Opinion issued November 29, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00731-CR

GABINO G. RODRIGUEZ, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Case No. 2070126

MEMORANDUM OPINION

A jury convicted appellant, Gabino G. Rodriguez, Jr., of the Class A misdemeanor offense of driving while intoxicated (DWI).[1] The trial court assessed

[1] *See* TEX. PENAL CODE ANN. § 49.04(a), (d) (West Supp. 2018) (providing that DWI offense is Class A misdemeanor if evidence demonstrates that analysis of person's

appellant's punishment at confinement for one year, probated for one year, and imposed a $1,000 fine. In two issues on appeal, appellant argues that (1) the trial court abused its discretion by excluding evidence that Dr. Fessessework Guale, the original expert reviewer of the toxicology report of appellant's blood-alcohol concentration, who was replaced at trial, had previously falsified her education and expert qualifications and had resigned from her position as a result; and (2) the trial court demonstrated partiality towards the State, depriving appellant of a fair trial.

We affirm.

Background

A. Factual Background

On January 22, 2016, Harris County Sheriff's Office (HCSO) Deputy J. Gaspar was on duty until 10:00 p.m. Deputy Gaspar stayed at the HCSO substation for two more hours writing reports before he left to drive home around midnight. Deputy Gaspar remained in uniform, but he was driving his personal vehicle, not a marked patrol car.

As Deputy Gaspar was driving southbound down Highway 6, in west Houston, he encountered appellant, who was also driving south. Deputy Gaspar's attention was drawn to appellant when he noticed that appellant's vehicle was not

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blood shows alcohol concentration level of 0.15 or more at time analysis was performed).

staying within one lane and nearly struck another vehicle, causing the other cars on the road to slow down and move out of appellant's way. Deputy Gaspar followed appellant and saw appellant moving in and out of the lane, hitting a curb, and driving on the shoulder of the road. At the intersection of Highway 6 and Bellaire Boulevard, Deputy Gaspar pulled behind appellant in the left turn lane onto Bellaire and stopped appellant. Deputy Gaspar asked appellant if he was okay, and, when appellant responded, Gaspar "smelled a strong odor of alcohol coming from his mouth." Deputy Gaspar testified that appellant's eyes were red and glassy, that his speech was slurred, and that appellant hesitated when answering questions and spoke in a way Gaspar could "hardly understand."

Deputy Gaspar told appellant to turn left at the light and pull into a nearby parking lot. He then contacted dispatch and requested that another unit stop by to perform field sobriety tests. HCSO Deputy J. Trevino, who worked out of an HCSO storefront location in the same shopping center where appellant and Deputy Gaspar had parked, arrived at the scene within minutes and took over the investigation.

Deputy Trevino testified that he was already in the parking lot when he received Deputy Gaspar's dispatch, and he responded to the scene. When Deputy Trevino approached appellant, he observed that appellant had red, bloodshot eyes and a strong odor of alcohol on his breath. Appellant told Deputy Trevino that he had been at a local sports bar where he had "a couple beers, or four beers." Deputy

Trevino decided to conduct standardized field sobriety tests, and, when appellant got out of his vehicle, Trevino noticed that appellant's balance was unsteady, that he was stumbling, and that he was using his vehicle for balance. Appellant would not follow directions on the horizontal gaze nystagmus test, he displayed six clues of intoxication on the walk and turn test, and he was unable to perform the walk and turn test fully. Deputy Trevino determined that appellant was intoxicated and placed him in custody.

Deputy Trevino read appellant the required statutory warnings related to breath and blood samples, and appellant consented to provide a breath sample. Deputy Trevino transported appellant to a local HCSO substation to use the Intoxilyzer to measure the alcohol concentration in appellant's breath. However, Deputy Trevino was unable to obtain a breath sample from appellant. At first, instead of blowing into a tube on the Intoxilyzer, appellant began sucking on the tube, and then appellant started chewing on the mouthpiece of the tube, and Deputy Trevino stopped the test to avoid damage to the machine. Deputy Trevino asked appellant if, instead of a breath sample, he would be willing to provide a blood sample, and appellant consented. Deputy Trevino drove appellant to Central Intox, located at Houston Police Department headquarters, and a nurse took a sample of appellant's blood.

