

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00574-CR

The State of Texas, Appellant

v.

Hung Quoc Dao, Appellee

**FROM THE COUNTY COURT AT LAW NO. 9 OF TRAVIS COUNTY
NO. C-1 -CR-17-218983, THE HONORABLE KIM WILLIAMS, JUDGE PRESIDING**

MEMORANDUM OPINION

After appellee Hung Quoc Dao was charged by information with driving while intoxicated, *see* Tex. Penal Code § 49.04(a), he filed a pretrial motion to suppress the blood draw evidence. The trial court conducted a hearing on the motion and, concluding that Dao had been subjected to an unreasonable search in violation of the Fourth Amendment, granted the motion. The State appeals, *see* Tex. Code Crim. Proc. art. 44.01(a)(5), contending that the trial court abused its discretion in granting the motion. We reverse the trial court's order suppressing the evidence and remand the cause to the trial court for further proceedings.

BACKGROUND

Rebecca Morton, a registered nurse and licensed paramedic, drew Dao's blood in the Travis County Jail's dedicated blood draw room pursuant to a search warrant. The State

introduced a video recording of the blood draw at the suppression hearing; the video depicted the following:

Before the blood draw, Morton had arranged the supplies for the blood draw on the top surface of a biohazard waste bin, or sharps container. As Dao entered the room, Morton removed a pair of gloves from the surface of the biohazard waste bin and put them on. Dao seated himself in a phlebotomy chair that was near both the biohazard waste bin and a small trash can. Morton applied a tourniquet, which she had removed from the surface of the biohazard waste bin, to Dao's upper arm. She then removed two connected unopened packets of disinfectant wipes from the surface of the biohazard waste bin. She opened one packet, wiped Dao's arm, and threw the used wipe into the nearby trash can. She then opened the second packet, threw the torn wrapping from both packets into the trash, wiped Dao's arm again with the second wipe, and threw the second used wipe into the trash can. Next, Morton moved an unpackaged four-by-four gauze pad, two empty blood vials, and a sealed Vacutainer needle from the surface of the biohazard waste bin to the armrest of Dao's chair.¹ She opened the Vacutainer needle, removed it from its packaging, and threw the wrapper into the trash can. She then stuck the needle into Dao's arm and filled two vials with Dao's blood.

After drawing the blood, Morton removed the tourniquet from Dao's arm and withdrew the needle. As she removed the needle, she flipped the safety cap over the needle and placed the gauze pad, which she had picked up from the armrest and folded in half, onto Dao's arm. The side of the gauze pad that had contacted the surface of the biohazard waste bin and the

¹ The record reflects that a Vacutainer needle is a needle apparatus that has two needles; one facing forward that goes into the patient's arm, another sticking out towards the back that is enclosed in a rubber sheath. When the Vacutainer tube (the empty blood vial) is inserted into the Vacutainer, the rubber sheath is pushed back, the needle is exposed inside the tube, and the blood is deposited inside the tube.

armrest of the chair was the side that touched Dao's arm. Morton put the used Vacutainer needle into the opening on the top of the biohazard waste bin as she applied pressure to Dao's arm and then instructed him to bend his arm at the elbow. She walked to the desk where she shook and labeled the vials of blood. Next, she returned to Dao, removed a sealed "tear-apart" band-aid from the surface of the biohazard waste bin, pulled it apart, and applied it to Dao's arm.² Morton then removed her gloves and threw them into the trash can.

Morton was the State's only witness at the suppression hearing. Her testimony reflected the following:

- She used the surface of the biohazard waste bin to stage her blood draw supplies because it allowed her to have all of the supplies she needed at hand while she was facing the arrestee without having to retrieve items from the desk and turn her back to the arrestee, who might hurt her or be uncooperative. Keeping the supplies close to the patient minimized the amount of time for the blood draw therefore minimizing the amount of pressure on the patient's arm.
- Her usual practice was to wipe down all the surfaces in the room, including the top of the biohazard waste bin, with bleach wipes at the beginning of her shift. She assumes that she stuck to her usual practice for her shift the night of Dao's blood draw.
- She routinely cleans the chair and biohazard waste bin between blood draws although she had no specific recollection of doing so in this case and it was possible that she did not.
- She changes gloves with each arrestee and uses a hand sanitizer in between blood draws.
- The four-by-four gauze pads are not individually packaged but come in a large "loaf" so that once the package is opened it is never completely resealed. The opened package of gauze pads is kept in the desk drawer.
- The removal of the last tube from the Vacutainer needle is "the actual ending of the removing of the blood" so "that's the point where the blood draw is complete." However, putting gauze on after the blood draw is part of the blood draw procedure.

