Affirmed and Memorandum Opinion filed August 31, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00379-CR

JERMAINE C. MITCHELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1179883

MEMORANDUM OPINION

Following a jury trial, appellant Jermaine C. Mitchell was convicted of aggravated assault and sentenced to ten years' imprisonment. Appellant challenges his conviction in seven issues. In issues one, two, and three, appellant contends the evidence is legally and factually insufficient to support his conviction and that the trial court erred by denying his motion for directed verdict. In issue four, appellant argues the trial court erred by refusing to instruct the jury on the lesser-included offense of deadly conduct. In issues five and six, appellant maintains the trial judge erred by overruling his motion for new trial and by failing to recuse herself from the new-trial hearing. In issue seven, appellant

asserts the trial court improperly admitted extraneous-offense testimony at trial. We affirm.

FACTUAL BACKGROUND

Near midnight on December 11, 2006, Jonah Foster and her friend Chase left a restaurant and began walking to Chase's car in the restaurant's parking lot. Chase left Foster's side after seeing another friend in the parking lot. As Foster continued on to Chase's car, a Mercedes Benz driven by Victor Galvez and with appellant in the passenger's seat pulled alongside her. The men began trying to strike up a conversation with Foster, who was standing next to Galvez's door. At some point, Galvez got out of the Mercedes and walked away from Foster. Appellant then asked Foster if she wanted to get in the car. Foster said "No" and began looking for Chase. As Foster scanned the parking lot, she noticed appellant reach into the rear seat of the vehicle. When she looked back at the vehicle, Foster saw that appellant had a rifle in his lap. Appellant's hands were on the rifle, which was pointed at Foster, and appellant was looking directly at her. Foster immediately ran away from the Mercedes and located Chase, who called the police. As Chase called the police, Foster was approached by Leah John, who overheard Foster speaking with Chase. John asked Foster "It happened to you, too?" and the two women began discussing the night's events.

Approximately two minutes later, members of the Houston Police Department arrived at the restaurant and stopped a Mercedes matching the description and license plate number provided by Foster and Chase. Officers recovered an AK-47 assault rifle from the floorboard of the rear seat, as well as two clips containing ammunition and a ski cap embroidered with "Police" from the vehicle's trunk. Foster provided the police with a statement and positively identified appellant as the individual who pointed the rifle at her and the recovered AK-47 as the weapon he used. Appellant was then arrested. John also spoke with the police and stated that Galvez pointed a rifle at her after the Mercedes approached her in the parking lot.

Appellant was indicted and tried for aggravated assault. The jury found appellant guilty and assessed punishment at ten years' confinement in the Texas Department of Criminal Justice, Institutional Division. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first and third issues, appellant contends the evidence is legally and factually insufficient to support his conviction because the State failed to prove that appellant committed aggravated assault while using or exhibiting a deadly weapon. In his second issue, appellant argues the trial court erred by denying his motion for directed verdict.[1]

A. Standards of Review

When reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could find the essential elements of the charged offense beyond a reasonable doubt. *Rollerson v. State*, 227 S.W.3d 718, 724 (Tex. Crim. App. 2007). As the trier of fact, the jury "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). As such, the jury may choose to believe or disbelieve any portion of the testimony at trial. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). However, our duty as a reviewing court requires us to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime charged. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

While conducting a factually sufficiency review, we view all of the evidence in a neutral light to determine whether the jury's verdict is justified. *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008); *Roberts v. State*, 220 S.W.3d 521, 524 (Tex. Crim. App. 2007). A conviction may be reversed for factual insufficiency only when (1)

[1] We review a challenge to a trial court's denial of a motion for directed or instructed verdict as a challenge to the legal sufficiency of the evidence. *See Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 2003); *Gabriel v. State*, 290 S.W.3d 426, 435 (Tex. App.—Houston [14th Dist.] 2009, no pet.). For this reason, we will address appellant's first and second issues together.

the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust or (2) there is some objective basis in the record showing the verdict is contradicted by the great weight and preponderance of the evidence. *Berry v. State*, 233 S.W.3d 847, 854 (Tex. Crim. App. 2007). During our review, we discuss the evidence the appellant claims is most important in allegedly undermining the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003). If we determine the evidence is factually insufficient, we must explain in exactly what way we perceive the conflicting evidence to greatly preponderate against conviction. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006).