Andre Salazar, a former forensic toxicologist at the Harris County Institute of Forensic Sciences (HCIFS), conducted the analysis on appellant's blood sample. Salazar testified that appellant's blood-alcohol concentration, as reported by HCIFS, was 0.230 grams per 100 milliliters. The trial court admitted a copy of an amended toxicology report concerning appellant's blood sample. This report was signed by Salazar as the analyst, Ashlyn Beard as the technical reviewer, and Dr. Teresa Gray as the expert reviewer.

Salazar testified concerning the roles of the technical reviewer and the expert reviewer of an HCIFS toxicology report. He stated:

> Ms. Beard is the technical reviewer for the case. Her responsibility as the technical reviewer is to look at the case in its entirety. All the analyses that were performed with this case, make sure that standard operating procedure was performed, quality controls, everything that's—all the criteria that's laid out in the SOP has been followed and it's within the ranges; that no issues exist, that the documentation that's contained within this case folder is supposed to be there. Also, she checks chain of custody, not only with the cases and the submission forms; makes sure that all the appropriate documentation is there. And then once she [is] completed with that, she then signs it and passes it off to the next level of review.

He testified that Dr. Gray, HCIFS's chief toxicologist, was the expert reviewer who is "the one[] who [is] responsible for the interpretive aspects of this case. You know, what does this number mean." He stated that the expert reviewer "does do some review of the case, but not as the technical reviewer would do."

B. Procedural Background

The State filed a pretrial motion in limine, requesting that the trial court instruct defense counsel not to mention certain topics. In its motion, the State informed the trial court and defense counsel that it had learned that Dr. Fessessework Guale, formerly with HCIFS and the original expert reviewer of Salazar's toxicology report on appellant's blood sample, had resigned her position with HCIFS in part because of a discovery that she had misrepresented her educational background. The State noted in the motion that Dr. Guale had been "no-billed" on a charge of aggravated perjury. The State also noted that the Texas Forensic Science Commission was investigating Dr. Guale's testimony in past cases "to determine whether her testimony regarding retrograde extrapolation calculations is consistent with recognized scientific standards" and that HCIFS had disclosed to the Commission that Dr. Guale had previously "relied on a software program known as BACTracker without understanding the underlying ethanol pharmacokinetics upon which the software is based."

The trial court addressed the State's motion in limine during a pretrial hearing. The trial court immediately stated that it was familiar with the controversy surrounding Dr. Guale, as the issue had arisen in another case before the court, and it granted the State's motion in limine. With regard to whether the court would completely restrict defense counsel from going into this matter at trial, the court

stated to counsel, "[A]ll you have to do is approach the Bench and show some materiality."

During direct examination of Salazar, the State offered, and the trial court admitted over defense counsel's objection, the amended toxicology report of appellant's blood sample, in which Dr. Gray had acted as the expert reviewer after the problems with Dr. Guale had come to light. On cross-examination of Salazar, defense counsel asked Salazar to confirm that the report that had been admitted into evidence was an amended report completed March 31, 2017, but the testing and analysis on appellant's blood sample had occurred on February 8, 2016. Defense counsel showed Salazar a copy of the original report—signed by Dr. Guale as the expert reviewer—that was dated February 17, 2016. The trial court then requested to see counsel at the bench and ultimately proceeded outside the presence of the jury.

The trial court reminded defense counsel that it had granted the motion in limine with respect to testimony concerning Dr. Guale. Defense counsel argued that, by offering the amended report into evidence, the State had opened the door, and "the jury has a right to know that there was an original report and see the original report." On voir dire examination, defense counsel asked Salazar if he knew why an amended report was issued, and Salazar stated that he had received a noticed dated March 28, 2017, stating, "Per the Assistant District Attorney's request another expert reviewer review the case." Defense counsel stated that he wished to offer the original

report as well as the State's request for an amended report into evidence. Counsel argued that this evidence was relevant because the State had requested that the report be amended and the jury should know why the State made that request. Counsel also stated:

> Judge, I'm not even planning on making Dr. Guale an issue unless they open the door to it; and frankly, the only mention of her name would just be to point out that's the difference in the two, but the relevance for the original also goes to the notice of amendment in that it was the District Attorney's Office who requested it.