² Morton explained that the tear-apart band-aid is a sealed band-aid; you hold the ends of the band-aid and pull apart to open and unseal it.

- The biohazard waste bin has a small one-way opening so that nothing comes back out of the container (“it’s only one way in, zero way out”).
- The venipuncture Vacutainer needle used for blood draws has a safety cap that, once put on (after the needle is removed from the patient’s arm), does not come off. Morton places the safety cap on the needle “the minute it leaves an arm,” so the needle is not exposed.
- When putting the used Vacutainer needle into the biohazard waste bin, the needle, covered by a safety cap, never touches the side of the opening or the outside barrier of the container.
- While only the needle used for the venipuncture is capped, neither of the Vacutainer needles is exposed to air because the needle exposed in the tube (the back needle) has a sheath that is pushed back in the tube while extracting the blood but that goes back over the needle to re-cover it when the tube is removed after the blood is drawn.
- Hypothetically, if there was something on the biohazard waste bin and the gauze pad touched it and then touched a person’s open wound, it could transfer whatever was on the top of the bin to that person’s wound. Different types of illnesses, infections, and diseases can possibly be transferred via “transference.”
- Morton did not remember how many blood draws she did before drawing Dao’s blood that night.³
- She did not know if any other EMS paramedic used the biohazard waste bin as a workstation.
- Subsequent to Dao’s blood draw, the jail has provided a removable tray on wheels in the blood draw room on which to put the blood draw supplies, and a smaller biohazard waste bin is now attached to the wall. Morton no longer uses the surface of the biohazard waste bin to stage her supplies.

After Morton testified, Dao called Joseph Urena, a certified phlebotomist, whose testimony reflected the following:

- Urena works for St. David’s Medical Center as a phlebotomy trainer. He has twenty-four years of phlebotomy experience total, has been a certified phlebotomist for twenty-one years, and has trained “a few hundred” in different capacities since 1998. He is

³ At the suppression hearing, the parties stipulated that Morton performed five blood draws during her shift before drawing Dao’s blood.

responsible for “troubleshooting or retraining” phlebotomists and nurses when procedures are not followed.

- Depending on how the venipuncture happens, it is possible for blood particles to remain on the back end of the Vacutainer (on the back needle) if the tube did not seal properly. However, even if the back needle is not re-covered by the sheath, the needle does not protrude past the end of the Vacutainer device.
- If you drop a used needle from above the biohazard waste bin, rather than placing it directly into the opening, there could be a risk of “blood splatter” around the opening if the needle potentially contains blood from the patient. It is possible for microscopic blood splatter to land on the top of the biohazard waste bin.
- “[A]ll types of stuff” can live on top of the biohazard waste bin. Hepatitis C can survive in dry blood outside the body up to thirty days. Urena was not aware of any particular time period that HIV can stay active as a virus outside the body because he had been taught that “basically, oxygen kills the actual virus itself.”
- Microscopic blood can create a risk of “transference”; microscopic “splashing” is sufficient to transfer to another person and cause them infection or disease.
- Using the surface of the biohazard waste bin to stage supplies is “below medical standards” and “beyond any type of safe practices”; doing so could possibly lead to risk of infection or disease.
- The phlebotomy procedure from start to finish lasts from the time you unsheathe the needle, put it into the patient, pull it out, secure the blood, and “make sure the wound that you just created is sealed.” Urena confirmed that part of the blood draw procedure is making sure that the wound is sealed, which is what the gauze is for. However, Urena acknowledged that, during the final steps of the procedure, blood is no longer being removed from the patient.

After hearing argument from counsel and clarifying the State’s legal arguments, the trial court granted the motion to suppress, stating:

I am a very germophobic person so I will just go ahead and say that even though it is on the record. But the disregard for the risk to Mr. Dao by using a biohazard bin and placing gauze on there is very troubling to me. And to say that it was done in possibly half the blood draws that she does is very troubling to me. It seems like there was a very cavalier — that she had been very cavalier about the safety of Mr. Dao and possibly other defendant patients.

If I were in a position to have my blood drawn — whether that was at a hospital, a jail, a lab, wherever — if a loved one, someone I cared about, were in that position, I would want to be treated with better care. I would want something that’s more careful and more conscientious. So, with that, I’m going to grant the defense motion to suppress.

