In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-13-00397-CR
NO. 09-13-00398-CR
NO. 09-13-00399-CR

NICOLE NADRA BAUKUS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 12-06-07085 CR (Count 1, Count 2, Count 3)

MEMORANDUM OPINION

Nicole Nadra Baukus changed her plea to guilty during a jury trial, without a plea-bargain agreement, to two counts of intoxication manslaughter and one count of intoxication assault. *See* Tex. Penal Code Ann. §§ 49.01(2), 49.07, 49.08 (West 2011). She also pled true to the allegation that she used a deadly weapon in committing these offenses. *See id.* § 1.07 (17)(B) (West Supp. 2015). At the close of the evidence, the jury assessed punishment at fifteen years imprisonment for

each conviction of intoxication manslaughter and eight years imprisonment for her intoxication assault conviction. *See id*. §§ 12.33, 12.34 (West 2011). The trial court sentenced Baukus accordingly and ordered Baukus's sentences to run consecutively. *See* Tex. Code Crim. Proc. Ann. art. 42.08(a) (West Supp. 2015); Tex. Penal Code Ann. § 3.03(a)–(b) (West Supp. 2015).[1] Baukus appeals her convictions and raises thirteen issues. We affirm the trial court's judgment.

I. Factual and Procedural Background

On June 28, 2012, Baukus clocked out from her job at Bikinis Sports Bar and Grill and consumed two alcoholic drinks before leaving around 5:38 p.m. She later had dinner at a restaurant with a friend and left the restaurant around 8:15 p.m. At around 9 p.m., Baukus met some other friends at On the Rox Sports Bar and Grill to have drinks. According to an agent with the Texas Alcoholic Beverage Commission (TABC), security footage from On the Rox depicts Baukus consuming at least twenty-one drinks while socializing with her friends that evening. The video indicates that Baukus had at least five beers and sixteen liquor beverages during the approximately four and a half hours she was at the bar. From watching the video, the TABC agent observed Baukus consuming the beers she was served, though he could not confirm that she completely consumed each of the

[1] We cite to the current version of these statutes as the subsequent amendments do not affect the outcome of this appeal.

beers because of the nature of the bottles. However, the TABC agent was able to observe that Baukus consumed the majority of the shots and mixed drinks she received that night. He testified that Baukus consumed a number of drinks that included Red Bull as an ingredient, which he explained causes delayed signs of impairment, a condition known as "wide awake drunk." The TABC agent identified observable signs of intoxication in Baukus's behavior at approximately 12:51 a.m. according to the video footage. Based on the video footage, by 1:46 a.m., Baukus was unsteady on her feet and clearly swaying. At approximately 1:53 a.m., the video shows Baukus struggling to walk and falling over tables. Baukus left On the Rox alone at 1:58 a.m. It is unclear from the record what Baukus did from the time she left On the Rox and 3 a.m., when the collision occurred. While there is some evidence that Baukus may have gone to a bar called Rebels, it is not clear from the record that she actually went to that bar or that she consumed any other alcohol after she left On the Rox.

Just before 3 a.m., Baukus drove her Ford F-150 truck in the wrong direction up one of the exit ramps of I-45 into oncoming traffic. According to eyewitness testimony, Baukus was driving "really fast" in the wrong direction on I-45 when she collided with a small Chevy Aveo occupied by Nicole Adams, Travis Saunders, and David Porras. The speed limit for the section of the highway where

the collision occurred was sixty-five miles per hour. The black box data from the Chevy Aveo shows that it was traveling approximately sixty-nine miles per hour immediately before the collision. The evidence at trial supports that Baukus was also traveling at a similar speed. The impact of the collision was so great that it killed Adams and Saunders, and Porras suffered serious bodily injuries.

When an officer first arrived at the scene, he found that a passerby had helped Baukus exit her vehicle through the passenger's side door of the truck. Baukus told the officer that a friend had been driving the truck at the time of the collision. When he found no other person in the truck, the officer assumed that Baukus's friend had been ejected from the truck and immediately began searching for the other person. The officer found no evidence that anyone had been thrown from the truck or had otherwise been in the truck at the time of the collision. The officer did, however, observe that Baukus did not have a shoe or sock on her left foot upon exiting the vehicle. The officer located a bloody sock and a left shoe on the driver's side floorboard of the truck that matched the one Baukus was wearing on her right foot. Officers observed that Baukus's left foot was bleeding, she smelled strongly of alcohol, and her eyes were watery and bloodshot. Officers also noted that Baukus was sluggish at times, and appeared carefree with laughter at other times. DNA evidence from the driver's side airbag and the bloody sock

admitted during her trial matched that of Baukus. It was also noted for the jury that only the driver's side airbag deployed in the collision.

Video footage from the dashboard camera of one of the responding officer's vehicles showed Baukus telling paramedics that she had been driving, that she had consumed "a lot" of liquor and beer, but that she stopped driving at some point because she was drunk. She also told paramedics that she had been at On the Rox that night.

Once at the hospital, officers observed that Baukus's speech was mumbled and a little slurred, both her person and breath smelled strongly of alcohol, she had a hard time keeping her eyes open, and her eyes were glassy and bloodshot. Baukus informed officers that she had gone to two bars that night, had consumed four or five beers and an unknown quantity of shots, and that she had been driving the Ford-F-150 truck. Medical personnel observing Baukus also believed she was highly intoxicated based on Baukus's behavior and from Baukus's admission to them that she had consumed several alcoholic beverages. According to officers and medical personnel treating Baukus, she had random outbursts of laughter, which were inappropriate for the situation. According to one of the surgeons, when he told Baukus that she was responsible for killing two people, Baukus laughed.

Not only did Baukus's appearance, behavior, and statements suggest she was intoxicated, but laboratory analysis of her blood showed high levels of alcohol concentration. For purposes of treating Baukus, medical personnel drew Baukus's blood at approximately 4:05 a.m. Baukus consented to giving officers a blood sample around 4:20 a.m. Baukus consented to giving officers another sample of her blood at 5:34 a.m. The laboratory analysis of Baukus's blood indicates she had a blood-alcohol level of 0.268 at 4:05 a.m., a blood-alcohol level of 0.265 at 4:20 a.m., and a blood-alcohol level of 0.204 at 5:34 a.m. The State introduced evidence that estimated that Baukus's blood-alcohol level at the time of the collision was approximately 0.30. The legal limit of blood-alcohol concentration for driving is 0.08 grams of alcohol per 100 milliliters of blood. *See* Tex. Penal Code Ann. § 49.01 (2)(B). Baukus's blood-alcohol concentration was more than three times the legal limit. *See id*. The toxicology report also showed the presence of diazepam in her blood.

Not only did Baukus's statements, behavior, demeanor, and blood-alcohol analysis support that she was highly intoxicated, but an officer also performed the horizontal gaze nystagmus test on Baukus and observed six clues that indicated she was impaired that night. The officer only needed four of the six to have probable

cause to make an arrest for intoxication. The officer also performed a vertical gaze nystagmus test on Baukus and identified a vertical nystagmus.