The State responded that the original report and request for amendment had limited relevance "because the amendment doesn't even affect the examination result." The State added, "They're just trying to backdoor in something that's been Motion in Limined out, Judge, at the end of the day—and it's been violated, Judge."

The trial court and defense counsel then had the following lengthy exchange:

> Counsel: Judge, I'd like to make something very clear for the record. There has been zero objection from the State with regard to any of this.
>
> The Court: They've been voicing their objections just now.
>
> Counsel: They made one objection to relevance; they have made no objection to any of this.
>
> The State: Objection to the violation of the Motion in Limine.
>
> The Court: He said it was hearsay to talk about this as I recall; I heard that.[2]

[2] After defense counsel first argued the relevance of the original report and the State's notice of amendment, the trial court stated, "And so you want to go into hearsay that someone from the DA's office asked them [HCIFS] to do something." Defense counsel responded that the notice is a public document that does not constitute

Counsel: I didn't.

Co-counsel: Okay. Well, that's fine.

The Court: Okay. So—wait—no.

Co-counsel: Yes, ma'am.

The Court: No, no, let's just get it out. I think I'm being accused of ethical violations right now, of manufacturing things in the record now, objections, and lying in open court.

Counsel: I'm not voicing any accusations towards you, Judge.

The Court: You just did, [Counsel]. You just did on the record. Do you want me to have it all read back?

Counsel: If you would like to do that, Judge.

Co-counsel: No.

The Court: I asked if you wanted it read back?

Counsel: No, Your Honor.

The Court: And I think your co-counsel said no to you, and you need to listen to him. What I'm trying to do right now is to figure out if any of this is admissible. And I was inclined to maybe let in the lab report itself, and then I was trying to figure out if you had a sponsoring witness for the attached memo.

Counsel: And I do have an answer for that. If I can't get it in through Mr. Salazar, then potentially Dr. Gray.

The Court: And yet I still wonder about whether this is appropriate and relevant to the jurors' decision as to whether this defendant was driving while intoxicated because that really is our point in this trial.

Counsel: I understand, Judge.

The Court: Now because I allowed the amended lab report in—

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hearsay and that it is "no more hearsay than testimony—other testimony about how they get blood . . . ." The State did not raise a hearsay objection to this evidence.

Counsel: Uh-huh.

The Court: —I'm inclined still—regardless of your offensive statements—out of fairness to your client to allow the original report itself.

Counsel: Okay.

The Court: I am just not understanding where this is relevant to the decisions the jury has to make—and when I say "this," it's the document entitled Notice of Amendment.

Defense counsel then suggested offering the original report through Salazar, asking him if he knew why an amended report was issued, and allowing him to testify that an amended report existed because the State requested it. The following occurred:

The Court: So then and what do they do when that stink bomb gets thrown to the jury box because it may imply that they [the State] didn't trust this witness; it could imply they wanted a different number—someone would have to explain why they requested it, wouldn't they?

Co-counsel: If they want to do that, Judge, respectfully, they can attempt to call a witness to explain that. But what we're just trying to do is clear up for the jury what Mr. Salazar has said is that we are required to test whatever we're provided from law enforcement, and then if there's a request for a secondary test from the prosecutor, we're required to just do that anyway.

The Court: But there wasn't another test.

Co-counsel: Well, another report issued—just to explain the reason for the amended report.

The Court: And the reason that they asked for this is because Dr. Guale imploded—forgive my wording—and they

replaced her with Dr. Gray. And I've already said that Dr. Guale's issues are not coming into this trial.

Co-counsel: And I don't have a problem with them not getting—we're not trying to backdoor anything in about Dr. Guale; I'm being genuine and honest with the Court.

The Court: You're setting a trap, [co-counsel]. You are setting a trap. Because if they don't, it looks like something nefarious was going on between the DAs and the lab people. I don't have any objection at all to this report. Ask this witness how is this different? A different reviewer. And who is this reviewer versus the other one? She took her place.

Co-counsel: I don't even know that we wanted to get into that—we just—what I was thinking is we offer the original. Say, this is the original one? Yes, it is. And then, if you know, Mr. Salazar, why was there an amended toxicology report done? And then he can answer, if he knows—

The Court: Because it's a different reviewer.

