Affirmed and Memorandum Opinion filed January 20, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00492-CR

DONALD WILLIAM PUGH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1210055

M E M O R A N D U M O P I N I O N

Donald William Pugh appeals his manslaughter conviction on grounds that (1) the evidence is legally and factually insufficient; (2) the trial court erred by admitting expert testimony regarding accident reconstruction; (3) the trial court erred by denying his motion for continuance; (4) the trial court erroneously denied his motion to recuse; and (5) the trial court erred by allowing the State to introduce evidence of an extraneous car accident. We affirm.

Background

I. Appellant is Indicted in Connection With a January 2008 Accident

Appellant was indicted for manslaughter in connection with a January 7, 2008 accident in which a vehicle operated by appellant struck multiple vehicles that were stopped at a red light on an I-10 feeder road in Houston. One of the vehicles was occupied by Sarah Hoffecker, who died in the accident.

Appellant initially was indicted for intoxication manslaughter. The State re-indicted appellant on April 2, 2009 and charged him with recklessly causing Hoffecker's death by driving and operating a motor vehicle (1) contrary to medical instructions; (2) while failing to follow medical aftercare instructions; (3) while failing to take prescribed seizure medication; or (4) while disregarding a known risk of seizure and while having a seizure. Appellant filed a motion for continuance on April 15, 2009 on grounds that (1) the State re-indicted him "on a new charge of manslaughter" on April 2, 2009; and (2) trial counsel "sustained either a very severe sprain and bone bruise or a bone chip fracture." The trial court denied appellant's motion for continuance on April 15, 2009.

Appellant's case was set for trial on April 21, 2009. Before voir dire began that day, the trial court asked appellant's trial attorneys if they intended to adopt a pro se recusal motion filed by appellant. When both attorneys refused to adopt it, the trial court declined to rule on the motion because Texas law does not recognize hybrid representation. Shortly thereafter, appellant fainted in the courtroom. Emergency medical technicians were called to the courtroom, examined appellant, reported that he was fine, and took him to the hospital for an evaluation. The trial court continued appellant's case until April 29, 2009.

II. Trial Begins on April 29, 2009

Voir dire was conducted on April 29, 2009, and the jury began hearing evidence on April 30, 2009.

Houston Police Officer Joseph D'Eugenio testified that he was dispatched around

noon on January 7, 2009 to an accident scene on the north side of Interstate 10 at the intersection of the I-10 feeder road and Kirkwood. He arrived to find appellant's four-door Toyota Avalon sedan badly damaged and appellant trapped inside the car with his right foot wedged under the gas pedal area. Hoffecker was nearby in a badly damaged four-door Infiniti sedan; she had died at the scene. A Cadillac and a Pontiac also were involved in the accident. When Officer D'Eugenio asked appellant what had happened, he said his knee had given out.

Kristal Ramsey testified that she had taken the Kirkwood exit from I-10 in her Cadillac. She was stopped in the second left turn lane at the intersection of Kirkwood and the I-10 feeder road facing west waiting for the light to turn green. Ramsey testified that the accident occurred in the lane to her left. She testified that her driver's side mirror broke off when appellant's car struck it before hitting Hoffecker's Infiniti. Ramsey estimated that appellant was driving between 55 and 60 mph just before impact; she never heard braking even though the light was red.

Houston Police Officer A.N. Taylor, who is assigned to the Houston Police Department accident division, determined that four vehicles had been involved in the fatal accident. He opined at trial that appellant's Toyota Avalon was traveling westbound along the feeder road when it struck the driver's side mirror of Ramsey's Cadillac and then hit Hoffecker's Infiniti from behind. Either appellant's Toyota or Hoffecker's Infiniti then struck the Pontiac's left side. Officer Taylor testified that the speed limit on that portion of the feeder road is 35 mph.

Paramedic Stacy Broderick treated appellant and transported him from the accident scene to the hospital. Broderick testified that appellant said (1) he did not remember what happened; (2) he had a history of seizures; and (3) he probably had had a seizure. Broderick testified that appellant had another seizure while he was in triage after the accident.