The trial court subsequently signed an order granting Dao’s motion to suppress and issued findings of fact and conclusions of law. The court made the following relevant findings:

4. Ms. Morton used a biohazard waste bin known as a sharps container as a workstation for her blood draw supplies.
5. On top of the biohazard waste bin, Ms. Morton placed a bare 4 by 4 inch gauze pad.
6. She used the gauze pad to stanch the bleeding from the Defendant’s arm after the needle was removed from the vein. This is a necessary and routine part of the blood draw procedure.
- ...
8. The bottom side of the 4 by 4 inch gauze pad that was sitting on top of the biohazard waste bin was placed directly on top of the Defendant’s open wound.
9. There were 5 blood draws performed by Ms. Morton prior to the Defendant on the night of Defendant’s blood draw.
- ...
11. Based on Mr. Urena’s and Ms. Morton’s testimony, the Court finds that the surface of a biohazard waste bin is not sanitary. It is possible that hazardous microscopic material exists on the top of the biohazard waste bin. The Hepatitis C Virus and other viruses and bacteria causing infection could be present on the top of the biohazard waste bin.
12. During cross-examination, the Defense asked Ms. Morton “if there was something on the sharps bin and the gauze touched it, hypothetically, and then it touched a person’s open wound, [could it] transfer whatever was on the top of the sharps bin to that person’s wound?” She answered, “Hypothetically, yes.” The Defense then asked, “And you would agree with [sic] me that different types of illnesses, infections, diseases can be

transferred in that way that we just discussed via transference?” She answered, “Yes.” The Defense then asked, “And would you agree with me that it only takes a microscopic amount of said blood with disease or infection in it to transfer from one place to another, to get into a person’s blood and ultimately infect them, correct?” She answered, “Depending on what it was, yes.”⁴

13. During the Defense’s direct examination of Joseph Urena, the Defense asked, “I just want to clarify that type of behavior could possibly lead to risk of infection or disease if done the way that Ms. Morton had done?” He answered, “Yes.”
14. Ms. Morton deviated from standard and accepted medical practices during the blood draw in this case. Mr. Urena testified that her conduct was “most definitely” below medical standards and “beyond that of any type of safe practices.” The blood draw performed by Ms. Morton is below the standard of care.

In addition, the trial court made explicit findings about the credibility of Morton and Urena:

10. The Court finds that Ms. Morton is not credible with regard to whether she cleans, or does not clean, the biohazard waste bin, which she used as a work station [sic]. Specifically, Ms. Morton testified on August 5, 2019 that she cleans the biohazard waste bin between each patient whose blood she draws. On cross-examination, the defense showed Ms. Morton a transcript of her testimony in another hearing in a different court on April 1, 2019. The defense asked her if she remembered testifying in a different case that she does not usually clean the biohazard waste bin between each patient. She said she does not remember what she testified. On cross-examination, she also testified it was possible she did not clean the biohazard waste bin between each patient.
15. The Court finds that Ms. Morton’s testimony that she used the biohazard waste bin as a workstation for safety reasons was not credible. There was no evidence that the Defendant acted in a dangerous or unsafe manner during the blood draw procedure. The Defendant appeared to be cooperative during the blood draw procedure. There were several officers in the room. While the behavior of defendants can be unpredictable, there

⁴ Alteration and correction in trial court’s order.

are much more prudent and reasonable ways to handle those concerns than to use a biohazard bin as a workstation.

...

17. The Court finds credible Ms. Morton's testimony that, sometime before this hearing, the jail has provided another surface for staging equipment, and the biohazard waste bin is now mounted on the wall.
18. Aside from not believing that Ms. Morton cleaned the surface of the biohazard waste bin between blood draws and that she used the biohazard waste bin as a workstation for safety reasons, the court does find credible the remainder of her testimony.
19. The court finds the testimony of Mr. Urena credible.

Based on those findings, the trial court made the following conclusions of law concerning the blood draw:

1. Although the general environment of the blood draw room may have been a safe place to draw blood, the exposure of the 4 by 4 inch gauze pad directly on top of the biohazard waste bin prior to being placed on top of the Defendant's open wound exposed the Defendant to an unjustifiable risk of infection and pain and was therefore a violation of the Fourth Amendment of the United States Constitution as an unreasonable search.
- ...
3. Applying the 4 by 4 inch gauze pad to the open wound created by the needle is part of the blood draw as it is a required and necessary part of the procedure. Therefore, it was part of the search and seizure of the Defendant's blood.