Co-counsel: Because the District Attorney's Office asked us to re-review it.

The Court: And why did they ask?

Co-counsel: And if [the State] want[s] to follow up with why that was done, that's fine.

The Court: I think it's backdoor. I just do.

Co-counsel: Here's the problem, Judge, and I truly mean this with no disrespect. But this is the man [appellant] who has the right to a fair trial.

The Court: I agree.

Co-counsel: And it's not the prosecutor.

The Court: Actually—

Co-counsel: There's no case law—

The Court: Actually, the State does have a right to a fair trial.

Co-counsel: The research I've done has not shown that. The thing is, it's not our fault any more than it's their fault that Dr. Guale lied her way into a position and then started issuing reports that she did not have the background to be doing and did that.

The Court: Whether or not she did is not an issue before this Court at this time, and I'm not going to presume any of that because according to the notice she [Dr. Guale] was "no billed"; so, let's start there.

Co-counsel: Right.

The Court: But the problem is: If you get this in front of the jury, I know where your argument's going to go; it's going to leave question marks: Why is the DA's office requesting this? Otherwise, why would you want it in there?

. . . .

Co-counsel: That is real evidence. And I think it is relevant to the citizens who are sitting in judgment of Mr. Rodriguez as to what was going on at [HCIFS]. Now, I don't think that [counsel] plans to get into those things at all—but I think the Court's concern is valid and that's the concern that everyone would have when we find out somebody was doing what Dr. Guale was doing at that lab, whether she was found criminally liable by a grand jury or not; so that's just our position on this, Judge—and I mean zero disrespect against Your Honor, this Court, or anybody else.

The Court: I appreciate that. But I disagree with you—

Counsel: I understand.

The Court: —as to the notice of amendment. I think it's just hearsay, and I think it's striking at a party opponent, and that's my concern. I don't see the probative value, and I keep telling you I'm trying to find probative value. I'm okay with this page you walked me through—and I'm sorry—for the record, the original results. You've gotten me past that concern.

Counsel: Right. If we don't—

The Court: But you have not gotten me past notice of amendment.

Co-counsel: Let me go back because maybe I misunderstood. If we don't offer that document, we just simply ask the question: If you know, Mr. Salazar, why was—why do we have an amended toxicology report?

The Court: Do you know?

Salazar: The reasons the amended toxicology reports were put out, that's outside the knowledge of the analyst.

The Court: You don't know?

Salazar: No.

Counsel: That may be a question for—

Salazar: For Dr. Gray.

Co-counsel: If you know, if we ask Dr. Gray why there's an amended report, would she know? Because the District Attorney asked me to or—

Salazar: She would be involved in all those meetings—

The Court: We don't know what she's going to say. He doesn't know. So you can take a partial victory or no victory at all. You can have the original lab report or nothing at all; that's your choice. These are stapled together; that's why I'm saying that. So you can unstaple your documents, label that as Defense 4, and then take that victory and run with it.

Counsel: May I ask that question to Dr. Gray when she testifies, the "why" question?

The Court: We will ask her before the jury sees her.

Defense counsel then resumed cross-examination of Salazar in the presence of the jury. The trial court admitted a copy of the original toxicology report. Salazar

pointed out that the only difference between the original report and the amended report was the expert reviewer: Dr. Guale was the expert reviewer for the original report, and Dr. Gray was the expert reviewer for the amended report. Salazar testified that no other amended reports have been issued, and he stated that no additional testing or analysis of appellant's blood sample occurred during the time period between the two reports. On redirect, Salazar testified that the change in expert reviewers did not affect the validity of the test that he performed, and appellant's blood sample was not reanalyzed when Dr. Gray reviewed the case for the amended report. Salazar also stated that the amended report included a notation reading, "The amendment does not affect the results."

After the State rested, defense counsel announced that he intended to call Dr. Gray as a witness. Counsel first questioned Dr. Gray outside the presence of the jury. Counsel asked Dr. Gray if she knew why she had been asked to replace Dr. Guale as the expert reviewer, and Dr. Gray stated, "The District Attorney's Office asked us to conduct a re-review after Dr. Guale resigned." Dr. Gray also stated, in response to the court's question, that "[t]he number stayed the same; basically what I did was a paperwork review, and then I would be the person who comes to explain facts on alcohol if necessary." The following exchange then occurred:

> The State: Judge, at this point I'd raise my same objection if that's the answer she's going to provide, then probative value is outweighed by the prejudice that would occur in this case. Like you said, this case is about driving while intoxicated.