Houston Police Officer Robert Kessler testified that he was a certified accident reconstructionist at the time he investigated the January 7 accident. Officer Kessler

stated that this accident was a "high-speed crash." He testified that he believed

> the Infiniti was stopped in the — what would be the left lane [and] was struck by the Toyota in the right rear causing the damage to the Infiniti and the front of the Toyota being shoved backwards. Upon impact from the Toyota to the Infiniti, the Infiniti is accelerated to a speed consistent with the Toyota not too far off from the speed at the time of impact. Basically, the energy is transferred from the Toyota to the Infiniti, which carries — which actually carries both of them across the intersection.

Officer Kessler opined that appellant's Toyota Avalon was traveling at approximately 82 mph when it hit Ramsey's Cadillac and Hoffecker's Infiniti.

III. Trial is Suspended After One Day of Testimony

Appellant checked himself into the hospital after the first day of testimony. He remained in the hospital until the trial court revoked his bond on May 5, 2009.

On May 4, 2009, appellant's trial attorneys and the State appeared before the trial court. Appellant was not present. Appellant's trial attorneys announced their intent to file a motion for continuance. They argued that appellant's case should be continued because (1) appellant was still in the hospital; (2) appellant potentially had been misdiagnosed with a seizure disorder when he may have a condition called "syncope;"[1] (3) this evidence came to light on April 29, 2009; and (4) neurologist Dr. David Chen, who was a witness in appellant's case, had been diagnosed with a tumor and was scheduled to have surgery.

The trial court took appellant's motion for continuance under advisement until Dr. Chen could be deposed. The trial court then arranged for Dr. Chen to be deposed later during the day on May 4, 2009. After the parties concluded questioning Dr. Chen, the trial court asked Dr. Chen whether syncope is life-threatening so as to necessitate immediate testing. Dr. Chen opined that syncope is not life-threatening and, because prior syncope tests conducted on appellant were "unremarkable," appellant safely could

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[1] Syncope is a fainting episode that can be caused by many reasons including blood loss, dehydration, and blood pressure disorder.

sit in the courtroom.

On May 5, 2009, the trial court held a hearing and revoked appellant's bond. At the hearing, the trial court stated the following reasons for revoking appellant's bond: (1) after a jury had been picked and a day of testimony had been heard, appellant failed to come to court for several days without providing medical documentation or a doctor's note; (2) "the social worker just said [appellant] was simply in the hospital to be tested for syncope;" (3) Dr. Chen "said it was simple testing, [appellant] had already tested before, unremarkable, perfectly safe to be here;" and (4) appellant "is a habitual while out on bond. The State has produced evidence he was using marijuana while out on bond." The trial court then continued the case until May 18, 2009.

Appellant subsequently filed a motion to recuse the trial judge on May 5, 2009, which was heard later that day by Judge Stricklin. At the recusal hearing, appellant's trial attorneys argued that revocation of appellant's bond was punitive and evidenced bias by the trial court. Appellant's attorneys contended that appellant "faces substantial danger to his health if he is sitting, standing, or moving around" and that appellant's release from the hospital would be contrary to medical advice.

No medical records or documentation were presented to substantiate these assertions regarding appellant's condition. Instead, trial counsel stated, "I anticipate that we will be able to obtain a letter from the doctor that says, you know, it is a substantial risk to his health. Medical records introduced by the State observed that "Patient also report[s] symptoms of dizziness and light-headedness . . . . Work-up for syncopal episode by primary team negative so far. . . . In addition, patient under trial regarding manslaughter charges, so malingering is of consideration." Judge Stricklin denied appellant's motion to recuse.

IV. Trial Resumes on May 20, 2009

When appellant's trial resumed on May 20, 2009, Houston Police Officer Francis LaSalle testified that he spoke with appellant at the hospital after the January 7 accident.

