the clinical interview, correct?

A: Correct.

Q: When you evaluated Dixie, what did you determine?

Mr. Herbster: I re-urge my prior objections, Your Honor.

The Court: Overruled.

Q: What did you determine?

A: During the clinical interview, it was apparent that Dixie feels uncomfortable talking about alcohol. When she did talk about it, she tended to minimize or excuse her drinking problem. She's a troubled woman. Very troubled indeed. Lots of alleged criminal behavior in her past, but in her mind, she has never done anything wrong.

Mr. Herbster: Objection, Your Honor! Rule 404(b).

The Court: Sustained. The jury will disregard that last statement made by the witness.

Mr. Herbster: Move for mistrial.

The Court: Denied.

Q: Tell us about the Cain Assessment results.

A: Well, on the questionnaire, she responded in a socially desirable way, so one must be very cautious in interpreting that. Again, the questionnaire is subjective and it's pretty face-valid, those questions. It's fairly obvious what those questions are trying to get at. Really nothing all that significant came up with the questionnaire, but I think that was because she knew how to answer the questions in a way that made her look good.

Q: Did she show any subjective interest in drinking and driving?

A: She answered those questions negatively, indicating that she would never do such a thing. Obviously that was a lie.

Q: What about the objective part?

A: With the slides, there was evidence of significant interest in alcoholic beverages, especially vodka. Oh, how she loves her vodka! There was also significant interest in dark beer, tequila, wine, and scotch.

Q: How would you characterize Dixie Herbster?

A: Based on the results of the Cain Assessment, I would say she's about as addicted to alcohol as can be. She's a binge drinker, both socially and in private.

Q: Do you think she is in denial about the extent of her problem?

A: Oh, definitely.

Q: Do you think she can change?

A: I strongly doubt that.

Q: Do you think she is at a high risk to reoffend – to drink and drive in the future?

A: Yes, I do.

Q: Would you recommend releasing her back into society on community supervision?

A: Absolutely not. She is a danger to herself and society. She needs to be locked up for as long as possible to make sure she never drinks and drives again.

Ms. Humphrey: I pass the witness, Your Honor.

CROSS EXAMINATION

By Mr. Herbster:

Q: Was I, her attorney, present in the room when you gave her the Cain Assessment?

A: No, you were not.

Q: Are there treatment plans available? I know that's a broad question, but thinking about what you know and what you know about this case, are there treatment plans available?

A: Yes.

Q: Is that something that could be done here in Luna County?

A: Uh—

Q: Is it something you could put together?

A: Sure, I could put together a treatment plan.

Q: And doctors as qualified as you are, they could also put together treatment plans?

A: Yes.

Mr. Herbster: That's all I have, Your Honor.

The Court: You may be excused, Dr. Appleby. Thank you for your time.

APPENDIX B: Trial testimony of Lacey Clark, in its entirety

LACEY CLARK
Having been previously sworn, testified as follows:

DIRECT EXAMINATION

By Ms. Humphrey:

Q: Would you state your name and occupation for the record, please?

A: Lacey Clark, Luna County probation officer.

Q: And you're here today on the Dixie Herbster case, is that correct?

A: That's correct.

Q: Would you please tell the members of the jury how you go about coming up with a recommendation in a case such as this?

A: I primarily compile a social history of the subject and then proceed from there.

Q: Based upon putting together the social history in this case, do you believe that Ms. Herbster is a good candidate for probation?

A: No, I don't.

Q: Why not?

A: Mostly because of her past history of alcohol abuse. She is an unrepentant binge drinker, especially in social situations. She drinks and drives all the time, even after her arrest.

Mr. Herbster: Objection, Your Honor!

The Court: What is the nature of your objection, counsel?

Mr. Herbster: Uh, relevance?

The Court: Overruled. Try again.

Mr. Herbster: More prejudicial than probative?

The Court: Also overruled. You may continue, Ms. Humphrey.

Q: What else led you to believe she should not be placed on probation?

A: Well, there was also that case a couple years ago in which she was convicted of—

Mr. Herbster: Objection, Your Honor! May we approach?

The Court: You may.