. . . .

> Judge, I don't think we have a problem with the way Ms. Gray would answer that question if asked that way, but there can be no further—well, why did she resign? You know, what happened? Like, why are you the new reviewer? The fact that she's [Dr. Guale's] not working there, that's fine. It was re-reviewed by her [Dr. Gray] and she's the one who can come to testify about it now.

The Court: Are you satisfied at that point?

Counsel: Yes, Judge. Going into the questions that she's talking about would violate the Motion in Limine.

The Court: And any argument to the jury that would lead to speculation as to why she resigned would also violate that, wouldn't it?

Counsel: Correct. However, Judge, before the close of evidence, I do need to make an offer of proof because I have an objection to that Motion in Limine, and I want to put on the record what I think the evidence would show with regard to those issues.

The Court: You want to be able to show why Dr. Guale resigned?

Counsel: Yes. And I want to be able to articulate for the record that this information—how it is relevant to this particular case.

The Court: I'll allow you to do that after argument while the jury's deliberating.

Counsel: Sure.

In the jury's presence, Dr. Gray testified that the original report was completed in February 2016, before she was employed at HCIFS, and the amended report, for which she was the expert reviewer, was completed in March 2017. She stated that

"[t]he District Attorney's Office asked us to conduct additional review since the original expert reviewer was unavailable for testimony."

On cross-examination by the State, Dr. Gray testified concerning her role as the expert reviewer:

> The expert reviewer is the individual who ultimately comes to court and explains what alcohol or drugs, if any were present, do on a person.
>
> And the lab, at the office, when we're conducting the expert review, we'll look at any case history that we have. In a DWI case, we have very little case history about the DWI, and that's pretty much what we know.
>
> I'll make sure things like the officer's name and submitting agency is correct; the defendant's name is spelled correctly. I'll make sure that the substances listed on the report are what we call "interpretable," could I take this report and explain what those things are? Do they make sense given what we know about drugs, how they interact with the body, how the body interacts with drugs; so, making sure that from a toxicology perspective—from a more global perspective, not from a laboratory testing perspective—that the results essentially make sense given the context that we have.

She agreed with the State that she "reviewed the lab report in this case so that [she] could come testify."

Dr. Gray also stated that she would not "sign off on" a report that was invalid, and she explained the technical review process:

> [B]efore [the report] can come to me for expert review, it has to go through a technical review where you make sure that the results are valid and do meet the standards set by the laboratory for acceptability. I can't begin the expert review process until that process is complete. And so through that process, through the analyst doing their testing and technical reviewer verifying that their results are valid and reportable

> and then coming through me, that entire sequence has to be conducted before a lab report is issued.

She agreed that the amended report was a valid lab report.

Defense counsel did not make an offer of proof concerning Dr. Guale. Ultimately, the jury found appellant guilty of the Class A misdemeanor offense of DWI.[3] The trial court assessed appellant's punishment at confinement for one year, placed appellant on community supervision for one year, and imposed a $1,000 fine. This appeal followed.

Exclusion of Evidence

In his first issue, appellant contends that the trial court abused its discretion by excluding testimony concerning Dr. Guale and the falsification of her expert qualifications. He argues that this evidence was directly relevant to the credibility of the toxicology report and the jury's determination of whether his blood-alcohol concentration was greater than 0.15—the threshold for Class A misdemeanor DWI—and, thus, the exclusion of this evidence deprived him of his right to present a complete defense.

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[3] The jury charge also included a lesser-included offense instruction on the Class B misdemeanor offense of DWI, which provides that "[a] person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04(a)–(b).

