Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00481-CR

Dorothy A. **HOLLOWAY**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CR0541
Honorable Sid L. Harle, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: December 18, 2019

AFFIRMED

Dorothy Holloway was convicted by a jury of manslaughter, and the jury assessed her punishment at fourteen years' imprisonment and a $3,000.00 fine. The jury also found Holloway used a deadly weapon during the commission of the offense. On appeal, Holloway contends the evidence is insufficient to support her conviction and the deadly weapon finding. In challenging the sufficiency of the evidence to support her conviction, Holloway also poses the issue of whether the State may impose criminal liability on Texas drivers by alleging noncompliance with a medical

prescription. Finally, Holloway contends the trial court erred in admitting evidence of extraneous acts of drug use. We affirm the trial court's judgment.

BACKGROUND

Holloway was diagnosed with congestive heart failure, and a doctor prescribed a LifeVest for her to wear at all times, with the exception of when she showered. A LifeVest is an external defibrillator that administers a shock when a patient is at risk of cardiac arrest. Holloway was driving a vehicle without wearing the LifeVest when she suffered a cardiac arrest and crashed into another vehicle. The driver of the other vehicle died at the scene, and Holloway was subsequently charged with manslaughter.

Based on the evidence presented over five days, the jury found Holloway guilty of manslaughter and of using a deadly weapon during the commission of the offense. The trial court entered a judgment based on the jury's verdict, and Holloway appeals.

SUFFICIENCY

In her first issue, Holloway challenges whether her conduct was criminal in nature. In her second and fourth issues, Holloway challenges the sufficiency of the evidence to support the jury's findings that she was guilty of manslaughter and used a deadly weapon during the commission of the offense.

A. Standard of Review

"When examining the legal sufficiency of the evidence, we consider the combined and cumulative force of all admitted evidence in the light most favorable to the conviction to determine whether, based on the evidence and reasonable inferences therefrom, a rational trier of fact could have found each element of the offense beyond a reasonable doubt." *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). "This standard requires the appellate court to defer 'to the responsibility of the trier of fact fairly to

resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018) (quoting *Jackson*, 443 U.S. at 319). A jury "is permitted to draw any reasonable inference from the evidence so long as it is supported by the record." *Ramsey*, 473 S.W.3d at 809. "When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

B. Manslaughter

A person commits the offense of manslaughter if he "recklessly causes the death of an individual." TEX. PENAL CODE ANN. § 19.04(a). "Manslaughter is a result-oriented offense: the mental state must relate to the results of the defendant's actions." *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013). "A person acts recklessly, or is reckless, with regard to . . . the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the . . . result will occur." TEX. PENAL CODE ANN. § 6.03(c). "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 under all the circumstances as viewed from the actor's standpoint." *Id*.

The Texas Court of Criminal Appeals has explained in detail the culpable mental state of reckless and the requisite sufficiency analysis for criminal recklessness as follows:

> [A]t the heart of reckless conduct is conscious disregard of the risk created by the actor's conduct. As has often been noted, [m]ere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be, do not suffice to constitute either culpable negligence or criminal recklessness. Recklessness requires the defendant to actually foresee the risk involved and to consciously decide to ignore it. Such a "devil may care" or "not giving a damn" attitude toward the risk distinguishes the culpable mental state of criminal recklessness from that of criminal negligence, which assesses blame for the failure to foresee the risk that an objectively