Appellant told Officer LaSalle that he had no recollection of what happened while he was driving for nine miles before the accident. Appellant also told Officer LaSalle that he was taking seizure medication, and that his last seizure was in 2006.

Dr. Arshad Umer testified that he treated appellant's seizure disorder in June 2005 at the West Houston Medical Center emergency room. Dr. Umer testified that, before discharging appellant, he instructed appellant not to drive a car unless appellant was free of seizures for six months. Since 2005, appellant had numerous seizures and received continuous treatment for his seizure disorder.

Ruben Sanchez, an HEB grocery store employee, testified that he observed appellant driving in the store parking lot on December 12, 2007. Sanchez said appellant hit a parked truck, turned his vehicle around, sped up and hit the store's exterior wall. Sanchez stated that appellant never hit the brake, and that the back tire of his vehicle "was in complete smoke." Sanchez testified that that appellant was sitting in the vehicle and "had his foot on the gas all the way down." Appellant "looked like he was out of it in a way. He just had a straight focused mind."

Harris County Deputy Ruben Morales testified that he was dispatched to the scene of the HEB accident on December 12, 2007 at approximately 12:30 p.m. Morales testified that appellant "thought he had a seizure because he had had them in the past." Appellant could not remember the details of the accident; he was confused and glassy-eyed.

Appellant's family physician, Dr. Albert Oguejiofor, testified that appellant told him during an October 25, 2007 office visit that his "seizures were controlled." Although appellant's medical records indicated that appellant had a grand mal seizure on July 20, 2007, Dr. Oguejifor testified that appellant did not mention the seizure during his October 25 visit. Dr. Oguejifor testified that he would not have diagnosed appellant's seizures as stable had he known about the July 2007 seizure. He also stated that appellant should not have been driving when his seizures were not controlled. Dr. Oguejifor testified that appellant came to his office on January 21, 2008 and complained that his right ankle was

swollen because he was involved in a car accident on January 7, 2008. Appellant told his doctor that he had been struck by a big SUV on I-10 while he was driving a small Toyota.

Appellant's wife, Linda Pugh, testified that she was sure appellant's last seizure was in June 2007. She acknowledged earlier grand jury testimony in which she stated that appellant's last seizure was "five months and 18 days" before the January 7, 2008 accident.

The jury found appellant guilty of manslaughter. Several witnesses testified during the punishment phase of the trial including Hoffecker's husband Phillip Nelson Trumbly, Hoffecker's friend Karen Pfeiffer, appellant's brother-in-law Paul Plummer, and appellant. The jury also listened to a jail tape of a telephone conversation during which appellant "was talking about getting a driver's license in another state." The jury assessed appellant's punishment at life imprisonment.

Analysis

I. Sufficiency of the Evidence

In his first issue, appellant argues that the evidence is legally and factually insufficient to support his manslaughter conviction.

We address appellant's sufficiency challenges under a single standard for evaluating legal sufficiency of the evidence to support a finding required to be proven beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 895, 912 (Tex. Crim. App. 2010) (plurality opinion); *id*. at 913-14 (Cochran, J., concurring) (concluding that a separate factual sufficiency standard no longer applies in criminal cases). That standard requires us to determine whether, after considering all the evidence in the light most favorable to the verdict, a jury was rationally justified in finding guilt beyond a reasonable doubt. *Id*. at 902 (plurality opinion).

Appellant was charged with manslaughter by recklessly causing Hoffecker's death. *See* Tex. Penal Code Ann. § 19.04 (Vernon 2003). A person acts recklessly, or is reckless, with respect to the result of his conduct when he is aware of but consciously

disregards a substantial and unjustifiable risk that the result will occur. *See id*. § 6.03(c) (Vernon 2003). The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise as viewed from the defendant's standpoint. *See id*.