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement, that is, when the decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.* at 83 (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)). We may uphold a trial court's ruling on the admissibility of evidence if it was correct on any legal theory or basis applicable to the case. *Id.* at 93; *Jones v. State*, 466 S.W.3d 252, 261 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable than it would be without the evidence. TEX. R. EVID. 401; *Henley*, 493 S.W.3d at 83. To be relevant, evidence must be both material and probative. *Henley*, 493 S.W.3d at 83 (citing *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001)). Evidence is material if it is "addressed to the proof of a material proposition, which is 'any fact that is of consequence to the determination of the action.'" *Id.* (quoting *Miller*, 36 S.W.3d at 507). If a party offers the evidence to "help prove a proposition which is not a matter in issue, the evidence is immaterial." *Id.* (quoting *Miller*, 36 S.W.3d at 507). The rules of evidence "favor the admission of all logically relevant evidence for the jury's consideration," but the

trial court "is still in charge of making the threshold decision as to whether evidence is relevant or not, and her decision will not be disturbed on appeal unless it is 'clearly wrong.'" *Id.* (quoting *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991), and *Taylor*, 268 S.W.3d at 579).

Even if evidence is relevant, under some circumstances, a trial court may permissibly exclude the evidence under Rule 403. *Id.* at 93. Rule 403 provides that a trial court may exclude otherwise relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. In determining whether it would be proper to exclude evidence under Rule 403,

> [W]e balance the claimed probative force of the proffered evidence along with appellant's asserted need for that evidence against (1) any tendency of the evidence to suggest that the case would be decided on an improper basis; (2) any tendency of the evidence to confuse or distract the jury from the main issues; (3) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence; and (4) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

Henley, 493 S.W.3d at 93. Whether evidence is admissible under Rule 403 is within the sound discretion of the trial court. *Burke v. State*, 371 S.W.3d 252, 257 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd, untimely filed).

B. Analysis

At trial, appellant sought to admit evidence that Dr. Guale—the original HCIFS expert reviewer for the toxicology report on appellant's blood sample—had falsified her education and expert credentials, leading to her resignation from HCIFS. Appellant argues that the trial court abused its discretion by excluding this evidence because Dr. Guale's misrepresentations and her resulting unavailability to testify were relevant to the credibility of the toxicology report. The State argues that because Salazar—and not Dr. Guale—conducted the testing of appellant's blood sample, no-retesting of the sample was conducted prior to issuing the amended toxicology report, and Dr. Gray independently reviewed the report as a second expert reviewer before issuing the amended report, any inquiry into Dr. Guale's misrepresentations was irrelevant and this testimony was also properly excluded under Rule 403. We agree with the State.

The State presented evidence that Andre Salazar, a former toxicologist at HCIFS, conducted the testing on appellant's blood sample that formed the basis for both the original and amended toxicology reports. Salazar testified at trial and stated that the test that he conducted on appellant's blood sample yielded a blood-alcohol concentration of 0.230 grams per 1000 milliliters, well over both the legal limit of 0.08 and the 0.15 threshold to make the offense a Class A misdemeanor. Salazar also testified that, per HCIFS internal protocol, his testing results were first reviewed by

a technical reviewer—Ashlyn Beard—and then an expert reviewer—first Dr. Guale, and then Dr. Gray.

The evidence reflected that Dr. Guale became unavailable to testify while the case was pending, and the State asked Dr. Gray to conduct a second expert review and issue an amended toxicology report. Both Salazar and Dr. Gray testified that no further testing was conducted on appellant's blood sample as part of Dr. Gray's review of the case and that the only difference between the original report and the amended report was that a different expert reviewer reviewed the results of the blood sample analysis. Dr. Gray also testified concerning the roles of the technical reviewer and the expert reviewer, and she stated that the technical reviewer—in this case, Beard, not Dr. Guale—checks the validity of the toxicologist's initial test results and ensures that the results meet the laboratory's accountability standards. The expert reviewer conducts a more "global" review, as opposed to a review that focuses on laboratory procedures, and is the person who comes to trial and ultimately interprets the results and explains the effect of alcohol on a person.

Dr. Guale's involvement in the analysis of appellant's blood sample was minimal. She did not conduct the testing herself, nor did she conduct the technical review of the testing. Upon learning of Dr. Guale's misrepresentations and resignation from HCIFS, the State asked Dr. Gray—whose qualifications are not disputed—to conduct a second expert review. Dr. Gray reviewed the case file

independently from Dr. Guale's earlier review, and she signed the amended report, which again reported appellant's blood-alcohol concentration as 0.230.