The State charged Baukus with two counts of intoxication manslaughter for causing the deaths of Adams and Saunders and one count of intoxication assault for causing serious bodily injury to Porras. *See* Tex. Penal Code Ann. §§ 49.07, 49.08. The State also alleged that Baukus used her vehicle as a deadly weapon in committing these offenses. *See* Tex. Penal Code Ann. § 1.07 (17)(B). Baukus initially entered a plea of not guilty; however, on the fourth day of trial, Baukus changed her plea to guilty. The trial then proceeded to the punishment phase. After both sides presented evidence, the jury returned a verdict of guilty. Baukus filed a motion for new trial, which the trial court denied.

II. Denial of Baukus's Motion for New Trial

In her first and second issues, Baukus contends the trial court abused its discretion in denying her motion for new trial, as she did not enter her pleas of guilty to the charges voluntarily or knowingly. She contends that her counsel had not informed her that she had a plausible defense at the time she pled guilty. She claims her counsel was unprepared for trial and rendered ineffective assistance of counsel, upon which she ultimately based her decision to change her pleas to guilty.

A. Evidentiary Issue

As an initial matter, we note in Baukus's motion for new trial that she requested a hearing to allow her to develop the evidence necessary to establish her contentions. There is no indication in the record that the trial court ruled on Baukus's request for a hearing on her motion for new trial. And, the record does not reflect that the trial court conducted a hearing on her motion.[2] However, on September 26, 2013, the trial court signed an order denying Baukus's motion for new trial. The order states simply, "The defendant's motion for new trial is hereby DENIED."

In an effort to persuade the trial court that reasonable grounds existed for a new trial, Baukus attached both her own affidavit and the affidavit of Dr. Gary Wimbish to her motion. She also attached a certificate indicating that her counsel delivered and presented the motion to the trial judge. The State filed a response to Baukus's motion and attached the affidavit of Baukus's trial counsel. The clerk's record also contains four additional affidavits that appear to have been filed with the trial court on September 26, 2013, including a second affidavit from Baukus, an affidavit from Baukus's father, an affidavit with records from Baukus's counselor, and an affidavit from the investigator appointed to help Baukus's trial

[2] Baukus does not complain on appeal of the trial court's failure to hold a hearing on her motion for new trial.

counsel in defending Baukus. Both Baukus and the State rely on and cite to various statements contained in the affidavits identified above in support of their contentions on appeal.

A trial court need not hear oral testimony to properly decide a motion for new trial but may rule based on sworn pleadings and affidavits admitted into evidence. *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006); *see* Tex. R. App. P. 21.7. However, an affidavit attached to a motion for new trial is not evidence and it must be presented at a hearing on the motion and admitted into evidence to be considered on appeal. *See Rouse v. State*, 300 S.W.3d 754, 762 (Tex. Crim. App. 2009); *see also Lamb v. State*, 680 S.W.2d 11, 13 (Tex. Crim. App. 1984) ("Motions for new trial are not self-proving. They must be supported by affidavits and the affidavits must be offered into evidence.") (internal citations omitted); *Jackson v. State*, 139 S.W.3d 7, 20 (Tex. App.—Fort Worth 2004, pet. ref'd) (quoting *Stephenson v. State*, 494 S.W.2d 900, 909-10 (Tex. Crim. App. 1973)) (explaining that an affidavit attached to a motion for new trial is merely "'a pleading that authorizes the introduction of supporting evidence' and is not evidence itself.").

In *Rouse*, the Court of Criminal Appeals was asked to decide whether the court of appeals erred in relying on allegations made in a party's post-trial motion

to conclude that the defendant's guilty plea was involuntary. 300 S.W.3d at 762. The post-trial motion had been overruled by operation of law with no indication on the record that a hearing was requested. *Id*. at 760. The Court concluded that the court of appeals erred in relying on the allegations in the post-trial motion when the party had not introduced the motion into evidence at a hearing. *Id.* at 762. The Court explained that "[t]his rule is based, in part, on permitting the non-moving party an opportunity to respond to these allegations before a conviction is reversed on their basis." *Id*.

Unlike the parties in *Rouse*, in this case, the parties do not assign error concerning this matter and appear to treat the affidavits as admitted by the trial court. *See Rouse*, 300 S.W.3d at 762. Another distinguishing feature between this case and *Rouse* is that Baukus requested a hearing on her motion for new trial, and the trial court considered and ruled on the motion without holding a hearing. Also in *Rouse*, the Court based its holding in part on its concern that the State did not have an opportunity to respond to the allegations supporting the defendant's motion before the motion was overruled by operation of law. *Id*. Here, the State responded to the allegations made in Baukus's motion for new trial and submitted an affidavit to respond to the claims asserted therein. There is no indication in the record that the State was not given the opportunity to file additional responses and

affidavits. The State did not object to the trial court's considering the affidavits and has not complained on appeal that it did not have an opportunity to respond to Baukus's allegations. And, it appears that both the parties and the court considered the affidavits. Because of these differences, we conclude that *Rouse* does not preclude our consideration of the affidavits attached to Baukus's motion for new trial. As such, we will review the record, including Baukus's motion for new trial and its attachments, as well as the State's responses thereto, in our consideration of the issues presented on appeal.

B. Standard of Review

We review a trial court's denial of a motion for new trial under an abuse of discretion standard. *Holden*, 201 S.W.3d at 763. We will not substitute our judgment for that of the trial court; rather, we must decide whether the trial court's decision to deny the motion was arbitrary or unreasonable. *Id*. "A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling." *Id*. We view the evidence in the light most favorable to the trial court's ruling, deferring to its credibility determinations and presuming all reasonable factual findings that could have been made in support of its ruling. *See Quinn v. State*, 958 S.W.2d 395, 402 (Tex. Crim. App. 1997). We apply this standard of review for denial of a motion for new trial

even when the denial is based solely on affidavits and no evidentiary hearing took place. *Holden*, 201 S.W.3d at 763.

C. Voluntary Guilty Plea

On the fourth day of trial, Baukus's defense counsel announced that Baukus wanted to change her pleas. The trial court proceeded to question Baukus and her defense counsel about whether she understood the consequences of this decision:

> THE COURT: You've talked to your client about the consequences of doing this?
>
> [DEFENSE COUNSEL]: I've talked to Ms. Baukus plus her mom and plus her dad.
>
> THE COURT: And she understands the consequences of what that means?
>
> [DEFENSE COUNSEL]: I believe so.
>
> THE COURT: Uh-huh. And, Ms. Baukus, I want to personally tell you that, you know, we're here now on the Thursday of trial, four days into this. And there's no reason that we can't proceed with a guilt/innocence finding by the jury. Do you understand that?
>
> [BAUKUS]: I understand, Your Honor.
>
> THE COURT: You don't have to plead guilty to them. We can persist with this trial.
>
> [BAUKUS]: I'm still going to plead guilty, Your Honor.
>
> THE COURT: Okay. If you plead guilty, then when the jury goes out in the jury instructions I will instruct them to find you guilty. Do you understand that?