B. Analysis

A person commits the offense of assault if that person intentionally or knowingly threatens another with imminent bodily injury. TEX. PENAL CODE ANN. § 22.01(a)(2) (Vernon Supp. 2009). "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. *Id.* § 1.07(a)(46). The offense becomes aggravated assault if the offender uses or exhibits a deadly weapon while carrying out the assault. *Id.* § 22.02(a)(2). "Deadly weapon" is defined as a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury. *Id.* § 1.07(a)(17)(A).

Appellant asserts the State failed to prove he threatened Foster with imminent bodily injury. In support of this contention, appellant cites several portions of Foster's testimony in which she states that appellant did not say anything to her or make his intentions known after reaching into the back seat to grab the rifle. Thus, appellant asserts, at no point did his conduct with the assault rifle or his actions ever communicate a threat to Foster.

The gist of an assault offense is that an individual acts with the intent to cause a reasonable apprehension of imminent bodily injury, though not necessarily with the intent

to cause such harm. *Dobbins v. State*, 228 S.W.3d 761, 766 (Tex. App.—Houston [14th Dist.] 2007, pet. dism'd, untimely filed); *Edwards v. State*, 57 S.W.3d 677, 679 (Tex. App.—Beaumont 2001, pet. ref'd). Evidence is sufficient to sustain a conviction for aggravated assault by threat when it establishes that (1) the victim perceived a threat and (2) a threat was made. *See Olivas v. State*, 203 S.W.3d 341, 350 (Tex. Crim. App. 2006); *Dobbins*, 228 S.W.3d at 766.

It is well-established that threats may be conveyed in more varied ways than merely orally. *McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984); *Dobbins*, 228 S.W.3d at 766. In addition to being communicated orally, threats also may be communicated by action or conduct. *Dobbins*, 228 S.W.3d at 766; *Tidwell v. State*, 187 S.W.3d 771, 775 (Tex. App.—Texarkana 2006, pet. struck). Under the proper circumstances, the mere presence of a deadly weapon may be enough to instill fear and threaten a person with bodily injury. *Tidwell*, 187 S.W.3d at 775; *Gaston v. State*, 672 S.W.2d 819, 821 (Tex. App.—Dallas 1983, no pet.) (op. on reh'g) ("It was the presence of the gun in appellant's hand that instilled fear in complainant and made her feel threatened with bodily injury."); *see also Williams v. State*, No. 01-03-00443-CR, 2004 WL 1065360, at *2 (Tex. App.—Houston [1st Dist.] May 13, 2004, pet. ref'd) (mem. op., not designated for publication) (concluding testimony by complainant that defendant pointed a pistol at her head was legally sufficient evidence to sustain an aggravated assault conviction). Additionally, aiming a deadly weapon at a supposed victim is sufficient evidence of a threat to sustain a conviction for aggravated assault. *Ward v. State*, 113 S.W.3d 518, 521 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

Here, Foster testified that she began to feel scared after appellant asked her to get into the Mercedes. After Foster declined to enter the vehicle, appellant reached into the back seat, grabbed an assault rifle, and laid it in his lap with it pointed at Foster. Foster stated that although appellant did not orally threaten her, she was scared appellant "was going to shoot me or something" and felt threatened with imminent bodily injury. Under

these facts, we conclude Foster's testimony establishes that (1) Foster perceived a threat and (2) appellant threatened Foster with imminent bodily injury by pointing an assault rifle at her. *See, e.g.*, *Olivas*, 203 S.W.3d at 350; *Tidwell*, 187 S.W.3d at 775; *Ward*, 113 S.W.3d at 521.

Appellant also contends the State failed to prove he used or exhibited a deadly weapon. We disagree. According to the uncontested facts at trial, appellant placed an assault rifle in his lap and pointed it at Foster. A firearm is a deadly weapon per se. *See* TEX. PENAL CODE ANN. § 1.07(a)(17)(A); *Ex parte Huskins*, 176 S.W.3d 818, 820 (Tex. Crim. App. 2005). Accordingly, there is sufficient evidence showing that appellant used or exhibited a deadly weapon during his encounter with Foster.