The jury was instructed that it could find appellant guilty of recklessly causing Sarah Hoffecker's death on January 7, 2008 by driving and operating a motor vehicle (1) contrary to medical instructions, and colliding with a motor vehicle occupied by Hoffecker; (2) while failing to follow medical aftercare instructions, and colliding with a motor vehicle occupied by Hoffecker; (3) while failing to take prescribed seizure medication, and colliding with a motor vehicle occupied by Hoffecker; or (4) while disregarding a known risk of seizure and while having a seizure colliding with a motor vehicle occupied by Hoffecker. Because four alternative means of committing manslaughter were submitted to the jury in the disjunctive, proof of any one alternative means is sufficient for conviction. *Head v. State*, 299 S.W.3d 414, 426 S.W.3d (Tex. App.—Houston [14th Dist.] 2009, pet ref'd). Additionally, when (as here) a jury returns a general guilty verdict on an indictment charging alternative theories of committing the same offense, the verdict stands if the evidence supports any of the theories charged. *Brooks v. State*, 990 S.W.2d 278, 283 (Tex. Crim. App. 1999).

Appellant argues that "the State failed to prove he recklessly caused Hoffecker's death by driving a vehicle contrary to medical instruction and contrary to medical aftercare instructions." We disagree.

At trial, Dr. Umer testified that appellant was in his care at the West Houston Medical Center emergency room in June 2005 after being admitted with a seizure disorder. Dr. Umer also testified that, before discharging appellant, he instructed appellant not to drive a car unless appellant had been free of seizures for six months. Dr. Umer explained that "most of the seizure[s] result in loss of consciousness or disattachment from the environment and that can lead to accident[s]."

The evidence showed that appellant had experienced numerous seizures and had received continuous treatment for a seizure disorder since June 2005. Medical records dated September 7, 2006 state under "Pertinent Social History" that appellant "was told not to drive until seizure free for at least 6 months." The medical records also indicate that Dr. Richard Hrachovy "advised [appellant] not to drive unless [he is] seizure-free for at least 6 months."

Deputy Morales testified that he investigated appellant's December 12, 2007 car accident at an HEB parking lot — about three weeks before the fatal accident — and appellant told him at the scene that appellant thought he had had a seizure.

Paramedic Stacy Broderick testified that, on the way to the hospital after the fatal accident, appellant told Broderick that (1) he did not remember what happened; (2) he had a history of seizures; and (3) he probably had had a seizure. Broderick testified that appellant had another seizure while he was in triage.

During cross-examination, appellant's family physician, Dr. Oguejiofor, reviewed appellant's medical records. These records established that appellant ran out of his seizure medication on July 19, 2007 and reported having a grand mal seizure the next day:

> THE STATE: Do you recognize these [medical records], what these are?
>
> DR. OGUEJIOFOR: Yes, these are records from the VA Hospital, yes.
>
> THE STATE: Medical records pertaining to who?
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> DR. OGUEJIOFOR: Mr. Pugh.
>
> * * *
>
> THE STATE: First of all, what's the date of the note right there?
>
> DR. OGUEJIOFOR: July 23rd, 2007.
>
> THE STATE: Now, I'd like you to look down towards the bottom, the second paragraph from the bottom starting where it says: He ran out of — I'd like you to read that sentence for us, please.
>
> DR. OGUEJIOFOR: He ran out of his medications Thursday last week and

had a grand mal seizure the next day per his report.

THE STATE: These are medical records of Donald Pugh, right?

DR. OGUEJIOFOR: Yes.

THE STATE: July 23rd, 2007. You see what it says right here, correct? See that?

DR. OGUEJIOFOR: Yes.

THE STATE: That would lead you to believe that in July of 2007, the defendant had a seizure, correct?

DR. OGUEJIOFOR: Yes, that's what he reported to the doctors, yes.

THE STATE: And then three months later, when he comes in to see you, he tells you what?

* * *

THE STATE: In October 2007 when he comes to see you, does he say anything about him having a grand mal seizure?

DR. OGUEJIOFOR: No. He said he was receiving his medications and that he was doing well.

THE STATE: So you would agree with me that he's telling you there is two different things happening here, correct?