> [BAUKUS]: Yes, Your Honor.
>
> THE COURT: That takes away any chance of a not guilty. Do you understand that?
>
> [BAUKUS]: Yes, Your Honor.
>
> THE COURT: Now, the range of punishment is not less than 2 not more than 20 years in prison. And even with the deadly weapon finding, the jury still can give you probation. But you understand by pleading guilty that that doesn't necessarily happen.
>
> [BAUKUS]: Yes, Your Honor.
>
> THE COURT: You haven't been promised that in any fashion?
>
> [BAUKUS]: Yes, Your Honor.
>
> THE COURT: You weren't promised anything by the State's lawyer or your lawyer or anybody else in exchange for having you plead guilty like this.
>
> [BAUKUS]: Yes, sir.
>
> THE COURT: Okay. And you discussed with your attorney that, you know, it can work to your advantage. It can also work to your disadvantage. Because we are here now on the fourth day of trial. Do you understand that?
>
> [BAUKUS]: Yes, sir.

Baukus expressed to the court that she understood she was abandoning any defenses she might have to the allegations against her and that she wished to enter a plea of guilty in each case.

Baukus's guilty pleas ostensibly appear to be voluntary. However, she contends her pleas were involuntary because she did not know she had a plausible defense to the allegations against her and her lack of knowledge was as a result of her counsel's failure to properly investigate the case and inform her of all of her options.

A guilty plea must be entered knowingly, intelligently, and voluntarily to be consistent with due process. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *see* Tex. Code Crim. Proc. Ann. art. 26.13(b) (West Supp. 2015). For a plea to be voluntary, "a guilty plea must be the expression of the defendant's own free will and must not be induced by threats, misrepresentations, or improper promises." *Kniatt*, 206 S.W.3d at 664. A defendant is entitled under the Sixth Amendment to effective assistance of counsel in guilty-plea proceedings. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010); *Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010).

A guilty plea may be considered involuntary due to ineffective assistance of counsel. *Ex parte Moussazadeh*, 361 S.W.3d 684, 689 (Tex. Crim. App. 2012); *Harrington*, 310 S.W.3d at 458-59. If a defendant pleads guilty based upon erroneous advice of counsel, the plea is not given voluntarily and knowingly. *Moussazadeh*, 361 S.W.3d at 689. "Competent counsel has a duty to render his

best judgment to his client about what plea to enter, and that judgment should be informed by an adequate and independent investigation of the facts of the case." *Ex parte Reedy*, 282 S.W.3d 492, 500 (Tex. Crim. App. 2009). When an appellant seeks to have her plea set aside on a basis that it was involuntary due to ineffective assistance of counsel, the appellant must establish that: (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's ineffectiveness, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Moussazadeh*, 361 S.W.3d at 691. In other words, but for the erroneous advice of counsel, appellant would not have pled guilty and would have insisted on going to trial or, as in this case, continuing in the guilt–innocence phase of her trial to a jury verdict. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Ex parte Moody,* 991 S.W.2d 856, 857-58 (Tex. Crim. App.1999).

Because there "are countless ways to provide effective assistance in any given case[,]" our review is highly deferential, and we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quotations and citations omitted). We will

not question counsel's tactical decisions unless those decisions were "'so outrageous that no competent attorney would have engaged in it.'" *Harrington*, 310 S.W.3d at 459 (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We review the evidence in the light most favorable to the trial court's determination that Baukus received effective assistance of counsel. *See Alexander v. State*, 282 S.W.3d 701, 706 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

D. Analysis

Baukus's first and second issues rest on her contention that she had a plausible defense to the charges filed against her—i.e., that she was involuntarily made to become intoxicated when some unknown person slipped an unknown drug into her drink at the bar that night before the collision occurred. Generally, to show that an offense has been committed, the State must prove the *actus reus* and the *mens rea* of the crime. *Ramirez-Memije v. State*, 444 S.W.3d 624, 627 (Tex. Crim. App. 2014); *see Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994) ("[I]n order to constitute a crime, the act or *actus reus* must be accompanied by a criminal mind or *mens rea*."). Texas Penal Code section 6.01 concerns the

requirement for a voluntary act or omission—the *actus reus*, while section 6.02 concerns the requirement for a culpable mental state—the *mens rea*. *See* Tex. Penal Code Ann. §§ 6.01, 6.02 (West 2011).

1. The *Mens Rea* of the Crime

Baukus was charged with intoxication assault and intoxication manslaughter. Both of these offenses are strict-liability crimes, meaning no proof of a culpable mental state is required. *See* Tex. Penal Code Ann. §§ 49.07(a)(1), 49.08(a), 49.11(a); *see also Burke v. State*, 28 S.W.3d 545, 549 (Tex. Crim. App. 2000) (explaining that intoxication assault is a strict liability offense); *Wooten v. State*, 267 S.W.3d 289, 305 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (explaining that intoxication manslaughter is a strict liability offense).

In support of her contention that she had a plausible defense, Baukus cites to *Torres v. State*, 585 S.W.2d 746 (Tex. Crim. App. [Panel Op.] 1979). In *Torres*, the Court of Criminal Appeals held that involuntary intoxication may constitute an affirmative defense to criminal culpability. *Id*. at 749. In that case, the defendant was convicted of aggravated robbery.[3] *Id*. at 747. On appeal, the Court reversed the defendant's conviction and found that she was entitled to an instruction on

[3] We note that aggravated robbery is not a strict liability crime and the State is required to prove the *mens rea* of the offense. *See* Tex. Penal Code Ann. §§ 29.02, 29.03 (West 2011).

involuntary intoxication because there was evidence that someone had slipped an intoxicating substance into the defendant's beverage without her knowledge. *Id.* at 748-50. The Court of Criminal Appeals later limited the scope of the involuntary intoxication defense and held that to establish this defense to prosecution, a defendant must show that "at the time of the alleged offense, the defendant, as a result of a severe mental defect caused by involuntary intoxication, did not know that his conduct was wrong." *Mendenhall v. State*, 77 S.W.3d 815, 818 (Tex. Crim. App. 2002); *see* Tex. Penal Code Ann. § 8.01(a) (West 2011) ("It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that [her] conduct was wrong."); *see also* Tex. Penal Code Ann. § 8.04(c) ("When temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of this section.").

We acknowledge that there may be circumstances like those presented in *Torres*, wherein a defendant could assert involuntary intoxication as an affirmative defense to certain offenses; however, the analysis in *Torres* does not extend to strict liability offenses where the defendant's mental state is not an element of the alleged offense. *See Brown v. State*, 290 S.W.3d 247, 251 (Tex. App.—Fort Worth

2009, pet. ref'd); *Nelson v.* State, 149 S.W.3d 206, 210 (Tex. App.—Fort Worth 2004, no pet.); *Aliff v. State*, 955 S.W.2d 891, 893 (Tex. App.—El Paso 1997, no pet.).

Baukus theorizes that someone must have given her a date-rape drug during the evening that caused her to over-indulge on alcohol. She believes she was given the date-rape drug because of how she was acting that night, suggesting that her behavior that night was not reflective of how she normally responds to excessive amounts of alcohol. Baukus's father and a number of her friends testified that Baukus was normally the designated driver, and it was not like her to overindulge in alcohol to the extent she did that night. One friend testified that there is a "chance" Baukus was drugged that night. In her affidavit, Baukus stated that there were "'persons of interest'" at the bar that night who were around her and had the opportunity to put something in her drink. Baukus does not identify any of these "persons of interest" or give any details to support her claim that one of these people had the opportunity or the propensity to put something in her drink. She simply claims that they were around her and were capable of putting something in her drink. Additionally, the TABC agent that viewed the video footage from On the Rox testified that he specifically reviewed the video footage to determine whether someone put something into one of Baukus's many drinks. Although he

could not rule out that all of the drinks Baukus consumed that night were uncontaminated by the time they were delivered to her, he saw nothing in the video to support a claim that she had been drugged.