The court made additional conclusions concerning the deterrent effect of suppression in light of the fact that the jail had since provided a satisfactory surface for staging blood draw equipment and the fact that the biohazard waste bin is now mounted on the wall. The court ultimately determined that "suppression is the best way to persuade the State not to invite unjustified elements of personal risk of infection and pain into the lives of those people in custody."

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018); *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We apply a bifurcated standard of review, *State v. Ruiz*, 581 S.W.3d 782, 785 (Tex. Crim. App. 2019); *Lerma v. State*, 543 S.W.3d 184, 189–90 (Tex. Crim. App. 2018), giving almost total deference to a trial court's findings of historical fact and credibility determinations that are supported by the record, but reviewing questions of law de novo, *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App.), *cert. denied*, — U.S. —, 139 S. Ct. 2749 (2019); *Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016).

In a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Lerma*, 543 S.W.3d at 190; *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007). In our review, “[t]he prevailing party is afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it.” *Matthews v. State*, 431 S.W.3d 596, 601 n.5 (Tex. Crim. App. 2014); *accord State v. Weaver*, 349 S.W.3d 521, 525 (Tex. Crim. App. 2011).

We overturn the trial court's ruling only if it is arbitrary, unreasonable, or “outside the zone of reasonable disagreement.” *Cortez*, 543 S.W.3d at 203; *Dixon*, 206 S.W.3d at 590. Further, we will uphold the trial court's application of the law if it is correct on any applicable theory of law, and the record reasonably supports the ruling. *Ruiz*, 581 S.W.3d at 785; *Lerma*, 543 S.W.3d at 190.

DISCUSSION

A compelled blood draw constitutes a search and seizure under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 758–59 (1966); see *Missouri v. McNeely*, 569 U.S. 141, 147 (2013) (recognizing that “[s]uch an invasion of bodily integrity implicates an individual’s ‘most personal and deep-rooted expectations of privacy’” (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985))). The “Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.” *Schmerber*, 384 U.S. at 768. The United States Supreme Court has set out a two-step test for determining the reasonableness of a blood draw. *Id.* This analysis requires a court to examine: (1) whether the police were justified in requiring the defendant to submit a blood test; and (2) whether the means and procedures employed in taking the defendant’s blood respected relevant Fourth Amendment standards of reasonableness. *Id.*; *State v. Johnston*, 336 S.W.3d 649, 658 (Tex. Crim. App. 2011).

The second part of the analysis contains two discrete questions. First, when resolving the reasonableness of the “means” employed, it must be determined whether the test chosen was reasonable. *Schmerber*, 384 U.S. at 768; *Johnston*, 336 S.W.3d at 658. Second, when resolving the reasonableness of the procedure employed, it must be determined whether the test was performed in a reasonable manner. *Schmerber*, 384 U.S. at 771–72; *Johnston*, 336 S.W.3d at 658. We review the reasonableness of the manner in which a DWI suspect’s blood is drawn on an objective, case-by-case basis in light of the totality of the circumstances surrounding the draw. *Johnston*, 336 S.W.3d at 661.

At the trial level, Dao did not challenge the first part of the analysis nor did he bring any complaint under the second part of the analysis regarding the reasonableness of the test

chosen. Rather, Dao complained solely about the procedure by which his blood was taken. He argued that his blood draw violated the Fourth Amendment because, in drawing his blood, Morton departed from accepted medical practices or the accepted standard of care in such a way as to expose him to an unjustifiable risk of infection and pain. The trial court agreed and, therefore, concluded that the search was unreasonable. In two points of error, the State contends that Dao’s blood draw did not violate the Fourth Amendment and that, even if it did, the trial court abused its discretion in suppressing the results of the blood test.

This Court has previously addressed the reasonableness of a blood draw performed by Morton under similar circumstances in which she used a biohazard waste bin as a workstation to stage her supplies when conducting a blood draw in the jail. *See State v. Fikes*, 585 S.W.3d 636 (Tex. App.—Austin 2019, no pet.). In *Fikes*, we concluded that “Fikes failed to meet his burden of showing that Morton’s actions were so egregious that they created an ‘unjustified element of personal risk of infection and pain’ that rose to the level of violating the Fourth Amendment.” *Id.* at 642 (citing *Schmerber*, 384 U.S. at 772). We explained,

Although Urena testified that pathogens can live on the top of the container and be spread through contact with blood, Fikes presented no evidence concerning the likelihood that Morton’s actions would spread a pathogen. Morton testified that it was her practice to disinfect each surface at the beginning of her shift, including the sharps container, and Fikes presented no evidence of how many people, if any, Morton drew blood from that shift before drawing his blood. Finally, Fikes presented no evidence that any part of the gauze or bandage that touched the sharps container later made contact with his puncture site.