DR. OGUEJIOFOR: That's what the records would indicate, yes.

THE STATE: Let me ask you this, Dr. Oguejiofor. Would your diagnosis of him being stable with his seizures, would that assessment right here, would it be different now that you are aware of the fact he reports in July 2007 that he had a grand mal seizure?

* * *

THE STATE: Knowing that he had a grand mal seizure as reported here in these medical records from July of 2007, do you think he should have been out driving?

DR. OGUEJIOFOR: No.

THE STATE: No. Why not?

DR. OGUEJIOFOR: Well, if he reports he's having seizures, one of the things you have to do is make sure his seizures are controlled and controlled for a certain period of time before you can give him the go ahead

to be able to drive.

THE STATE: That wasn't the case here, was it?

DR. OGUEJIOFOR: That would not to be the case from what I see in the records.

Appellant's wife, Linda Pugh, acknowledged earlier grand jury testimony in which she stated that appellant had his last seizure "five months and 18 days" before the fatal accident on January 7, 2008.

Viewing all the evidence in the light most favorable to the jury's verdict, the jury could have found beyond a reasonable doubt that appellant (1) was advised by doctors not to drive a vehicle unless he had been free of seizures for six months; (2) had seizures on July 20, 2007 and December 12, 2007; and (3) drove on January 7, 2008, had a seizure while driving, and collided with Hoffecker's vehicle. We conclude the evidence in this case sufficiently supports appellant's manslaughter conviction because it establishes that appellant recklessly caused Hoffecker's death by driving a vehicle "contrary to medical instructions" and "while failing to follow medical aftercare instructions."

Accordingly, we overrule appellant's first issue.

II. Expert Testimony

In his second issue, appellant contends that the trial court abused its discretion by allowing Officer Kessler to testify at trial as an accident reconstructionist because he did not qualify as an expert and his testimony was not reliable. Appellant contends that Officer Kessler did not qualify as an expert because "he had no training in science or engineering" and "admitted that he had never taken a class in physics or calculus before he attended the Northwestern Traffic Institute for his certification." Appellant further challenges the reliability of Officer Kessler's testimony that appellant's vehicle was traveling about 82 mph before hitting Hoffecker's vehicle because Officer Kessler did not understand how a measuring instrument and a Vericom 3000 machine worked.

We apply an abuse of discretion standard in reviewing a trial court's determination of a witness's qualifications as an expert and judgment regarding the admission of any

expert testimony. *Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App. 2006). Absent a clear abuse of discretion, we will not disturb the trial court's decision to admit or exclude testimony. *Id*. A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007).

A trial court's improper admission of evidence is a non-constitutional error. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997); *James v. State*, 264 S.W.3d 215, 222 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). Thus, an appellate court will reverse a judgment if the improper admission of evidence affected a substantial right of the appellant. *See* Tex. R. App. P. 44.2(a), (b); *King*, 953 S.W.2d at 271; *James*, 264 S.W.3d at 222. A substantial right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict. *King*, 953 S.W.2d at 271; *James*, 264 S.W.3d at 222. Error that did not influence the jury's verdict or had but a slight effect is harmless error. *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001). The improper admission of evidence is harmless if the trial record contains other, properly admitted evidence that is probative of the same matter. *See Saldano v. State*, 232 S.W.3d 77, 102 (Tex. Crim. App. 2007); *James*, 264 S.W.3d at 222.

Appellant's argument fails even if we assume without deciding that the trial court improperly admitted Officer Kessler's testimony about the speed of appellant's vehicle. The asserted error was harmless because the speed at which appellant's car was traveling before hitting Hoffecker's vehicle was not germane to the elements of the offense of manslaughter for which appellant was indicted and convicted. Speed was not an element of manslaughter the State had to prove under the charge submitted to the jury in this case. The State had to prove only that appellant recklessly caused Hoffecker's death by driving or operating a motor vehicle contrary to medical instructions or while failing to follow medical aftercare instructions, and colliding with Hoffecker's vehicle.