Baukus also relies on the toxicologist's affidavit wherein he stated that he could not rule out the possibility that Baukus had been given a date-rape drug that night, and that it was a plausible story. In his affidavit, Dr. Gary Wimbish, the toxicologist appointed to assist Baukus at trial, attested that he informed Baukus's counsel that the toxicology report of the blood samples from Baukus showed no presence of GHB (a type of date-rape drug). He further stated that Baukus's counsel did not ask, but it was his opinion that if GHB had been ingested some five hours before the blood was drawn, it would not likely be found in any blood test. He concludes that the toxicology report did not exclude the possibility that Baukus had ingested the date-rape drug GHB on the night of this accident.

By definition, the issue of involuntary intoxication presumes the existence of an intoxicant. In this case, Baukus voluntarily ingested alcohol and diazepram[4]. Without evidence that Baukus ingested an intoxicant other than alcohol or diazepam, there is no evidence to assert such an affirmative defense. There is no

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[4] The toxicology report indicated the presence of the metabolite, nordiazepam, which evidences that the diazepam was ingested approximately twenty hours prior to the time the blood was drawn.

evidence in the record that someone slipped a date-rape drug into one of Baukus's many drinks without her knowledge. There is no evidence that Baukus was ever under the influence of any intoxicant other than alcohol and diazepam. The evidence is that Baukus voluntarily consumed alcohol on the evening of the accident and had introduced diazepram into her body at some earlier time.

The affidavit of Dr. Wimbish does not constitute evidence that Baukus involuntarily ingested an unknown intoxicant on the evening of this incident. Baukus's argument is merely based on speculation that the involuntary ingestion of an intoxicating substance could have caused her behavior. The issue of involuntary intoxication cannot be raised without some evidence of an intoxicant other than those that Baukus voluntarily consumed. *See Peavey v. State*, 248 S.W.3d 455, 465 (Tex. App.—Austin 2008, pet. ref'd); *Spence v. State,* No. 02-08-411-CR, 2009 WL 3720179, at *4 (Tex. App.—Fort Worth Nov. 5, 2009, pet. ref'd) (mem. op., not designated for publication); *Howey v. State,* No. 05-08-00483-CR, 2009 WL 264797, at *5-6 (Tex. App.—Dallas Feb. 5, 2009, no pet.)(mem. op., not designated for publication).

2. The *Actus Reus* of the Crime

The issue of the voluntariness of a defendant's conduct is separate from the defendant's mental state. *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App.

2003) (internal quotations and citations omitted); *see also Mendenhall*, 77 S.W.3d at 818 (explaining that the defenses of involuntary intoxication and involuntary act are separate and distinct). Although the offenses at issue here do not require a culpable mental state, the State is still required to show a voluntary act. *See Farmer v. State*, 411 S.W.3d 901, 905-06 & n. 6 (Tex. Crim. App. 2013); *Rogers*, 105 S.W.3d at 638; *see also* Tex. Penal Code Ann. § 6.01(a). Section 6.01(a) of the Texas Penal Code states that "[a] person commits an offense only if [she] voluntarily engages in conduct, including an act, an omission, or possession." Tex. Penal Code Ann. § 6.01(a). The voluntariness in section 6.01(a) refers only to the defendant's physical body movements. *Farmer*, 411 S.W.3d at 906 (quoting *Rogers*, 105 S.W.3d at 638). A defendant's body movements are considered involuntary "only if that movement is 'the nonvolitional result of someone else's act, [was] set in motion by some independent non-human force, [was] caused by a physical reflex or convulsion, or [was] the product of unconsciousness, hypnosis or other nonvolitional impetus . . . .'" *Id.* (quoting *Rogers*, 105 S.W.3d at 638). All that is necessary to satisfy section 6.01(a) is proof that the commission of the offense *included* a voluntary act. *Farmer*, 411 S.W.3d at 907.

In *Farmer*, the defendant was convicted of driving while intoxicated. *Id.* at 901. He argued that he was entitled to an instruction on "voluntariness" under

Texas Penal Code section 6.01(a) because he presented evidence at trial that he did not consume the intoxicating substance intentionally. *Id*. at 902, 904; *see also* Tex. Penal Code Ann. § 6.01(a). The defendant in *Farmer* took prescription medications daily, but on the day of the incident, the defendant accidentally took his sleeping pill in the morning and was later involved in an automobile accident. 411 S.W.3d at 902. There was evidence that the defendant had taken his sleeping medication by mistake thinking it was actually his muscle relaxant medication. *Id*. at 902-03. The Court rejected the defendant's voluntariness claim and determined that the defendant was not entitled to an instruction on voluntary act because he had voluntarily taken the intoxicating substance. *Id*. at 908. The Court explained that the defendant knowingly took pharmaceutical medication even though he mistakenly took the wrong one. *Id*. The Court reasoned that even if the defendant took the medication in error, that error was made because the defendant did not take the time to verify the medication he was taking, although he knew that he was prescribed medications that could have an intoxicating effect. *Id*.

Baukus's defense counsel responded to Baukus's claims of ineffectiveness in an affidavit that was submitted by the State in response to Baukus's motion for new trial. Therein he stated that the first defensive theory Baukus had wanted him to assert was that she was not driving the truck at the time of the collision. He

stated that when it became obvious that the evidence supported that she was driving, her next defense was to say she must have been drugged. Defense counsel recalled that he spoke with Baukus's toxicology expert before the trial about the possibilities of her having been drugged by either a date-rape drug or diazepam. According to defense counsel, it was not until the morning the State's toxicologist testified that Baukus's toxicology expert informed him that involuntary intoxication based on the finding of diazepam in Baukus's blood was not plausible. Thereafter, defense counsel met with Baukus and her family, and no one could determine how the diazepam had entered Baukus's system. He then told Baukus and her family that he "thought changing her plea to 'guilty' would have a more beneficial effect on the jury than continuing with a defense that was certainly not plausible and would cause the jury to view [Baukus] in a harsher light." He stated that he thoroughly discussed this change of strategy and that Baukus and her family were aware of the punishment possibilities that Baukus faced. He explained that the new strategy was appropriate because he believed it would lessen the punishment the jury would give Baukus. He stated that he believed asserting a defense based on Baukus's claim that she was slipped a date-rape drug was not a valid defense.

At most, the evidence supporting this defense comes from Baukus's self-serving affidavit wherein she stated that because of her actions that night, she believed someone put something in her drink. As noted above in more detail, Baukus's contention that someone put something in her drink that night is based solely on speculation, not evidence. *See Peavey*, 248 S.W.3d at 465. There is no evidence of an intoxicant other than the one that Baukus voluntarily consumed—alcohol. Thus, Baukus's claim to have a plausible defense under Texas Penal Code section 6.01 is without merit.

E. Conclusion

Regarding Baukus's contention that her pleas were rendered involuntary because she was not made aware of a plausible defense to the charges against her, we conclude that Baukus has failed to show that her guilty plea was involuntary on the basis that she was unaware that she had a plausible defense because she has not shown that she, in fact, had a plausible defense. We overrule Baukus's first issue.