Id. The State relies on *Fikes* to support its claim that the trial court erred in concluding that Dao’s blood draw was unreasonable. Dao distinguishes *Fikes* from the facts of his case based on the trial court’s fact findings—particularly those involving Morton’s lack of credibility about

cleaning the surface of the biohazard waste bin between blood draws—and the fact that, unlike in *Fikes*, the part of the gauze pad that touched the surface of the biohazard waste bin contacted his puncture site.

We acknowledge that the facts in this case differ, not insignificantly, from those in *Fikes*. Nevertheless, we conclude that Dao, like *Fikes*, has “failed to meet his burden of showing that Morton’s actions were so egregious that they created an ‘unjustified element of personal risk of infection and pain’ that rose to the level of violating the Fourth Amendment.” *See id.* What the evidence at the suppression hearing established—and what the trial court’s fact findings reflect—was a hypothetical risk to Dao based on mere possibilities: it is *possible* for a used Vacutainer needle to have blood on the back needle *if* the tube in the device did not seal properly when the blood was drawn; it is *possible* for microscopic blood particles to transfer from a used needle to the surface of a biohazard waste bin *if* the needle is dropped, rather than placed, into the bin and *if* the needle *potentially* contains blood from the patient; it is *possible* that hazardous microscopic materials exist on the top of a biohazard waste bin; it is *possible* that a virus or bacteria *could be* present on the surface of a biohazard waste bin; it is *possible* for microscopic blood particles to transfer infection or disease (depending on the infection or disease); and, ultimately, it is *possible* that *if* there is something on the surface of a biohazard waste bin and a gauze pad touches it and then touches an open wound, it *could hypothetically* transfer that something to the person and *could possibly* lead to a risk of infection or disease.

Given the hypothetical nature of these various possibilities, the record does not support the trial court’s finding that “a surface of a biohazard waste bin is not sanitary”—only that the surface of a biohazard waste bin might not, in some circumstances, be sanitary. Moreover, the trial court’s finding was a global statement about *a* biohazard waste bin, not a

specific finding about the surface of the biohazard waste bin that Morton used during Dao’s blood draw. The record evidence does not support an implied finding that this particular biohazard waste bin was “not sanitary” at the time of Dao’s blood draw. The evidence reflected that Morton cleaned the surfaces of the blood draw room, including the surface of the biohazard waste bin, with bleach wipes at the beginning of her shift.⁵ No evidence in the record showed that any of the myriad possibilities noted above occurred in this case or that any of the five individuals from whom Morton drew blood prior to drawing Dao’s blood (in the event that any of those possibilities had occurred) had any type of infection or communicable disease to transfer.

“[T]he focus of a Fourth Amendment analysis to determine if the manner used to seize a blood sample was reasonable is not on whether departures from standard technique or the standard of care occurred but on the effect of the bodily intrusion (including any departures from standard technique or the standard of care) on the defendant’s safety, health, dignitary interests, and personal privacy.” *Siddiq v. State*, 502 S.W.3d 387, 403 (Tex. App.—Fort Worth 2016, no pet.) (citing *Winston*, 470 U.S. at 761; *Schmerber*, 384 U.S. at 771–72). Even deferring to the trial court’s fact findings, we cannot conclude that those findings support the court’s conclusion that the application of the gauze pad to Dao’s puncture site, under the circumstance reflected here, exposed Dao to “an unjustifiable risk of infection and pain” and therefore constituted an unreasonable search. No evidence at the suppression hearing demonstrated the likelihood of risk specific to Dao based on Morton’s actions. *See, e.g., id.* (concluding that “[t]here [was] simply

⁵ The trial court explicitly found “the remainder of [Morton’s] testimony” to be credible aside from her testimony “that [she] cleaned the surface of the biohazard waste bin between blood draws and that she used the biohazard bin as a workstation for safety reasons.” Thus, the court implicitly found this evidence—that Morton cleaned the surface of the biohazard waste bin with bleach wipes at the beginning of her shift—to be credible.