Given Dr. Guale's minimal involvement in this case, evidence that she had previously misrepresented her education and her expert credentials and had resigned from HCIFS after an investigation into these misrepresentations, has limited probative value. Salazar and Dr. Gray were present and were able to testify to their backgrounds and the actions that they took in connection with the analysis of appellant's blood sample and the issuance of the amended toxicology report, which was the report relied upon by the State to establish appellant's blood-alcohol concentration. There was no objection to Dr. Gray's qualifications or to the accuracy of her conclusion in the amended report, which duplicated Dr. Guale's conclusion. Dr. Guale was not present at trial and she personally played no role in the issuance of the amended report. The trial court reasonably could have concluded that the limited probative value of the evidence of Dr. Guale's misrepresentations about her qualifications, which caused her resignation and made Dr. Gray's report necessary, was substantially outweighed by a danger that the evidence would confuse the issues or mislead the jury. *See* TEX. R. EVID. 403.

Under the facts of this case, we conclude that the trial court did not abuse its discretion by excluding evidence that Dr. Guale had previously falsified her

education and expert credentials and had resigned from HCIFS as a result. *See id.*; *Henley*, 493 S.W.3d at 93; *Burke*, 371 S.W.3d at 257.

We overrule appellant's first issue.

Judicial Bias

In his second issue, appellant argues that he was deprived of his due process right to a fair trial because the trial court was partial to the State, as demonstrated by the court's arguments against the admission of evidence relating to Dr. Guale and "in defense of the State's presentation of misleading evidence."

Due process requires trial before a "neutral and detached hearing body or officer." *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006); *Dockstader v. State*, 233 S.W.3d 98, 108 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) ("One of the most fundamental components of a fair trial is a neutral and detached judge."). A trial judge should not act "as an advocate or adversary for any party." *Dockstader*, 233 S.W.3d at 108; *see Avilez v. State*, 333 S.W.3d 661, 673 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) ("Due process requires that a criminal trial be held 'before a judge with no actual bias against the defendant or interest in the outcome of his particular case.'"). Due process does not permit a trial judge to assume the role of a prosecutor. *Avilez*, 333 S.W.3d at 673; *see Brown v. State*, 122 S.W.3d 794, 797 (Tex. Crim. App. 2003) ("[T]he judge is a neutral arbiter between the advocates; he is the instructor in the law to the jury, but he is not involved in the

fray."). To reverse a judgment of conviction based on improper judicial comments or conduct, we review the entire record and must find (1) that judicial impropriety was in fact committed with (2) probable prejudice to the complaining party. *Dockstader*, 233 S.W.3d at 108.

"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion," but are instead generally proper grounds for appeal. *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994); *Rodriguez v. State*, 491 S.W.3d 18, 33 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (noting that "[o]nly in the rarest circumstances" will judicial rulings support showing that "fair and impartial trial is impossible"). Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties, or the parties' cases ordinarily do not support a challenge of judicial bias or partiality. *Dockstader*, 233 S.W.3d at 108. Judicial remarks may constitute bias if they reveal an opinion derived from an extrajudicial source, but when no extrajudicial source is alleged, "such remarks will constitute bias only if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* (quoting *Markowitz v. Markowitz*, 118 S.W.3d 82, 87 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)); *Roman v. State*, 145 S.W.3d 316, 322 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). Absent a clear showing of bias, we presume a trial court's actions to have been impartial. *Brumit*, 206 S.W.3d at 645; *Rodriguez*, 491 S.W.3d at 33.

Appellant argues that the trial court demonstrated partiality in favor of the State by making arguments against the admission of evidence concerning Dr. Guale, which moved the court from its role as "neutral and detached arbiter" to an advocate for the State. Appellant argues that other actions by the trial court indicate that it was not impartial, including its decision to allow defense counsel to make an offer of proof concerning Dr. Guale while the jury was already deliberating and its decision to grant the State's motion in limine concerning this evidence without hearing arguments from the parties. We disagree that the record reflects that the trial court abandoned its role as "neutral and detached arbiter" and instead became an advocate for the State rather than a courtroom administrator.