Regarding Baukus's contention that her pleas were rendered involuntary due to ineffective assistance of counsel, we conclude Baukus has failed to show counsel was deficient. Contrary to Baukus's contention, the evidence does not suggest that Baukus's defense counsel was ignorant of the possibility of asserting involuntary intoxication under *Torres* or involuntary act under Texas Penal Code

section 6.01(a). Rather, the affidavit from Baukus's father shows that defense counsel was aware of this defensive possibility but decided it would not be an effective trial strategy. The evidence also supports that her counsel retained and consulted a toxicology expert before trial. There is some dispute over the level of discussion defense counsel had with the expert, but the trial court could weigh the credibility of the witnesses and resolve the dispute in defense counsel's favor. Defense counsel also retained an investigator who interviewed several of the witnesses at the bar that night. The investigator provided defense counsel with a report of what those witnesses observed, and counsel met with many of those witnesses before they testified at trial. Thus, defense counsel's decision has not been shown to be due to his lack of preparation, but was strategic, likely based on the lack of quality evidence to support the theory. Baukus has failed to rebut the strong presumption that her trial counsel's actions were reasonable and based on sound trial strategy. Having determined that Baukus failed to show that her counsel did not provide effective assistance of counsel regarding her guilty pleas, we need not address the second prong of *Strickland*. We overrule Baukus's second issue.

III. Judicial Bias

In her third issue, Baukus contends the trial court committed structural error by denying her constitutional right to a fair and impartial judge. Structural errors

are federal constitutional errors labeled by the United States Supreme Court as structural. *Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005). Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The United States Supreme Court has identified the presence of an impartial trial judge as a structural error. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997); *see also Fulminante*, 499 U.S. at 309-10. A structural error is not subject to harm analysis. *See Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). The State contends that Baukus did not preserve this issue for review. Assuming without deciding that Baukus preserved this issue for review, we conclude that Baukus has failed to show any bias on the part of the trial judge.

Due process requires a neutral and detached trial court. *See Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). When an appellant claims judicial bias, we review the record to determine whether it shows the trial court's bias denied the appellant due process of law. *Ex parte Freeman*, 778 S.W.2d 874, 877 (Tex. App.—Houston [1st Dist.] 1989, no pet.). The proponent of a claim of bias must show a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

> [T]he terms "bias" and "prejudice" do not encompass all unfavorable rulings towards an individual or her case, but instead must "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree."

Abdygapparova v. State, 243 S.W.3d 191, 198 (Tex. App.—San Antonio 2007, pet. ref'd) (quoting *Liteky*, 510 U.S. at 550). Absent a clear showing of bias, we presume a trial court's actions were neutral and detached. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006); *Steadman v. State*, 31 S.W.3d 738, 741 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd).

Baukus specifically complains that the trial court's impartiality is reflected by (1) the trial court's comments made during voir dire regarding punishment; (2) the trial court's comments during voir dire regarding the role of the court and the attorneys in the case; (3) the trial court's acquiescence to Baukus's testifying during punishment; and (4) the trial court's denial of a hearing on Baukus's motion for new trial. We review each contention to determine if there is evidence to support Baukus's claim that the trial court held bias or prejudice against her.

A. Judicial Comments During Voir Dire

As one basis for claiming the trial court was biased against her, Baukus complains that the trial court made improper comments during voir dire. The comments singled out and complained of by Baukus on appeal were part of a much

longer statement made by the trial court. During voir dire, the trial court explained to the venire panel the importance of waiting to hear the evidence before making any decisions:

> THE COURT: Now, we haven't heard any what so far?
>
> VENIREPERSON: Evidence.
>
> THE COURT: Evidence. Okay. We need to make our minds up based upon --
>
> VENIREPERSON: Evidence.
>
> THE COURT: -- evidence. So because we've heard no evidence, how can we possibly know what punishment to give Ms. Baukus at this time? Correct.
>
> Now, the legal question is you have to be able to consider the full range of punishment. And I don't want to keep putting facts in your mind. Well, you know, I'm thinking somebody got killed in a drunk driving accident, they have got to go to prison. Okay? Don't put the facts in your mind right now. We're going to give you the facts for which to decide this case and you will make your decision based upon those facts. But right now I have got to make sure if you're going to sit on this jury that you can consider the evidence and determine -- you know, keep an open mind as to the entire range of punishment for this case because you've heard no what?
>
> VENIREPERSON: Evidence.
>
> THE COURT: Evidence. So I need to make sure that you can consider the full range of punishment. Two years of probation all the way up to 20 years in prison. Now, I know that people come in here with experiences, with these type[s] of activities, these type[s] of crimes. I know that we've had people in this jury room -- it would not surprise me -- that have been affected by intoxicated drivers of vehicles.

On appeal, Baukus argues that the trial court's comments improperly conveyed the court's opinion of the case. Baukus contends that the trial court essentially told the venire panel that Baukus should go to prison when the trial court stated, "Well, you know, I'm thinking somebody got killed in a drunk driving accident, they have got to go to prison." We examine the comments of the trial judge from the context of the entire record. When read in context of the entire record, it is clear that the trial court's comment was not a reflection of the trial court's opinion in this case. Rather, the text suggests that the trial court was attempting to provide the jury with an example of what the venire panel should not be considering at this point in the proceedings—i.e., that "somebody got killed in a drunk driving accident, [and] they have got to go to prison[.]" The court had previously informed the panel that he did not have an opinion on the case because he also had not heard any evidence. The trial court cautioned the panel repeatedly that everyone should keep an open mind until the evidence in the case had been presented.

Baukus also complains that the trial court placed himself in the position of an advocate by stating, "We're going to give you the facts for which to decide this case and you will make your decision based upon those facts." Nothing by this statement demonstrates that the trial court assumed the role of an advocate. Rather,

the court was attempting to explain to the jury that the jury was to make its decision in this case on the facts it received in court.

Baukus also complains that comments made by the trial court had a "chilling impact" on the panel's ability to answer voir dire questions honestly. Again, Baukus complains of two comments taken out of a much longer statement. In explaining to the panel the necessity for members of the jury to be able to consider the full range of punishment, the trial court stated:

> THE COURT: And the question is . . . can you separate . . . those experiences that you've had with potentially drunk drivers, okay, and listen to the evidence in this case to determine this is the appropriate range of punishment? Everyone understand that? Keeping an open mind the entire time from the 2 all the way to 20. I don't want anyone to say I can't even consider a two-year probated sentence for this type of activity. And -- because you've heard no what?
>
> VENIREPERSON: Evidence.
>
> THE COURT: You need to hear evidence first. So anybody here have a situation they can't consider the full range of punishment before they've heard the evidence in this case? Tell me now. I take it by your silence that you will keep an open -- open mind for the full range of punishment. Once you get in evidence, start making your mind up. Prior to then, you have got to make sure you have an open mind about the evidence. Everybody okay with that?
>
> VENIREPERSON: Yes.
>
> THE COURT: Anybody have a problem with that, I need to know now. The lawyers may ask you some questions about this. I don't like to retread ground that we've been over, though, because I come from a farming state. Anybody have any questions for me at this time?