no evidence that the manner in which [the blood draw technician] performed the blood draw on Siddiq—including the departures from accepted medical practices—threatened Siddiq’s safety or health, caused Siddiq trauma or pain, endangered Siddiq’s life or health, or created a level of intrusiveness greater than a typical blood draw” (citing *Winston*, 470 U.S. at 761–63)). While the evidence demonstrated a disturbing lapse by Morton in following the final steps of the protocol for a blood draw, the evidence did not show that Dao was exposed to “an *unjustified* element of *personal risk* of infection and pain.” See *Schmerber*, 384 U.S. at 772 (emphases added). The record showed only a hypothetical possibility, based on the cumulation of manifold possibilities, of such an exposure. Such a hypothetical possibility—without a showing of the likelihood of risk to Dao—does not demonstrate “an unjustified element of personal risk of infection or pain” to Dao that rises to the level of a constitutional violation.⁶ See, e.g., *Siddiq*, 502 S.W.3d at 403 (concluding that blood draw performed—even considering departures from standard of care by blood draw technician—was performed in reasonable manner as required by Fourth Amendment); *Fikes*, 585 S.W.3d at 642–43 (concluding that nurse’s use of biohazard waste bin as workstation for staging supplies and nurse running her hands through her hair and

⁶ We do not suggest that “an unjustified element of personal risk of infection and pain” can only be demonstrated by evidence of actual infection. However, some unquantified risk does not equal an “unjustified element of personal risk” that rises to the level of a constitutional violation. While the evidence at the suppression hearing supported the concept of transference, no testimony or data was presented demonstrating the statistical probability of transference of pathogens in microscopic materials. Likewise, no testimony or data was presented regarding the pathogen-transmission rate resulting from transference if transference does occur.

Evidence in the record must demonstrate the likelihood of risk to an individual beyond a general theoretical possibility. See *State v. Fikes*, 585 S.W.3d 636, 642 (Tex. App.—Austin 2019, no pet.). Our conclusion in this case simply reflects that evidence (testimony with supporting data) demonstrating the likelihood of a personal risk of exposure to infection or pain to Dao beyond a general unquantified theoretical possibility was not in the record here.

putting on sweater while wearing gloves did not demonstrate that blood draw subjected appellant to unjustified risk of infection); *Zalman v. State*, No. 13-13-00471-CR, 2015 WL 512914, at *9 (Tex. App.—Corpus Christi—Edinburg Feb. 5, 2015, pet. ref'd) (mem. op., not designated for publication) (concluding that appellant had not shown that blood draw was unreasonable despite presence of insects in room during blood draw because appellant had not shown that insects contaminated EMT's equipment or touched injection site during or after blood draw); *Adkins v. State*, 418 S.W.3d 856, 861 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (concluding that evidence that cotton ball used to clean injection area had been placed on table before it was used was “not enough evidence to prove that the environment or the procedure presented an unjustified risk of infection or pain.”); *Gambini v. State*, No. 01-12-00395-CR, 2013 WL 4680380, at *5 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, pet. ref'd) (mem. op., not designated for publication) (rejecting appellant's argument that procedures used to take blood were unreasonable even though nurse who drew her blood “touched his nose, mouth, and hair, as well as [appellant's] leg and the straps on the chair” with his gloved hands).

Because the evidence showed only the hypothetical possibility (based on the cumulation of various possibilities) of an exposure to an unjustified risk of infection, Dao failed to demonstrate that his blood draw exposed him to “an unjustified element of personal risk of infection and pain” that, therefore, subjected him to an unreasonable search. Thus, the trial court erred in concluding that Dao was subjected to an unreasonable search that violated the Fourth

Amendment. Consequently, we conclude that the trial court abused its discretion in granting Dao's motion to suppress the blood draw evidence.⁷ We sustain the State's first point of error.⁸

CONCLUSION

Having concluded that Dao failed to demonstrate that his blood draw was an unreasonable search and seizure that violated the Fourth Amendment, we hold the trial court abused its discretion in granting his motion to suppress. Accordingly, we reverse the trial court's order granting Dao's motion to suppress and remand this cause to the trial court for further proceedings consistent with this opinion.

Edward Smith, Justice

Before Chief Justice Rose, Justices Triana and Smith

Reversed and Remanded

Filed: July 9, 2020

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⁷ Given our conclusion, we do not address the State's alternative argument that the search and seizure ended the moment that Morton finished extracting blood from Dao's arm so the application of the gauze pad to his puncture site was not part of the search.

⁸ Because we reverse the trial court's order on this basis, we need not reach the State's remaining point of error, which asserts that suppression of the evidence "confers no deterrence benefits."