After viewing the evidence in the light most favorable to the verdict, we conclude a rational finder of fact could have found beyond a reasonable doubt that appellant threatened Foster with imminent bodily injury while using and exhibiting a deadly weapon. We further conclude, after conducting a neutral review of the evidence, that the proof supporting the verdict is not so week as to appear clearly wrong and manifestly just or contradicted by the great weight and preponderance of the evidence. The evidence is therefore legally and factually sufficient to support appellant's conviction. *See Rollerson*, 227 S.W.3d at 724; *Berry*, 233 S.W.3d at 854. We overrule appellant's first, second, and third issues.

DEADLY-CONDUCT INSTRUCTION

In his fourth issue, appellant argues the trial court erred by refusing his request to include an instruction on the lesser-included offense of deadly conduct. After the close of evidence, appellant requested that the jury charge include an instruction on deadly conduct. The State opposed appellant's request, arguing there was no evidence that appellant was guilty only of the lesser-included offense. The trial court denied appellant's request.

A. Standard of Review

We review a trial court's decision regarding a lesser-included offense charge for an abuse of discretion. *Hall v. State*, 283 S.W.3d 137, 157 (Tex. App.—Austin 2009, pet. ref'd); *Dobbins*, 228 S.W.3d at 768. We use a two-pronged test to determine whether a defendant is entitled to an instruction on a lesser-included offense. *See Pickens v. State*, 165 S.W.3d 675, 679 (Tex. Crim. App. 2005). First, the lesser-included offense must be included within the proof necessary to establish the charged offense. *Id.* Second, the record must contain some evidence that if the defendant is guilty, he is guilty only of the lesser offense. *Id.*

B. Analysis

We will focus our analysis on the second prong of the test as it is well-settled that deadly conduct is a lesser-included offense of aggravated assault. *See Guzman v. State*, 188 S.W.3d 185, 190 (Tex. Crim. App. 2006); *Isaac v. State*, 167 S.W.3d 469, 474 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). When applying the second prong of the test, we review all of the evidence presented at trial without considering the credibility of the evidence or whether it conflicts with other evidence. *Delacruz v. State*, 278 S.W.3d 483, 488 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). If more than a scintilla of evidence from any source indicates that the defendant is guilty only of the lesser-included offense, the trial court must submit the requested instruction. *Williams v. State*, 294 S.W.3d 674, 680–81 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). The record must contain affirmative evidence raising the lesser offense before an instruction is warranted. *Id.*

The principal difference between aggravated assault as charged in the indictment and deadly conduct is the culpable mental state. A conviction for aggravated assault requires proof that the defendant *intentionally or knowingly* threatened another with imminent bodily injury while using or exhibiting a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02(a)(2). In contrast, a conviction for deadly conduct

requires proof that the defendant *recklessly* engaged in conduct that placed another in imminent danger of serious bodily injury. *See id.* § 22.05(a) (Vernon 2003). Recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded. *Id.* § 22.05(c). Appellant contends the jury could have reasonably concluded that his conduct in pulling out the rifle and placing it on his lap while Foster stood near the Mercedes constituted a conscious disregard of a substantial and unjustifiable risk, thus raising the issue of recklessness. *See id.* § 6.03(c) (defining reckless behavior).

The undisputed evidence at trial establishes that Foster saw appellant reach into the rear seat of the Mercedes after she declined to get in the car with him. When Foster turned back toward appellant after looking for her friend, she saw appellant staring directly at her with his hands on the rifle while the barrel of the rifle was pointed at her. This does not constitute evidence that appellant's conduct was merely reckless; rather, it demonstrates that he acted deliberately and intentionally in reaching for a weapon and pointing it at Foster. As the evidence does not raise more than a scintilla of evidence that appellant was guilty only of the lesser-included offense of deadly conduct, appellant was not entitled to a deadly-conduct instruction. *See Williams*, 294 S.W.3d at 681 ("There must be affirmative evidence in the record raising the lesser offense before an instruction is warranted.").