Because the State was not required to prove that appellant was driving a vehicle at or beyond a certain speed, the admission of Officer Kessler's testimony did not have a

substantial and injurious effect or influence in determining the jury's verdict.[2] *See King*, 953 S.W.2d at 271. The jury heard testimony that appellant had been advised not to drive a car unless he had been free of seizures for six months, and that appellant had had seizures within six months of the fatal accident.

Because speed was not an element of the offense, any asserted error in admitting Officer Kessler's testimony was harmless. Therefore, we overrule appellant's second issue.

III. Continuance

In his third issue, appellant argues that the trial court abused its discretion in denying his April 15, 2009 motion for continuance. Appellant contends that, although the trial court granted a subsequent motion for continuance on May 5, 2009 and continued the case until May 18, 2009, "this limited continuance failed to remove the prejudice of trying a case under a new indictment so shortly after its filing" because he "needed more than 13 days to prepare his defense for a new theory of Manslaughter without intoxication."

We review a trial court's ruling on a motion for continuance for abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). To establish an abuse of discretion, a defendant must show he was actually prejudiced by the denial of his motion. *Id*. Speculation will not suffice to obtain reversal for a trial court's failure to grant a continuance. *See Renteria v. State*, 206 S.W.3d 689, 702 (Tex. Crim. App. 2006).

An appellate court will conclude the trial court's denial of a motion for continuance was an abuse of discretion "'only if the record shows with considerable specificity how the defendant was harmed by the absence of more preparation time than

[2] Additionally, Krystal Ramsey testified that appellant was driving between 55 or 60 mph, and that she did not hear braking noises before the collision even though the light at the intersection was red. Officer Taylor testified that the speed limit on the portion of the feeder road on which the accident occurred is 35 mph. Even if speed had been germane to the elements of the offense of manslaughter for which appellant was indicted and convicted, Officer Kessler's testimony that appellant exceeded the speed limit on the feeder road was cumulative of Ramsey's testimony.

he actually had. This showing can ordinarily be made only at a hearing on a motion for new trial, because almost always only at that time will the defendant be able to produce evidence as to what additional information, evidence or witnesses the defense would have had available if the motion for delay had been granted.'" *Gonzales v. State*, 304 S.W.3d 838, 842-43 (Tex. Crim. App. 2010) (quoting George E. Dix & Robert O. Dawson, 42 Tex. Practice: Criminal Practice and Procedure § 28.56 (2d ed.2001)).

Appellant filed an unsworn motion for continuance on April 15, 2009 in which he requested the trial court continue the case and set a new trial date because (1) the State re-indicted him "on a new charge of manslaughter" on April 2, 2009; and (2) trial counsel "sustained either a very severe sprain and bone bruise or a bone chip fracture." The trial court denied appellant's unsworn motion for continuance.

The Legislature has set out the requirements for a motion for continuance in Articles 29.03 and 29.08 of the Texas Code of Criminal Procedure. *Anderson v. State*, 301 S.W.3d 276, 278-79 (Tex. Crim. App. 2009). Article 29.03 states: "A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown; which cause shall be fully set forth in the motion." Tex. Code Crim. Proc. Ann. art. 29.03 (Vernon 2006). Article 29.08 provides: "All motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance." Tex. Code Crim. Proc. Ann. art. 29.08 (Vernon 2006).

The court of criminal appeals has construed these statutes to require a sworn written motion to preserve appellate review from a trial court's denial of a motion for continuance. *Anderson*, 301 S.W.3d at 279. Thus, if a party makes an unsworn motion for continuance and the trial court denies it, the party forfeits the right to complain about the trial court's ruling on appeal. *Id.* Because appellant's April 15 motion for continuance was unsworn, appellant forfeited his right to complain about the trial court's ruling on appeal. *See id.*

Accordingly, we overrule appellant's third issue.