Baukus contends that the trial court's comments reveal that the trial court wanted to make sure that the panel members who could not consider probation would stand mute. Baukus relies upon two parts of this portion of the trial court's voir dire instructions to support this contention: (1) the trial court's comment, "I don't want anyone to say I can't even consider a two-year probated sentence for this type of activity[,]" and (2) the trial court's comments, "Anybody have a problem with that, I need to know now. The lawyers may ask you some questions about this. I don't like to retread ground that we've been over, though, because I come from a farming state." Baukus argues that these comments, taken together, would cause a panel member who could not consider probation to say that he or she could consider probation so as to follow the trial court's directive and not disappoint the court. However, when read in context of the entirety of the record, the trial court was attempting to assist panel members in identifying any preconceived ideas that they may not be able to set aside in sitting on the jury for this case. *See Unkart v. State*, 400 S.W.3d 94, 102 (Tex. Crim. App. 2013). In fact, the trial court urged the panel members not to conceal information or give answers that were not true.

The trial court here instructed the jurors about what the law required and the importance that they follow the law. The trial court never conveyed his personal opinion specific to Baukus regarding the issues present in the case. In fact, the trial

court took special care to explain to the venire panel that he could not make that decision because he too had not yet heard any evidence. When we look at the trial court's voir dire instruction to the venire panel as a whole, it is clear that the trial court was trying to protect Baukus's rights. *See id.* The complained-of comments do not support Baukus's contention that the trial court failed to act in a neutral and detached manner. The trial court's comments were made with the obvious intent to benefit Baukus and to safeguard her rights. *See id.* The court's comments were part of the trial court's effort to ensure that the jury chosen for the case would keep an open mind and would consider the full range of punishment.

In her fourth and fifth issues, Baukus further argues that the trial court's comments during voir dire also violated article 38.05 of the Texas Code of Criminal Procedure, were improper, and amounted to fundamental error. Because we have concluded that the trial court's comments were not improper, we overrule Baukus's fourth and fifth issues.

B. Trial Court's Denial of Hearing on Baukus's Motion for New Trial

Baukus complains that the trial court's failure to grant her a hearing on her motion for new trial reflects the court's bias. As indicated above, Baukus does not contend that the trial court erred in denying her a hearing; she only claims that his denial reflects his bias towards her. Baukus does not cite to the record or to any

authorities to support her contention. In fact, the entirety of her argument is contained within one sentence. A defendant does not have an absolute right to a hearing on a motion for new trial. *Rozell v. State*, 176 S.W.3d 228, 230 (Tex. Crim. App. 2005). Because a trial court may rule on a motion for new trial based on sworn pleadings and affidavits, live testimony is not always required. *Holden*, 201 S.W.3d at 763. Baukus does not show how the trial court's denial of a hearing reflects judicial bias or otherwise prejudiced her with regard to her motion for new trial or the presentation of her appeal. The trial court's unfavorable ruling alone is insufficient to show bias. *See Abdygapparova*, 243 S.W.3d at 198. We find no merit in Baukus's contention that the trial court's denial of a hearing on her motion for a new trial reflects judicial bias.

C. Trial Court's Response to Baukus's Testimony

Next, Baukus complains that the manner in which the trial court handled Baukus's testimony during punishment reflects the trial court's bias. During the punishment phase of trial, Baukus's counsel informed the trial court that Baukus was not going to testify on her own behalf. Baukus indicated that she understood the consequences of her decision not to testify. However, Baukus's trial counsel informed the court he did not believe Baukus really understood the consequences of her decision, but that he had to abide by his client's wishes. The trial court then

proceeded to call the jury back into the courtroom and after the jury was seated, the following exchange took place:

> THE COURT: Okay. Let's bring the jury in.
>
> [DEFENSE COUNSEL]: I call her, Judge.
>
> THE COURT: Are you going to?
>
> [DEFENSE COUNSEL]: I'm going to.
>
> THE COURT: Does she know that?
>
> [DEFENSE COUNSEL]: No. I'm just now telling her.

The trial court then swore Baukus in, and she took the stand to testify. Baukus's counsel questioned her regarding her desire to testify, as follows:

> [DEFENSE COUNSEL]: You don't want to testify, do you?
>
> [BAUKUS]: Not really.
>
> [DEFENSE COUNSEL]: Why?
>
> [BAUKUS]: I deserve to be in jail. They told me that if I don't testify I'm not eligible for probation and --

Baukus also explained that she did not want to testify because there was evidence that she did not want shown to the people in the courtroom.

On appeal, Baukus argues that when defense counsel called her to the stand to testify, the trial court should have questioned Baukus to determine whether Baukus made a voluntary choice to testify. She further contends that when she

testified that she did "[n]ot really" want to testify, the trial court should have intervened. She contends the trial court's failure to intervene to determine whether her testimony was voluntary is evidence of the trial court's bias.

The United States Supreme Court has labeled a defendant's right to testify at trial as a fundamental constitutional right. *Rock v. Arkansas*, 483 U.S. 44, 52, 53 & n.10 (1987). The Court held that a defendant's right to testify is derived from the Fifth and Sixth Amendments to the United States Constitution, is personal to the defendant, and cannot be waived by counsel. *Id*. at 52-53. However, a defendant may knowingly and voluntarily waive this right. *See Smith v. State*, 286 S.W.3d 333, 338 n.9 (Tex. Crim. App. 2009) (citing *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997)). Trial counsel bears the primary responsibility to inform a defendant of her right to testify and that the ultimate decision of whether she testifies belongs to the defendant. *Johnson*, 169 S.W.3d at 235. "[A] trial court has no duty to inform a testifying defendant, represented by counsel, of [her] right not to testify." *Id*.; *Newell v. State*, 461 S.W.2d 403, 404 (Tex. Crim. App. 1970). "When a defendant, represented by counsel, takes the stand to testify in his or her own defense, we presume that the act is done voluntarily and with full knowledge of the defendant's rights." *Lantrip v. State*, 336 S.W.3d 343, 350 (Tex. App.—

Texarkana 2011, no pet.) (citing *Mullane v. State*, 475 S.W.2d 924, 926 (Tex. Crim. App. 1971)).

Baukus does not contend she was compelled to testify against her will by the trial court or even coerced by the court to waive any such right. The trial court had no duty to independently determine whether Baukus's testimony was otherwise voluntary. Baukus expressly acknowledged to the trial court that she was aware of her right not to testify and voluntarily waived such right. We conclude that Baukus has failed to show any bias on the part of the trial judge. *See Gagnon*, 411 U.S. at 786; *Steadman*, 31 S.W.3d at 741-42. We overrule Baukus's third issue.

IV. Baukus's Right to Decide to Testify

In her sixth, seventh, eighth, ninth, tenth, and eleventh issues, Baukus complains that she was forced to testify during the punishment phase of trial. In her sixth issue, Baukus contends she was denied her right to choose to testify. In her seventh issue, she contends she was denied her privilege against self-incrimination. In her eighth and eleventh issues, she contends she was called as a witness without her consent and in violation of her right to effective assistance of counsel. In her ninth and tenth issues, she contends the trial court erred in allowing her trial counsel to force her to testify.