In spite of the lack of evidence supporting appellant's requested instruction, appellant contends the trial court "acknowledge[d] that the evidence raised the issue of reckless conduct." Appellant references the following exchange between the trial judge, defense counsel, and the prosecutor after appellant submitted his request for a deadly conduct instruction:

> [The Court]: What evidence is there that it was only reckless and not intentional, Mr. Hecker?
>
> [Defense Counsel]: The fact is that it wasn't the type of pointing a weapon that you normally see in an aggravated assault. It wasn't the holding the

> weapon and pointing of the weapon, and we believe that it is the difference that would make it a reckless act rather than an intentional act.
>
> . . .
>
> [The Court]: What is your opinion, Ms. Evans? Do you have an opinion about it?
>
> [Prosecutor]: I'm trying to think in terms of what specifically was raised from testimony.
>
> [The Court]: That it was reckless instead of intentional?

Appellant maintains the trial judge's query "That it was reckless instead of intentional?" constitutes "the trial court's own admission" that the evidence raised the issue of reckless conduct. This is a mischaracterization of the trial judge's statement, which was plainly meant to clarify the prosecutor's statement. The trial judge clearly did not believe the evidence raised the issue of recklessness, given her ultimate conclusion that "I just don't see it, since I have heard the testimony. I just don't see it as reckless. So, the Defense request for a lesser is denied."

The evidence in this case does not demonstrate that appellant was guilty only of the lesser-included offense of deadly conduct and not the greater offense of aggravated assault. Accordingly, the trial court did not err by overruling appellant's request for a deadly-conduct instruction. We overrule appellant's fourth issue.

ADMISSIBILITY OF OTHER CRIMES, WRONGS, OR ACTS

In his seventh issue, appellant contends the trial court erred in admitting evidence of an extraneous act of misconduct by Victor Galvez, the driver of the Mercedes. According to the testimony, Leah John left the restaurant at approximately the same time as Foster on the night of the offense. As she walked to her car, she was stopped by the vehicle containing Galvez and appellant. The two men asked John if she wanted to go have breakfast with them. John declined this invitation, and Galvez then asked if he could drive her to her car. John responded "No. You could be a psycho. I'm not getting

into the car with you." Galvez replied "I could be a psycho," and then reached into the rear seat, pulled out the assault rifle, and pointed it at John. John acknowledged that she spoke mainly with Galvez and that she did not see appellant handle the rifle at any time. Prior to and during trial, appellant objected under Texas Rule of Evidence 404(b) that John's testimony constituted inadmissible extraneous offense evidence elicited to prove appellant's character. *See* TEX. R. EVID. 404(b). The trial court overruled appellant's objections and allowed John to testify.

On appeal, appellant contends that John's testimony was inadmissible under Rules 403 and 404(b) because its probative value was substantially outweighed by the danger of unfair prejudice and it was impermissible evidence of other crimes, wrongs, or acts elicited solely to prove appellant's character and character conformity. *See* TEX. R. EVID. 403, 404(b). Because appellant's sole objection at trial was that John's testimony constituted impermissible character evidence, the issue of whether her testimony was unfairly prejudicial is not properly before this court. *See* TEX. R. APP. P. 33.1; *Rothstein v. State*, 267 S.W.3d 366, 373 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) ("An objection stating one legal theory may not be used to support a different legal theory on appeal."). An objection under Rule 404(b) is not sufficient to raise the issue of unfair prejudice; further objection under Rule 403 is required. *See Montgomery v. State*, 810 S.W.2d 372, 388–89 (Tex. Crim. App. 1990) (op. on reh'g); *Grider v. State*, 69 S.W.3d 681, 687 (Tex. App.—Texarkana 2002, no pet.). Therefore, we will address only whether John's testimony was admissible under Rule 404(b).

A. Standard of Review

Whether evidence of extraneous acts of misconduct has relevance apart from character conformity is a question for the trial court. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). We review a trial court's ruling on the admissibility of extraneous offenses for an abuse of discretion. *Prible v. State*, 175 S.W.3d 724, 731 (Tex. Crim. App. 2005). There is no abuse of discretion so long as the trial court's ruling

is within the "zone of reasonable disagreement." *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007).

B. Analysis

Under Rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove an individual's character or to show action in conformity with that bad character. *See* TEX. R. EVID. 404(b). This is because evidence of extraneous acts forces the accused to defend himself against uncharged crimes in addition to the charged offense and encourages the jury to convict based on the accused's bad character rather than the proof at trial. *Daggett v. State*, 187 S.W.3d 444, 451 (Tex. Crim. App. 2005). Evidence of extraneous misconduct may be admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." TEX. R. EVID. 404(b). This list of exclusions is illustrative, not exhaustive. *See Berry*, 233 at 858. The circumstances justifying the admissibility of evidence of extraneous misconduct must be judged on a case-by-case basis. *Pollard v. State*, 255 S.W.3d 184, 188 (Tex. App.—San Antonio 2008), *aff'd*, 277 S.W.3d 25 (Tex. Crim. App. 2009).