(At the bench)

Mr. Herbster: Your Honor, she is about to refer to my client's previous conviction for burglary. As I am sure the prosecutor is well aware, that conviction was thrown out by the court of criminal appeals and is no longer on the books. I should know, as I was the victim in that case.

Ms. Humphrey: That is true, Your Honor. I apologize. I didn't know the witness was going to go there.

The Court: Objection sustained.

Mr. Herbster: Move to strike the witness's last answer, Your Honor?

The Court: Granted. The jury will disregard the witness's previous statement.

Mr. Herbster: Move for mistrial?

The Court: Not a chance. Let's move on.

Q: Is there any other reason why you believe probation is not appropriate for Ms. Herbster?

A: I just don't think there is any way we can guarantee that she will not drink and drive again unless she is forced to go to jail and suffer the full consequences of her actions. You know, I have three children. I do not want drunks on the road endangering their lives.

Ms. Humphrey: I pass the witness, Your Honor.

CROSS EXAMINATION

By Mr. Herbster:

Q: Ms. Clark, do you know Dixie the way I know her?

A: Definitely not.

Q: In fact, you don't know her at all, do you?

A: Personally, no.

Q: Then you can't be 100% sure that she would drink and drive in the future, can you?

A: Well, no.

Q: In fact, aren't you simply speculating on her future behavior?

A: No, I am not. I believe her past conduct is a good predictor of her future behavior.

Q: But, again, you aren't 100% sure, are you?

A: Of course not. I would say 99% sure.

Mr. Herbster: Nothing further, Your Honor.

Ms. Humphrey: No redirect, Your Honor.

The Court: The witness may be excused.

APPENDIX C: Selected excerpts from affidavit of Dan Herbster admitted at the hearing on the motion for new trial

My name is Dan Herbster. I am a licensed attorney in the State of Texas, and have been practicing law in the State of Texas for more than five years. I am primarily a litigator on the civil side and have participated in at least 20 jury trials. I have limited experience with criminal defense. I have tried two criminal trials, including this one involving my ex-wife, Dixie Herbster.

I have reviewed the allegations of Dixie Herbster in her motion for new trial and vigorously disagree with her assertion that I did not provide her with effective assistance of counsel.

I represented Dixie Herbster in May 2010 in the jury trial out of Luna County. I did the best I could under what I believe were exceptionally difficult circumstances, including that I had only weeks to prepare for trial, I had other civil cases on my docket, I had limited experience in criminal law, and the fact that my client was obviously as guilty as sin.

At the time of trial, although I knew that I was under investigation for violations of the Texas Disciplinary Rules of Professional Conduct, I had no idea I had been suspended. I believed the grievance against me ultimately would be dismissed, and I was not particularly concerned about it. The Redbeard trial had been a total disaster, I freely admit that. However, I believed then and still believe today that I did the best I could under difficult circumstances. Were mistakes made? Of course. There always are, in every trial. That does not mean that I was an ineffective attorney then or now. Ask anyone in the Luna County legal community – I am an exceptional advocate for all of my clients. As a plaintiff's attorney, I have won at least five jury trials over the years, all personal injury lawsuits.

During Dixie's trial, I do not believe that I rendered ineffective assistance. I did not subpoena Britney Lindsay, the analyst who had actually performed the test on Herbster's blood, for strategic reasons.

With regard to Dr. Appleby, he testified as a State's witness only in the punishment phase of Dixie's trial, after she had already been found guilty. I took him on voir dire examination outside the presence of the jury to clarify what admonishments, if any, that he had given to Dixie at the time he interviewed her. I also examined him about administration of the Cain Assessment, which involves both a questionnaire and an evaluation of how long the patient looks at various slides of different alcoholic beverages. Dr. Appleby testified that the test was supported by his own research and also researchers at the University of South Central Texas. He also stated that the accuracy rate for the test for female subjects was 85%, meaning a 15% error rate.

The court recognized Dr. Appleby as an expert in treatment and assessment of intoxicated offenders. I objected to admission of anything related to the Cain test

because of the fifteen percent error rate causing the test to be insufficiently reliable under Rule 702. I also objected to admission of any testimony following an inadequate admonishment of Dixie's *Miranda* rights prior to the interview. Both of these objections were overruled by the trial court and preserved for appeal.