Because the underlying basis of all of these issues is Baukus's contention that she was denied her right to decide whether to testify during the punishment phase, we first look to the appellate record to determine if it supports Baukus's claim. In the affidavit supporting her motion for new trial, Baukus unequivocally indicated that she understood she had the right to decide whether to testify. She stated:

> At the punishment stage of my trial, I told [defense counsel] that I did not want to testify. My parents and friends all told me that I should testify, but I decided not to testify. I believed it was my decision whether to testify or not. In the courtroom with [defense counsel] present, the trial judge informed me that I could testify or not testify; that it was my decision. He asked me if I understood the consequences of not testifying, and I told him I did. He asked [defense counsel] if he thought I understood the consequences, and he said he didn't think so or something to that effect. I told the trial judge that I had decided not to testify. [Defense counsel] told the trial judge that he was going to call me to testify, and the trial judge asked him if I knew he was calling me [to] testify. [Defense counsel] said something to the effect that I knew now. He called me to testify and informed the jury by his questions that I did not want to testify. He called me to testify without any preparation. He had never discussed my testimony with me or what I would be asked on [cross-examination]. He did nothing to prepare me to testify.

In support of the State's response to Baukus's motion for new trial, the State attached defense counsel's affidavit. Therein, defense counsel acknowledged that Baukus was reluctant to testify because she did not want to risk certain exhibits being shown to people in the courtroom, notably, her parents.

As noted above, we generally presume a defendant represented by counsel made the decision to testify voluntarily and with full knowledge of her rights; however, here, we need not employ this presumption because it is clear from the record that Baukus understood her rights and chose to waive those rights in electing to testify. Baukus stated clearly in her affidavit that the trial court informed her that it was her decision as to whether she testified. There is no evidence in the record that Baukus was coerced or otherwise forced to testify against her will. Baukus has not presented any basis for this Court to conclude that she believed that, if she had invoked her right to silence, she would have been punished or penalized by the trial court for asserting that right. *See Johnson v. State,* 357 S.W.35 653, 660 (Tex. Crim. App. 2012). There is no evidence in the record to indicate what conversation, if any, occurred between Baukus and her counsel or Baukus and her parents while the jury was out. Upon the jury's return, Baukus's counsel indicated to the court that he was going to call Baukus as a witness after all. In response, Baukus took the stand and testified without asserting her Fifth Amendment privilege against self-incrimination or otherwise indicating to her counsel or the court that she unequivocally did not want to testify. Baukus's response of "[n]ot really" to defense counsel's question regarding whether Baukus wanted to testify is insufficient to overcome the presumption that she testified

voluntarily, especially in light of the evidence indicating she knew and understood she had a right to refuse to testify. Because the record does not support Baukus's contention that her testimony during the punishment phase of trial was involuntary, we overrule Baukus's sixth, seventh, eighth, ninth, tenth, and eleventh issues.

V. Involuntary Pleas of "True" to Deadly-Weapon Allegations

In her twelfth issue, Baukus claims her pleas of "true" to the deadly-weapon allegations were not voluntary because her counsel did not inform her she could plead guilty to the charges in the indictment and still enter pleas of "not true" to the deadly-weapon allegations. She claims she would have entered a plea of not true if counsel had fully advised her.

As described above in detail, the trial court questioned Baukus at length regarding whether her decision to change her pleas was knowing and voluntary. After Baukus entered pleas of "guilty" to the three offenses with which she had been charged, Baukus entered pleas of "true" to each deadly-weapon allegation and stated that she was doing so voluntarily, of her own free will, and understanding the nature and consequences of her pleas.

In her first affidavit to her motion for new trial, Baukus stated that her defense counsel never told her the consequences of entering pleas of "true" to the deadly-weapon allegations or otherwise inform her of her options. She contends

that her counsel did not discuss her pleading "true" to the deadly-weapon allegation until they were in court, just before she entered her pleas. She stated that counsel did not explain and she did not understand that she could enter pleas of guilty to the charged offenses and still enter pleas of "not true" to the deadly-weapon allegations.

For Baukus to have her pleas of "true" set aside on the basis that her pleas were involuntary due to ineffective assistance of counsel, she must establish that her counsel's performance fell below an objective standard of reasonableness and a reasonable probability exists that, but for counsel's ineffectiveness, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687-88, 694. Under the prejudice prong of *Strickland*, Baukus must show there is a reasonable probability that, but for counsel's errors, she would have entered a plea of "not true" and would have insisted on proceeding to trial on the deadly-weapon allegation. *See Hill*, 474 U.S. at 59; *Moussazadeh*, 361 S.W.3d at 691. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694; *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). In our determination, we consider the totality of the circumstances surrounding the pleas and the gravity of the alleged failure material to that determination. *See Moody*, 991 S.W.2d at 858; *Ducker v. State*, 45 S.W.3d

791, 796 (Tex. App.—Dallas 2001, no pet.). If an appellant fails to prove one prong of the *Strickland* test, we need not reach the other prong. *Strickland*, 466 U.S. at 697; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

Baukus contends that if she had known that she could have entered a plea of "not true" after pleading "guilty" to the intoxication manslaughter and intoxication assault charges, she would have pled "not true" and insisted on going to trial. By statutory definition, a deadly weapon is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code Ann. § 1.07 (17)(B). "'An automobile can be a deadly weapon if it is driven so as to endanger lives.'" *Brister v. State,* 414 S.W.3d 336, 342 (Tex. App.—Beaumont 2013), *aff'd,* 449 S.W.3d 490 (Tex. Crim. App. 2014) (quoting *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003)). To establish a deadly-weapon finding, the State must establish that: (1) the object meets the statutory definition of a dangerous weapon; (2) the weapon was used or exhibited during the transaction from which the felony conviction was obtained; and (3) other people were actually endangered. *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005); *Brister*, 414 S.W.3d at 342. "A deadly-weapon finding is justified if a rational jury could have concluded that the appellant's vehicle posed an actual danger of death

or serious bodily injury." *Brister*, 414 S.W.3d at 342 (citing *Sierra v. State*, 280 S.W.3d 250, 254, 256–57 (Tex. Crim. App. 2009)).

In pleading guilty to the intoxication manslaughter charges and the intoxication assault charge, Baukus, in effect, pled guilty to causing the death of two people and seriously injuring a third person with her truck because she was too intoxicated to operate the vehicle properly. The overwhelming evidence in the record showed that Baukus drove her vehicle up an exit ramp of I-45 in the wrong direction at a high rate of speed into oncoming traffic and collided with a Chevy Aveo, thereby killing two people and seriously injuring a third. Before Baukus changed her plea to true to the deadly weapon finding, several witnesses had already testified as to her actions that evening and video of the gruesome resulting accident had been played to the jury. A deadly-weapon finding would have been justified in that a rational jury could have concluded that the appellant's vehicle posed an actual danger of death or serious bodily injury. *See id.* Baukus submitted an affidavit stating, "If he had told me I did not have to plead true to the [deadly-weapon] allegation, I would not have pled true. I would have insisted on a jury trial[.]"