The Court of Criminal Appeals has determined that Rule 404(b) applies to the conduct of third parties in addition to the conduct of the accused. *See Castaldo v. State*, 78 S.W.3d 345, 348–49 (Tex. Crim. App. 2002); *Thomas v. State*, 137 S.W.3d 792, 795 (Tex. App.—Waco 2004, no pet.). Third-party acts may reflect on the character of the accused and, if they do, these acts are subject to exclusion under Rule 404(b) unless an exception to the rule applies. *See Lucky v. State*, No. 05-02-00108-CR, 2003 WL 40670, at *5 (Tex. App.—Dallas Jan. 6, 2003, no pet.) (not designated for publication) (citing *Castaldo*, 78 S.W.3d at 350–51).

C. John's Testimony Admissible to Show Context of the Offense

In overruling appellant's Rule 404(b) objection, the trial court reasoned that John's testimony was admissible as "same transaction contextual evidence." Same transaction

contextual evidence reflects the context in which the charged offense occurred. *McDonald v. State*, 148 S.W.3d 598, 601 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 179 S.W.3d 571 (Tex. Crim. App. 2005). In order to realistically evaluate the evidence, the jury is entitled to know all of the relevant facts and circumstances and to hear what occurred immediately prior to and subsequent to the offense. *Prible*, 175 S.W.3d at 732; *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Austin v. State*, 222 S.W.3d 801, 808 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). To be admissible under Rule 404(b), same transaction contextual evidence must be necessary to the jury's understanding of the offense. *McDonald*, 148 S.W.3d at 601–02. Necessity is therefore the "other purpose" for which such evidence may be admitted under Rule 404(b). *See* TEX. R. EVID. 404(b); *McDonald*, 148 S.W.3d at 602. Necessity may exist either because: (1) several offenses are so intermixed or connected as to form a single, indivisible criminal transaction, making it impracticable not to discuss one in describing the other, or (2) the same transaction contextual evidence serves to establish some evidentiary fact, such as motive or intent. *McDonald*, 148 S.W.3d at 602; *see also Mason v. State*, No. 08-07-00189-CR, 2009 WL 2623363, at *6–7 (Tex. App.—El Paso Aug. 26, 2009, pet. ref'd) (not designated for publication) (applying the *McDonald* standard and concluding arresting officer's testimony regarding his observations of appellant before, during, and after appellant's arrest provided the jury with information essential to understanding the context and circumstances of the arrest).

The State's theory at trial was that appellant and Galvez were intentionally threatening young women with the rifle while driving through the restaurant's parking lot. During cross-examination of the State's witnesses, appellant attempted to demonstrate that the State had not proven intent because he did not orally threaten Foster or lift the rifle out of his lap while pointing it at her. *See, e.g.*, *Olivas*, 203 S.W.3d at 350 (evidence showing the victim perceived a threat is necessary to prove aggravated assault by threat). However, when appellant's conduct with Foster is viewed in context with his and Galvez's interaction with John, mere minutes later, the evidence showing appellant's

intent becomes much more apparent. The State was thus entitled to use John's testimony to show the context in which the charged offense occurred in order to establish appellant's intent to threaten Foster. *See Reyes v. State*, 267 S.W.3d 268, 276 (Tex. App.—Corpus Christi 2008, pet. ref'd) ("[I]ntent is a fact question to be determined by the trier of facts from all the facts and circumstances in evidence."). Further, because the evidence was closely related in time, location, and subject matter with the charged offense, it was within the trial court's discretion to conclude it was "arising in the same transaction." *See McDonald*, 148 S.W.3d at 602; *see also Wesbrook*, 29 S.W.3d at 115 (stating the jury has the right to hear what occurred immediately prior to and subsequent to the offense). The trial court, therefore, did not err by concluding John's testimony constituted same transaction contextual evidence and overruling appellant's Rule 404(b) objection.