IV. Recusal

In his fourth issue, appellant asserts that Judge Stricklin abused her discretion by denying appellant's motion to recuse the trial judge. Appellant contends that the evidence shows the trial judge was biased "against [appellant] by revoking his bond while he remained hospitalized for his fainting spells." To support his assertion that the trial judge was biased, appellant argues that his trial counsel: (1) testified that the trial judge revoked appellant's "bond and ordered that he be taken into custody even though he was in the hospital for a serious medical condition;" (2) introduced a letter into evidence from Dr. Roger Rossen which encouraged appellant's continued stay in the hospital; (3) "alleged that Judge Campbell retaliated against [a]ppellant by revoking his bond after he filed his pro se Motion to Recuse;" and (4) "contended that Judge Campbell was biased against [a]ppellant by not granting a longer continuance for [a]ppellant to produce proper medical evidence."

We review the denial of a motion to recuse under an abuse of discretion standard. Tex. R. Civ. P. 18a(f); *Wesbrook v. State*, 29 S.W.3d 103, 120 (Tex. Crim. App. 2000). The trial court abuses its discretion only if the ruling on the motion was not within the zone of reasonable disagreement. *Roman v. State*, 145 S.W.3d 316, 319 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); *see Wesbrook*, 29 S.W.3d at 120. We consider the totality of the evidence elicited at the recusal hearing. *Roman*, 145 S.W.3d at 319.

A judge ruling on a motion alleging bias as a ground for disqualification must decide whether the movant has provided facts sufficient to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial judge. *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992). Bias may be a ground for disqualification only when it is shown to be of such nature, and to such extent, as to deny the defendant due process of law. *Id.*

At the May 5, 2009 recusal hearing, appellant's trial counsel argued that the trial judge's revocation of appellant's bond was punitive and evidenced bias warranting recusal. Appellant's counsel claimed that appellant "faces substantial danger to his

health if he is sitting, standing, or moving around," and that appellant's release from the hospital would be contrary to medical advice. No medical records or documentation were presented substantiating these assertions regarding appellant's condition. Instead, trial counsel stated, "I anticipate that we will be able to obtain a letter from the doctor that says, you know, it is a substantial risk to his health."

Appellant's counsel also questioned whether the trial judge revoked appellant's bond in retaliation for appellant having filed a pro se recusal motion before trial began. Counsel acknowledged that the trial judge granted appellant's motion for continuance when she revoked his bond and continued appellant's case for 13 days. To support the bias assertion, counsel offered appellant's pro se recusal motion and a letter by Dr. Rossen. Dr. Rossen's letter described the examinations and studies the doctors had performed during appellant's various hospital stays between April 21, 2009 and May 4, 2009. Dr. Rossen concluded his letter by stating, "We plan additional studies of the blood vessels of his head this week and a summary evaluation by our colleagues in Neurology. We encourage him to stay the course and complete these studies."

Contrary to appellant's assertion on appeal, no evidence was presented in the trial court substantiating appellant's claims that (1) he was in "the hospital for a serious medical condition;" (2) his release from the hospital would be contrary to medical advice; or (3) the trial judge retaliated against him for filing a pro se motion to recuse. Nor did appellant's counsel contend at the hearing "that Judge Campbell was biased against [a]ppellant by not granting a longer continuance for [a]ppellant to produce proper medical evidence."

At the May 5 hearing, the State argued that appellant fainted on April 21, 2009 when the trial judge refused to consider appellant's pro se recusal motion because appellant's trial attorneys did not want to adopt the motion. Emergency medical technicians were called to the court, evaluated appellant, reported that appellant was fine, and took appellant to the hospital for an evaluation. The trial court continued appellant's case until April 29, 2009.

The State presented evidence that appellant was admitted to the hospital and evaluated on April 21, 2009 and April 23, 2009. The State introduced appellant's medical records, which stated, "Patient also report[s] symptoms of dizziness and light-headedness . . . . Work-up for syncopal episode by primary team negative so far. . . . In addition, patient under trial regarding manslaughter charges, so malingering is of consideration."