Considering all the circumstances surrounding the plea and viewing the evidence in the light most favorable to the trial court's ruling, we conclude Baukus

has failed to show there is a reasonable probability that, but for counsel's errors, she would have entered a plea of "not true" and would have insisted on proceeding to trial on the deadly-weapon allegation. *See Hill*, 474 U.S. at 59; *Moussazadeh*, 361 S.W.3d at 691. The trial court could reasonably have disbelieved Baukus's affidavit testimony, especially in light of her pleas of "guilty" to the intoxication manslaughter and intoxication assault charges. *See Riley v. State*, 378 S.W.3d 453, 457-58 (Tex. Crim. App. 2012). We conclude that Baukus failed to demonstrate prejudice from trial counsel's conduct. Accordingly, the trial court did not abuse its discretion in denying Baukus's motion for new trial, and we overrule Baukus's twelfth issue.

VI. Exclusion of Evidence

In her thirteenth issue, Baukus contends the trial court erred in refusing to allow Baukus to offer evidence that the blood of Saunders, one of the victims, tested positive for THC use. Baukus contends the trial court's error was prejudicial to her because the State offered the false testimony that Saunders did not do drugs and invited the jury to compare the value of Saunders's life with that of Baukus's.

Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tex. R. Evid. 401. Although

relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Tex. R. Evid. 403.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). As long as the trial court's ruling falls within the zone of reasonable disagreement, we will affirm the trial court's decision. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). The exclusion or admission of evidence does not result in reversible error unless it affects a substantial right of the defendant. *See* Tex. R. App. P. 44.2(a), (b).

Saunders's mother testified during the punishment phase of trial. When asked what went through her mind when she found out Saunders had been killed, she responded:

> I didn't believe it. I just couldn't believe it. I mean, he -- you know, it's not like he was a bad kid and he was always running around and, you know, bound to get in trouble. He was -- he was a good kid. He -- when he went anywhere he was hanging out with his friends. They were never doing anything wrong. They weren't drinking. They weren't doing drugs. They -- you know, they weren't doing anything wrong. He would never hurt anybody.

Defense counsel sought to enter the results from Saunders's toxicology report indicating that his blood had tested positive for THC (active ingredient of

marijuana). Defense counsel argued the finding was relevant to impeach the impressions left by the mother's testimony that Saunders did not do drugs. The trial court denied defense counsel's request and found that the evidence was inadmissible because it was not relevant.

Victim-impact evidence can help assist the jury in assessing the defendant's personal responsibility and moral guilt in terms of the trauma or loss the defendant's actions caused. *See Miller-El v. State*, 782 S.W.2d 892, 896-97 (Tex. Crim. App. 1990). However, negative victim-impact evidence sought to be admitted to show that the defendant's punishment should be lessened because of the victim's character is not permissible. In *Clark v. State*, the defendant sought to introduce evidence that the victim was not a person of good character. 881 S.W.2d 682, 698-99 (Tex. Crim. App. 1994). The defendant offered the evidence during punishment on the grounds that the jury might find that the defendant was a greater threat to society if they believed he murdered a particularly valuable member of the community; whereas the jury might have placed less value on the victim's life if they knew her true character. *Id*. at 699. In dicta, the Court of Criminal Appeals disagreed with the defendant's argument "in suggesting that the decedent's behavior indicated that she was not a particularly valuable member of the

community and that her life might have had more value had she been of a different character." *Id*.

While Baukus's argument is not identical to the argument put forth in *Clark*, Baukus does state that "the saint-like qualities of the victim's character . . . are at the core of the jury's decision [on punishment]." Baukus suggests that Saunders's life was perceived as more valuable than it really was because of the exclusion of the blood analysis results showing THC. Despite her contention that this evidence was admissible to rebut the false impression that Saunders did not abuse drugs, the evidence amounts to negative victim-impact evidence, offered to show that the victim abused drugs. Evidence of the victim's drug use was not admissible for this purpose. *See Clark*, 881 S.W.2d at 699; *see, e.g., Richards v. State*, 932 S.W.2d 213, 215-16 (Tex. App.—El Paso 1996, pet. ref'd); *cf. Goff v. State*, 931 S.W.2d 537, 554-56 (Tex. Crim. App. 1996).We conclude the trial court's ruling was within the zone of reasonable disagreement and correct under this theory of the law. We conclude the trial court did not abuse its discretion in excluding this evidence and overrule Baukus's thirteenth issue.

Having overruled all of Baukus's issues on appeal, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on January 20, 2015
Opinion Delivered March 9, 2016
Do not publish

Before Kreger, Horton, and Johnson, JJ.

DISSENTING OPINION

A trial court's statement conveying the court's view about the defendant's guilt represents such elementary error that enforcing the defendant's right to be presumed innocent is a duty that "lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). In this case, Baukus pled not guilty, and the trial commenced before she later changed her mind and pled guilty in the middle of the trial. During voir dire, before the jury heard any testimony, and when Baukus was still entitled to the presumption of innocence, the trial judge told the array: "Well, you know, I'm thinking somebody got killed in a drunk driving accident, they have got to go to prison. Okay?"

The majority reasons that the trial court's statement, when placed in its proper context, indicates the trial judge was attempting to explain to the potential jurors that they should keep an open mind because they had not yet heard any evidence. However, the trial court never told the jury that it had not made up its mind on whether it thought Baukus was guilty. In my opinion, the majority errs when it concludes "[t]he *trial court* never conveyed his personal opinion specific to Baukus regarding the issues present in the case." (emphasis added). In my mind, there is a significant difference between telling potential jurors to keep an open mind and telling them that the court thinks the defendant is guilty but the potential

jurors should nonetheless maintain an open mind. Here, the trial court's statement conveyed the trial court's opinion about Baukus' guilt, and no amount of rationalization indicating that we know what he probably meant can change what the trial judge actually said.

Even though I agree with the majority that the evidence of Baukus' guilt is overwhelming, the trial court's error in conveying its view on Baukus' guilt destroyed the presumption Baukus enjoyed at the beginning of the trial that she was innocent. Under the circumstances, the trial court's error in this case constituted fundamental error that requires Baukus to be retried. *Compare Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000) (plurality opinion) (concluding a trial court's comment that he would prefer the defendant to plead guilty constituted fundamental error requiring a new trial), *with Unkart v. State*, 400 S.W.3d 94 (Tex. Crim. App. 2013) (concluding that a judge's remarks indicating that he would want to testify if he were accused of a crime, if error, was not fundamental error such that a request for an instruction asking the jury to disregard the comment was not required to preserve error).

I respectfully disagree with the majority's characterization of the statement as one that did not convey the trial court's view regarding Baukus' guilt. The majority's characterization of the context of the trial court's statement reminds me

of the make-believe world of Alice in Wonderland, where Tweedledee said "Contrariwise, . . . if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't." LEWIS CARROLL, ALICE IN WONDERLAND, in THE ANNOTATED ALICE 230-31 (Martin Gardner ed. 1960). If the judge had said that he did not know if the defendant was guilty, this might be a case that we did not have to reverse. But, he never said that Baukus enjoyed a presumption of innocence, and no matter what the majority claims the judge meant, what he said is that he thought "they have got to go to prison."

Because the trial court's comment destroyed Baukus' right to be presumed innocent, I would hold that Baukus should receive a new trial. Because the majority denies the request for another trial, I respectfully dissent.

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HOLLIS HORTON
Justice

Dissent Delivered
March 9, 2016