Prior to trial I had interviewed Dr. Appleby about his report and he gave me some brochures and literature regarding the Cain Assessment that explained it in more general terms. He even demonstrated the test for me. I had also spoken with a psychiatrist from Houston (I don't recall her name) who also liked the test as an assessment tool. I also conducted independent research on the test and came across a study that supported Dr. Cain's findings. I found no research casting any doubt on the validity of the test.

My intention at the time of trial was to preserve what I perceived as good appellate issues with respect to whether Dixie should have been sent to jail rather than put on probation and placed on some treatment plan. In my opinion, Dr. Appleby's testimony had zero impact on the jury; they were highly impressed with the testimony of the probation officer, and that was the primary motive behind Dixie receiving the maximum sentence.

Dixie notes that at the time of trial, two articles by Price and Wesson had concluded that studies of the validity of the Cain Assessment were 'weak,' especially when used on females. I was not aware of their study, which apparently came out only a few weeks before trial, and I disagree that I would be able to determine that the theory behind the test was not accepted in the scientific community. I had already talked to one psychiatrist who did accept it. I had preserved for appeal what I thought were good issues attacking the reliability of the test and a questionable interview procedure.

APPENDIX D: Selected excerpts from *Smith v. State*, an unpublished opinion out of the Fifteenth Court of Appeals that came out two weeks before trial

. . . .

In her fourth issue, Smith asserts that the trial court erred during punishment in admitting purported expert evidence proffered by Gary Johnson, who spoke about the administration of a test known as the Cain Assessment. The test purportedly evaluated Smith's propensity for drinking and driving.

. . . .

Smith secured a timely running or continuing objection to Johnson's testimony. His complaint was founded upon Rule 702 of the Texas Rules of Evidence. Among other things, Smith believed that Johnson's purported expert testimony was unreliable when tested against the standard resurrected by *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) and that the trial court's admission of same was reversible error. We agree and sustain the contention.

In describing the Cain Assessment, Johnson mentions two components. They consist of a supposed "objective" aspect involving reaction time to pictures of alcoholic beverages and a subjective aspect involving self-analysis through the completion of a questionnaire. Also discussed is what the person administering the test does with it once it is completed by the subject; the raw data is sent to Dr. Cain in Austin. Johnson then describes what he does with the information returned by Dr. Cain. Yet, the sum and substance of evidence describing what Dr. Cain does to the data he receives consists of Johnson's testifying that the doctor applies some "formulas" to it and plots the results on graphs. This is of particular import because it is the sum of Cain's work which is then interpreted by individuals such as Johnson to derive the subject's degree of alcoholism and dangerousness to society.

In short, of what the formulas applied by Cain consist, how they were derived, and whether they have ever been subjected to analysis or testing goes utterly unmentioned by Johnson or anyone else. For all we know, they and their components could be mathematically based, founded upon indisputable empirical research, or simply the result of "magic." Johnson simply interpreted the "information" returned from Austin. How that undeniably pivotal "information" was contrived or applied by those in Austin remains a mystery, given the record before us and the trial court.

Simply put, the trial court, acting as gatekeeper, could not "evaluate the methods, analysis, and principles relied upon [by Johnson] in reaching [his] opinion" about Smith without evidence of the various crucial methods and principles underlying that opinion and their accuracy. And, by admitting the alleged expert evidence without that evidence, the trial court abused its discretion.

We sustain Smith's fourth issue and reverse for a new punishment hearing.

APPENDIX E: Selected excerpts from Dan Herbster's testimony at the hearing on the motion for new trial

DAN HERBSTER
Having been previously sworn, testified as follows:

DIRECT EXAMINATION

By Ms. Wingate, appellate attorney for Dixie Herbster:

Q: Mr. Herbster, are you an attorney here in Luna County?

A: Yes.

Q: But you don't practice criminal law, do you?

A: No, not really. I mostly work on the civil side, although I have tried a couple of criminal cases.

Q: One of those two cases was Ms. Herbster's DWI case, correct?

A: Correct.

Q: Were you appointed or retained in this case?

A: Retained. At the time Dixie hired me, she thought I was the best attorney in the county, and she didn't care about my lack of criminal experience.

. . . .

Q: Let's talk about Dr. Appleby's testimony. What did you do in preparation for that testimony?