The trial court expressed concern over the prejudicial effect that evidence relating to Dr. Guale—including evidence of the State's request to have a second expert reviewer review the case—would have on the jury. On appeal, appellant argues that these statements are evidence that the trial court began advocating for the State and that the State should have been the one arguing against admission of this evidence.[4] The trial court's statements, however, were made in the context of determining the admissibility of evidence relating to Dr. Guale under Rules 401 and 403, an issue the State first raised pre-trial. Appellant cites no law supporting the

[4] We also note that all of the discussions concerning the admissibility of evidence relating to Dr. Guale occurred outside the presence of the jury.

proposition that the trial court, in attempting to fulfill its role of determining what evidence is admissible for the jury, is not permitted to question counsel about the evidence or to raise concerns over the evidence's admissibility and that in doing so, the trial court abandons its neutral role and instead demonstrates partiality.

Appellant also argues that the trial court demonstrated partiality in favor of the State when it ruled that appellant could make an offer of proof concerning Dr. Guale while the jury was deliberating. Appellant argues that this ruling was improper under the Rules of Evidence, which require the court to allow a party to make an offer of proof before the court reads the charge to the jury,[5] and that this ruling demonstrated that the trial court had no intention to reconsider its determination that evidence concerning Dr. Guale was inadmissible. He further argues that the trial court's ruling granting the State's motion in limine without hearing argument from counsel demonstrated that the trial court "had predetermined that evidence of Dr. Guale was not admissible in this case."

The trial court had the following exchange with defense counsel concerning the offer of proof:

> Counsel: Correct. However, Judge, before the close of evidence, I do need to make an offer of proof because I have an objection to that Motion in Limine, and I want to put on

[5] *See* TEX. R. EVID. 103(c) ("The court must allow a party to make an offer of proof outside the jury's presence as soon as practicable—and before the court reads its charge to the jury.").

the record what I think the evidence would show with regard to those issues.

The Court: You want to be able to show why Dr. Guale resigned?

Counsel: Yes. And I want to be able to articulate for the record that this information—how it is relevant to this particular case.

The Court: I'll allow you to do that after argument while the jury's deliberating.

Counsel: Sure.

Defense counsel, however, did not object to this procedure or insist that he be allowed to make the offer of proof before the trial court read the charge to the jury. *See Mays v. State*, 285 S.W.3d 884, 891 (Tex. Crim. App. 2009) ("It was the responsibility of the appellant to ensure that the substance of the evidence was placed into the record [via offer of proof], and he failed to do so.").

"[J]udicial rulings almost never constitute a valid basis for a bias or partiality challenge." *Celis v. State*, 354 S.W.3d 7, 24 (Tex. App.—Corpus Christi 2011), *aff'd*, 416 S.W.3d 419 (Tex. Crim. App. 2013); *see Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157; *Rodriguez*, 491 S.W.3d at 33. We do not agree that this ruling demonstrates that the trial court was partial to the State or "reveal[s] such a high degree of favoritism or antagonism as to make fair judgment impossible." *See Dockstader*, 233 S.W.3d at 108. We also do not agree with appellant that the trial court's ruling on the State's motion in limine demonstrates a "predisposition

regarding Dr. Guale" or that the court "was unwilling to fairly consider the arguments of the opposing party."

The trial court heard extensive arguments from defense counsel concerning the admissibility of evidence relating to Dr. Guale. Ultimately, the trial court allowed evidence that HCIFS had issued an original and amended toxicology report and that HCIFS issued the amended report—reviewed by Dr. Gray—at the State's request, but it did not allow evidence concerning Dr. Guale's misrepresentations about her credentials, which were entirely irrelevant to the issue before the jury—whether the amended report reviewed by Dr. Gray was sound and credible. We have held that the trial court did not abuse its discretion by excluding this evidence as more prejudicial than probative. We likewise hold that, upon reviewing the entire record, appellant has not demonstrated that the trial court's trial rulings relating to evidence of Dr. Guale—including its ruling concerning the timing of appellant's offer of proof and its ruling on the State's motion in limine—constitute a "clear showing of bias," such that will overcome the presumption that the trial court acted impartiality. *See Brumit*, 206 S.W.3d at 645; *Rodriguez*, 491 S.W.3d at 33.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Bland, and Lloyd.

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