The State also argued that, after the jury was seated and the State presented evidence on April 30, 2009, appellant stated that he was not feeling well. The State argued that "Judge Campbell was very accommodating and allowed us to recess for the day." Appellant voluntarily checked himself into the hospital that night. The State introduced appellant's medical records dated May 1, 2009. Under the heading "Assessment/Plan," the medical records state: "Neurology also pointed out that patient is undergoing trial regarding [sic] for manslaughter charges, so raised possibility of malingering." Nothing in the records indicated that appellant should not be released from the hospital.

In its closing argument at the May 5 hearing, the State argued that the trial court took into account that appellant is "a true habitual who is out on bond, has tested positive while out on bond." The State concluded by stating that, "Nothing has been shown by the Defense that Judge Campbell is biased or has punished or done anything else unfairly towards the defendant in this case."

Based on the record before us, we conclude that appellant failed to demonstrate at the May 5 hearing that the trial judge possessed any bias — much less sufficient bias to interfere with appellant's due process rights. *See Wesbrook*, 29 S.W.3d at 121. Therefore, the presumption of judicial impartiality was not overcome by appellant. *See id*. Judge Stricklin acted within her discretion in denying appellant's motion to recuse the trial judge. *See* Tex. R. Civ. Proc. 18a(f); *Wesbrook*, 29 S.W.3d at 121.

We overrule appellant's fourth issue.

V. Admission of Evidence

In his fifth issue, appellant argues that the trial court abused its discretion by "allowing evidence of the extraneous December 12, 2007, car accident." Appellant argues that "[t]he evidence shows that the only similarity between the accidents of December 12, 2007, and January 7, 2008, is that they are both car accidents" because "no medical records exist to prove that a seizure caused Appellant to crash his car into a wall." Appellant contends the only evidence establishing that appellant suffered a seizure at the time of the December 12 accident is Deputy Morales's trial testimony; Deputy Morales testified that appellant told him after the December 12 accident that he had a seizure. Appellant contends that, because Deputy Morales did not include appellant's statement that he had a seizure in his accident report, "[t]he prejudicial effect of his testimony outweighs it[s] probative value when he testified in court about statements which he failed to include in an accident report." As framed, appellant's issue challenges the admissibility under Texas Rules of Evidence 404(b) and 403 of any evidence relating to the December 12 accident in the HEB parking lot.

In order to preserve error concerning the admission of evidence, a party must make a proper objection each time the allegedly inadmissible evidence is offered or obtain a running objection. *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004); *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). An error, if any, in the admission of evidence is cured if evidence similar to the objected-to evidence is admitted without objection elsewhere at trial. *Lane*, 151 S.W.3d at 193 (citing *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998)).

At trial, two witnesses testified about the December 12 accident. HEB employee Sanchez testified that he observed appellant on December 12; appellant drove in the store parking lot, hit a parked truck, turned his vehicle around, sped up and hit the store's exterior wall. Sanchez testified that that appellant was sitting in the vehicle and "had his foot on the gas all the way down." Appellant "looked like he was out of it in a way. He just had a straight focused mind."

Deputy Morales testified without objection that he was dispatched to the scene of the December 12 accident at approximately 12:30 p.m. Deputy Morales created "a diagram of the accident scene and how it occurred, where it started and ended." The State published the diagram to the jury. Deputy Morales testified that the accident occurred as drawn on his diagram, indicating that appellant hit a parked truck before hitting the wall of the HEB store. Deputy Morales also testified several times without objection that appellant had told him he had a seizure.

Appellant objected to Sanchez's testimony at trial. Even if we assume appellant's objection covered all of Sanchez's testimony regarding the December 12 accident, no objection was lodged at trial to Deputy Morales's testimony about the circumstances of the accident and appellant's statements to Deputy Morales that appellant had a seizure.

Accordingly, we overrule appellant's fifth issue.

Conclusion

We affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.

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