A: First, I read the literature that he had given to me, although it wasn't the full, sum total of his studies. His literature was where I got the 85% accuracy rate.

Q: Would it surprise you to learn that the accuracy rate is actually 65% in females?

A: Yeah, it would.

Q: What steps did you take to ensure Dr. Appleby was giving you an accurate error rate?

A: I spoke to Dr. Appleby. I read the literature that he handed me and the literature of another expert in the field. I don't remember this other expert's name.

Q: Do you understand that Dr. Cain sells these tests for profit?

A: Of course.

Q: And, therefore, that his literature may be biased?

A: You have no proof of that.

Q: Would it surprise you to know that in Dr. Cain's own article, the accuracy rate was 65%?

A: Yes, that would surprise me. However, whether the accuracy rate is 65% or 85%, that's an awful number either way, and I made that clear to the trial court when I objected to the testimony.

Q: Okay. And so what independent research did you undertake to verify the claims of Appleby and Cain?

A: Well I asked around about it. I checked what literature I could.

Q: Okay. Who did you ask?

A: Criminal defense attorneys in Luna County who were friends of mine. I also asked my father, who is a retired judge here in Luna County.

Q: What did you ask them?

A: I would always ask them what other literature was out there. No one knew of any other literature. The Cain Assessment, as far as I knew, was a national test that was just starting to catch on in Texas. No one who I talked to, other than Appleby and the other doctor out of Houston, was very familiar with it.

Q: So that's all you did?

A: No. I also went to the University of South Central Texas Law Library and tried to read up on it.

Q: What were you looking for?

A: I tried to find out who was doing it, whether other people had sponsored it or not. I didn't find any criticism at the time, and maybe that was just a lack of researching skills.

Q: Did you do any online research on Lexis or Westlaw?

A: Yes.

Q: Would it surprise you that there is a case out of the Fifteenth Court of Appeals—*Smith v. State*, decided two weeks prior to trial—disparaging the Cain Test?

A: No. I am now aware of that case, although I wasn't at the time of trial.

Q: Can you explain why you weren't able to find that and present that to the trial court if you did this research at the Law Library?

A: Honestly, I don't know. Keep in mind, however, that it is an unpublished opinion.

Q: The University of South Central Texas also has a medical library, doesn't it?

A: Yes.

Q: Did you go to that library and try to find anything there?

A: Yes. During my research, I found an independent study that supported Dr. Cain's findings, although the study said nothing about the test's accuracy rate.

Q: So how did you verify the accuracy rate?

A: Again, I talked to criminal defense lawyers in the community, and that doctor out of Houston. My father wasn't crazy about the test, but no one else had anything negative to say about it.

Q: Dr. Appleby claimed that researchers at the University of South Central Texas had established the reliability of the test. What steps did you take to verify that claim?

A: Honestly, I just don't remember Dr. Appleby or the literature he gave me mentioning anything about that particular research study. When it came out at trial, the Price and Wesson study was news to me.

Q: Would it surprise you that the study of which Dr. Appleby referred at trial, the Price and Wesson study, actually disparaged the test? In other words, that Dr. Appleby was lying about the researchers' findings?

A: I'm not surprised now. We all know now that the test was deeply flawed. But no one, not even the prosecutors, knew it at the time.

Q: This article disparaging the test came out three weeks before trial. Shouldn't you have been aware of the article?

A: Again, I had limited preparation time. I focused my efforts on talking to people in the community who were familiar with the test. There is only so much research I could

do. My main concern was preparing for guilt / innocence. I knew Dr. Appleby was only going to testify during punishment.

Q: Were you aware that of the 162 participants in Dr. Cain's study, only 16 were females?

A: Yes.

Q: Were you aware that Dr. Cain's study did not involve anyone who admitted being an alcoholic?

A: No, but I don't see how that is relevant.

Q: Well, my client admits to being an alcoholic. But you weren't aware of that, either, were you?

A: Actually, at the time I was representing her, she was in denial about her alcoholism.

. . . .

Q: Let's talk about the one other criminal case you have tried. That case led to your current suspension, did it not?

A: Yes, but I strongly disagree that I deserved to be suspended because of that trial.

Q: Why is that?