D. Appellant Was Not Harmed by John's Testimony

Even if the trial court erred in allowing John to testify concerning Galvez's actions, any error was harmless. Error in the admission of evidence constitutes non-constitutional error. *See* TEX. R. APP. P. 44.2(b); *Plouff v. State*, 192 S.W.3d 213, 222 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Reviewing courts disregard any non-constitutional errors that do not affect the defendant's substantial rights. TEX. R. APP. P. 44.2(b); *Plouff*, 192 S.W.3d at 222. A conviction may not be overturned for non-constitutional error if the reviewing court, after reviewing the record as a whole, has fair assurance that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004). In assessing the likelihood that the defendant's substantial rights were adversely affected, we consider the entire record, including voir dire, all testimony or physical evidence considered by the jury, the State's theory and any defensive theories, the nature of the evidence supporting the verdict, the jury instructions, closing arguments, whether

the State emphasized the error, and the character of the alleged error. *Rich v. State*, 160 S.W.3d 575, 577–78 (Tex. Crim. App. 2005).

Here, we cannot say that John's testimony had a substantial and injurious influence in determining the jury's verdict. Foster's testimony identifying appellant as the individual who pointed the assault rifle at her is sufficient evidence, standing alone, to sustain appellant's conviction. *See Ward*, 113 S.W.3d at 521. John clearly testified that, while appellant was in the vehicle with Galvez, she interacted mainly with Galvez and that appellant did not handle the rifle at any time during the encounter. During closing argument, the prosecutor reemphasized appellant's lack of involvement with John by stating "[John] can't put the gun in [appellant's] hands. She didn't have anything to do with him." Thus, the jury was reminded on several occasions that appellant did not threaten John in any manner. The danger of the testimony having an injurious influence is reduced when it involves evidence of a third party's extraneous act. *See Castaldo*, 78 S.W.3d at 350 (noting in context of Rule 403 analysis that danger of unfair prejudice may be much lower when evidence of a third party's extraneous act is offered). Considering the record as a whole, including the evidence of appellant's guilt discussed above, any error by the trial court in allowing John to testify regarding her encounter with Galvez did not affect appellant's substantial rights. Accordingly, error, if any, in the admission of extraneous-offense testimony was harmless. We overrule appellant's seventh issue.

POST-VERDICT MOTIONS

After the trial court entered final judgment, appellant filed a motion for new trial. The trial judge, the Honorable Jan Krocker, conducted a hearing regarding this motion. During the hearing, appellant argued that a new trial was necessary because Judge Krocker denied his request for a deadly-conduct jury instruction and overruled his Rule 404(b) objection to John's testimony. Appellant's counsel insisted that Judge Krocker initially found appellant was entitled to a deadly conduct instruction, but changed her ruling after the prosecutor informed the court that the State could defend the issue on

appeal. Counsel then announced he would be filing a motion to recuse Judge Krocker from hearing the motion for new trial because resolving the issue could involve calling Judge Krocker as a witness to explain her rulings. Judge Krocker stopped the proceedings and allowed appellant to file an emergency motion to recuse. The recusal motion was assigned to the Honorable Belinda Hill, who conducted a hearing and denied appellant's motion. Judge Krocker then continued the hearing regarding appellant's motion for new trial and denied appellant's request. These rulings form the basis of appellant's fifth and sixth issues.

A. Motion to Recuse

In his sixth issue, appellant asserts Judge Krocker erred by failing to recuse herself from the motion for new trial hearing.

1. Standard of Review

We review a denial of a motion to recuse for an abuse of discretion. TEX. R. CIV. P. 18a(f); *Roman v. State*, 145 S.W.3d 316, 319 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). The determination of whether recusal is necessary is a fact-intensive process that must be made on a case-by-case basis. *Abdygapparova v. State*, 243 S.W.3d 191, 198 (Tex. App.—San Antonio 2007, pet. ref'd). Absent a clear showing to the contrary, we presume the trial court was neutral and detached. *Id.* In making our determination, we consider the totality of the evidence presented at the recusal hearing. *Roman*, 145 S.W.3d at 319.