A: Because I tried as hard as I could in that case. That is more than can be said for many of the attorneys in Luna County who actually practice criminal law on a regular basis.

Q: Isn't it true that you secretly hate Dixie? That she has been getting you into trouble for years and that you wanted her to go to jail?

A: Absolutely not! I love my ex-wife.

Ms. Wingate: Nothing further, Your Honor.

CROSS EXAMINATION

By Mr. Busby, attorney for the State

Q: Why did you take Dixie's case, Mr. Herbster, especially given your limited criminal experience?

A: Because I love her. Always have, always will. We have been through a lot of legal battles together over the years, and I thought it would be really cool to represent the woman I love. Plus, she begged me to take the case.

Q: Let's talk about your trial strategy. Why did you not spend more time cross-examining Dr. Appleby?

A: Because I didn't want to give him more time in front of the jury. During his direct examination, he came across as very arrogant and pompous. I looked at the jurors during his testimony on direct, and I could tell on their faces that they were bored by what he was saying and were highly skeptical of his strange theory. I didn't want to give him a chance to rehabilitate himself on cross. I thought his testimony could have been a lot worse than it was, and I did not want to give him an opportunity to do more damage to my client.

Q: Had Dr. Appleby ever been qualified as an expert in other criminal trials?

A: Yes. I had heard from other attorneys that he had testified in Luna County in the past, on several occasions.

Q: Did any of the attorneys who you talked to tell you he was not a reliable witness?

A: No.

Q: Now you indicated that you talked to a doctor out of Houston. You don't remember her name?

A: No.

Q: But do you remember talking to her about this kind of testimony?

A: Yes.

Q: And did she indicate to you there was any particular issue on reliability?

A: No. She was actually the test's biggest fan.

Q: Did she tell you about any articles disparaging this type of test?

A: No. If she would have, I certainly would have mentioned that to the court during trial.

Q: Was there anyone else you talked to?

A: Yes. Dr. Warren. I can't remember his first name.

Q: How did you know this doctor?

A: Some of the local lawyers had used him in the past. Like Dr. Appleby, he specialized in treatment and assessment of intoxicated offenders.

Q: Had he ever testified for you before?

A: No.

Q: Mr. Herbster, isn't it true that you did the best that you could do in this case, given the difficult circumstances?

A: Absolutely. Hey, we all know that Dixie is no saint. I tried my best to get her probation, but it was a steep hill to climb.

Q: During guilt / innocence, do you think you did a good job representing your client?

A: Yes, I do. Let's face it – the evidence against Dixie was overwhelming, especially after the blood test results were admitted. I tried my best to get that evidence suppressed, and I preserved that issue for appellate review. If Dixie's conviction is ultimately reversed, it will be because of my efforts during the trial. I'll freely admit that things did not go well during punishment. But that was not for lack of effort or investigation on my part.

Q: Why did you not subpoena Britney Lindsay, the analyst who performed the blood test on Ms. Herbster?

A: It was part of my trial strategy. Prior to trial, I had asked criminal-law practitioners in the community about whether they knew anything about Ms. Lindsay. They told me that she had testified in DWI trials in the past and that her credentials were "rock solid." They described her as a very credible witness who responded well to questions on cross-examination. They told me that if Lindsay testified, the case would be a "slam dunk" for the State. Obviously that caused me great concern. When I found out that she would not be testifying, I figured I had dodged a major bullet.

Q: What else were you thinking?

A: I also was aware that Lindsay and her supervisor, Clint Harbour, had been involved in a dating relationship that had recently ended. I was not aware of the details, but I had heard rumors that Lindsay did not take the break-up well and that it had affected her work product. When I learned that Harbour was going to testify instead of Lindsay, I figured I could ask him uncomfortable questions on cross that could possibly create reasonable doubt in the jury's mind about whether the test was done properly.

Q: Anything else?

A: I was also aware of the many questions involving the Confrontation Clause that had been raised by the Supreme Court's recent decision in *Melendez-Diaz*. I realized that by allowing a surrogate witness to testify, I could at the very least preserve error on a good appellate issue that might ultimately result in the reversal of Dixie's conviction.

Mr. Busby: Nothing further, Your Honor.

APPENDIX F: Relevant excerpts from trial testimony of Clint Harbour

CROSS EXAMINATION

By Mr. Herbster

Q: You didn't actually test Ms. Herbster's blood in this case, did you, Mr. Harbour?

A: No, I did not.

Q: So you have no way of knowing whether the test was actually performed properly?

A: I was assured by the analyst who performed the test that proper protocol was followed.

Q: But you have no personal knowledge of whether that is true, do you?

A: No.

Q: You testified earlier that Britney Lindsay was the analyst who performed the test. What is the nature of your relationship with Ms. Lindsay?

A: I'm her supervisor.

Q: Isn't it true that you and Lindsay had a dating relationship while you were her supervisor?

Ms. Humphrey: Objection, Your Honor. Relevance.

The Court: Where are you going with this, counsel?

Mr. Herbster: Your Honor, whether or not Mr. Harbour and Ms. Lindsay had a dating relationship bears directly on the issue of the credibility of this witness.

The Court: I'm going to allow it. You may answer the question.

A: Yes, we did date for a brief period of time.

Q: Did the relationship become sexual?

A: Absolutely not. She wanted it to, but I had no desire to put myself in that position.

Q: Which one of you ended the relationship?

A: I did. I eventually came to my senses and realized how inappropriate it was to be dating a woman who worked for me.

Q: Isn't it true that Ms. Lindsay did not take the break-up well?

A: What do you mean?

Q: Wasn't she distraught by the break-up?

A: I guess.

Q: In fact, didn't the quality of her work suffer?

A: No. She is the most accurate analyst who has ever worked under me. She is very good at what she does.

Q: But isn't it true that she has recently been disciplined by you?

A: That is true. She has had some disciplinary problems.

Q: What was the nature of those problems?

A: On at least two occasions, she has been insubordinate to me.

Q: What does that mean?

A: I can't go into that. An employee's disciplinary file is confidential.

Q: Okay. But isn't it true that these disciplinary problems began at around the same time as Ms. Herbster's blood was tested?

A: Yes.

Q: Why are you testifying here today instead of Ms. Lindsay?

A: She is very ill and recently went on extended sick leave.

Q: What is the nature of her illness?

Ms. Humphrey: Objection, Your Honor. Relevance.

The Court: I'm going to allow it. Overruled.

A: She has been having some mental health issues.

Q:	And did these mental health issues begin before or after she performed the test on my client's blood?

A:	I have no idea.

Mr. Herbster: Nothing further, Your Honor.

RE-DIRECT

By Ms. Humphrey

Q:	What are these "mental health issues," Mr. Harbour?

A:	Nothing serious. I think she is just depressed because of the break-up.

Q:	Do you believe these mental health issues interfered with her work?

A:	Absolutely not. I have seen no evidence of that.

Q:	In fact, has Ms. Lindsay ever been disciplined because on the quality of her work?

A:	Never.

Ms. Humphrey: I pass the witness.

RE-CROSS

By Mr. Herbster

Q:	You're not a medical doctor, are you?

A:	No.

Q:	Have you ever diagnosed a mental illness before?

A:	No.

Q:	So you have no idea what is really wrong with Ms. Lindsay, do you?

A:	No.

Mr. Herbster: Nothing further, Your Honor.

APPENDIX G: Relevant Excerpts from the trial court's findings of fact and conclusions of law following the hearing on the motion for new trial

FINDINGS OF FACT

1. During the defendant's trial, a witness testified in court to the results of the lab report of the blood test results and was subject to cross-examination.

2. The suspension of trial counsel prior to the defendant's trial was **not** for reasons that reflect so poorly upon the attorney's competence that it may be reasonably inferred that the attorney was incompetent to represent the defendant in the proceeding in question.

3. The actions of trial counsel before and during the defendant's trial were based on sound and legitimate trial strategy. Trial counsel performed sufficient trial preparation and investigation into the facts of the case, and all decisions regarding evidence presented were sufficiently explained and shown to be sound trial strategy.

4. The evidence presented indicated that the jury was not likely swayed by the testimony of Dr. Appleby.

CONCLUSIONS OF LAW

1. The defendant's confrontation rights were not violated.

2. Trial counsel rendered reasonably effective assistance during trial.

3. The defendant was not prejudiced by trial counsel's performance.