2. Bias and Impartiality

Appellant contends Judge Krocker's denial of his request for a deadly-conduct instruction shows bias or partiality "of such a nature and extent that it denied [appellant] due process of law." *See* TEX. R. CIV. P. 18b(2)(b) (stating a judge shall be recused if he or she "has a personal bias or prejudice concerning the subject matter or a party"). Generally, bias or partiality sufficient to warrant recusal must arise from an extrajudicial

source and result in an opinion on the merits based on information other than what the judge learned from participating in the case. *Roman*, 145 S.W.3d at 321. If the alleged bias does not result from an extrajudicial source, the only proper basis for recusal based on bias or partiality is a showing of a high degree of favoritism or antagonism. *Id.* at 322. To make this showing, the movant must provide sufficient information to show that a reasonable person with knowledge of all of the circumstances would harbor doubts as to the judge's impartiality. *See Abdygapparova*, 243 S.W.3d at 198. The alleged bias must be of such a nature and extent as to deny the defendant due process of law. *Wesbrook*, 29 S.W.3d at 121; *Roman*, 145 S.W.3d at 321.

During the recusal hearing, appellant's counsel argued that Judge Krocker made a finding of recklessness by stating "That [appellant's conduct] was reckless instead of intentional?" Counsel then argued that Judge Krocker reversed this finding and decided not to include the deadly-conduct instruction only after the prosecutor stated the State could successfully defend the omitted instruction on appeal. Counsel opined that Judge Krocker should have recused herself from appellant's motion for new trial because she would "have to become a witness and explain her actions" for denying appellant's requested instruction after initially finding the issue of recklessness was made. The State argued that appellant made no showing that Judge Krocker was influenced or biased in any way and that appellant was simply trying to "subject Judge Krocker to cross-examination on each one of her rulings."

Judge Krocker's statements concerning appellant's alleged recklessness were not sufficient to create doubt as to her impartiality or bias, thus interfering with appellant's due process rights. As we concluded in our discussion of appellant's fourth issue, the record does not support appellant's assertions that Judge Krocker found appellant's conduct to be reckless. The only finding in the record concerning recklessness was Judge Krocker's ultimate conclusion that she did not see appellant's conduct as reckless. Appellant is essentially arguing that Judge Krocker's bias or partiality is established by

her ruling and that she would be called as a witness at the new trial hearing to explain her ruling. Standing alone, a judicial ruling can almost never constitute a valid basis for a bias or partiality motion. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("Almost invariably, [judicial rulings] are proper grounds for appeal, not for recusal."); *Kniatt v. State*, 239 S.W.3d 910, 918 (Tex. App.—Waco 2007, pet. ref'd) (per curiam) (op. on reh'g); *Garcia v. State*, 246 S.W.3d 121, 147 (Tex. App.—San Antonio 2007, pet. ref'd), *cert. denied*, 129 S. Ct. 404 (2008). Also, as this court has previously noted, allowing recusal in every situation where a party threatens to call the judge as a witness "would result in unwarranted recusal and provide an easy means of recusing a judge." *Sommers v. Concepcion*, 20 S.W.3d 27, 42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

In this case, Judge Krocker's comments regarding the state of the evidence were not sufficient to rebut the presumption of a neutral and detached trial court. Accordingly, Judge Hill did not abuse her discretion in denying appellant's motion to recuse and Judge Krocker did not err by refusing to recuse herself. *See Abdygapparova*, 243 S.W.3d at 198. Appellant's sixth issue is overruled.

B. MOTION FOR NEW TRIAL

In his fifth issue, appellant argues the trial court erred by overruling his motion for new trial because the trial court refused his request for a deadly-conduct instruction, thereby "misdirect[ing] the jury about the law." We review a trial court's ruling on a motion for new trial for an abuse of discretion. *State v. Herndon*, 215 S.W.3d 901, 906 (Tex. Crim. App. 2007); *Clarke v. State*, 305 S.W.3d 841, 846 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). A trial court abuses its discretion by denying a motion for new trial when no reasonable view of the record could support its ruling. *Clarke*, 305 S.W.3d at 846. As we determined in issue four, appellant was not entitled to a deadly-conduct instruction because the record is devoid of any evidence that he acted recklessly in reaching into the back seat for the assault rifle and pointing it at Foster. Accordingly,

we cannot say the trial court abused its discretion in denying appellant's motion for new trial. Appellant's fifth issue is overruled.

CONCLUSION

Having overruled each of appellant's issues, we affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.
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