> reasonable person would have foreseen. Those who are subjectively aware of a significant danger to life and choose, without justification, to engage in actions (or in some cases inactions) that threaten to bring about that danger have made a calculated decision to gamble with other people's lives. This combination of an awareness of the magnitude of the risk and the conscious disregard for consequences is crucial. It is callous disregard of risk, and not awareness vel non of risk, however, which is critical. And, of course, determining whether an act or omission involves a substantial and unjustifiable risk requires an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight.
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> Whether a defendant's conduct involves "an extreme degree of risk" must be determined by the conduct itself and not by the resultant harm. Nor can criminal liability be predicated on every careless act merely because its carelessness results in death or injury to another.
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> In addressing the sufficiency of evidence to prove criminal recklessness, it is not enough to provide the jury with a set of legally correct definitions and then simply turn them loose and accept whatever they decide. Instead, there are intermediate and progressively more demanding burdens of production that must be met by the State, as a matter of law, before the fact-finding process is even ratcheted up from one to the next higher level of possible culpability. The State cannot be permitted to submit its case to the jury unless it has offered a prima facie case of a defendant's actual, subjective disregard of the risk of a resulting [injury] which ... rise[s] to the level of a "gross deviation" from an ordinary standard of conduct. The incremental risk and mens rea that may transform mere civil negligence into criminal negligence and then possibly into criminal recklessness are, although elusive, substantive elements with unique burdens of production that must be satisfied as a matter of law.
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> In sum, in addressing the culpable mental state of recklessness under section 6.03(c), the factfinder (and a reviewing court) must examine the defendant's conduct to determine whether
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> (1) the alleged act or omission, viewed objectively at the time of its commission, created a "substantial and unjustifiable" risk of the type of harm that occurred;
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> (2) that risk was of such a magnitude that disregard of it constituted a gross deviation from the standard of care that a reasonable person would have exercised in the same situation (i.e., it involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others),
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> (3) the defendant was consciously aware of that "substantial and unjustifiable" risk at the time of the conduct; and
>
> (4) the defendant consciously disregarded that risk.

Williams v. State, 235 S.W.3d 742, 751-56 (Tex. Crim. App. 2007) (internal quotation omitted).

As the *Williams* court explained, "The incremental risk and mens rea that may transform mere civil negligence into criminal negligence and then possibly into criminal recklessness are,

although elusive, substantive elements with unique burdens of production that must be satisfied as a matter of law." *Id*. at 753. "'Civil or 'simple' negligence 'means the failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.'" *Fulton v. State*, 576 S.W.3d 905, 912 (Tex. App.—Tyler 2019, no pet. h.) (quoting *Tello v. State*, 180 S.W.3d 150, 158 (Tex. Crim. App. 2005) (Cochran, J., concurring)). Criminal liability is triggered when the risk of harm is "substantial and unjustifiable" and of such a magnitude that disregarding the risk is a gross deviation from the standard of care a reasonable person would have exercised. *See Williams*, 235 S.W.3d at 756. To be criminally reckless further requires the person to be "consciously aware" of the "substantial and unjustifiable" risk and to consciously disregard it. *Id*. Thus, criminal liability arises when "some serious blameworthiness" attaches to the conduct that caused a "substantial and unjustifiable" risk of death. *Tello*, 180 S.W.3d at 157-58 (quoting *People v. Boutin*, 556 N.Y.S.2d 1, 555 N.E.2d 253, 254 (1990)).

1. Criminal Nature of Conduct

Holloway's first issue asks, "Whether the State may derive and impose legal obligations on Texas drivers to comply fully with all medical prescriptions, and thereby impose criminal liability by alleging compliance failure as proximate cause of harm." In framing her issue as a global challenge to the ability of the State to impose criminal liability on Texas drivers for failing to comply fully with a medical prescription, Holloway appears to be asking this court to analyze whether the evidence is legally sufficient to support her conviction independent of the evidence presented by the State in this case. This is contrary to our standard of review which, as previously noted, requires us to consider the evidence presented in the light most favorable to the jury's verdict. *See Zuniga*, 551 S.W.3d at 732. It would also require us to render an advisory opinion

which we are without authority to do. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (noting advisory opinions address abstract questions of law); *Armstrong v. State*, 805 S.W.2d 791, 794 (Tex. Crim. App. 1991) (noting courts of appeals are without authority to render advisory opinions). Therefore, we decline to address Holloway's global challenge. Instead, we review the evidence presented to determine if it is sufficient to support the jury's finding of guilt.

2. Sufficiency

The jury was charged to find Holloway guilty of manslaughter if it found:

> from the evidence beyond a reasonable doubt that on or about the 6th Day of December, 2015, in Bexar County, Texas, the defendant, Dorothy A Holloway, did recklessly cause the death of an individual, namely, Kristian Maldonado, by disregarding a known risk of heart failure, or operating a motor vehicle contrary to medical instructions, or failing to follow medical aftercare instructions, or operating a motor vehicle after consuming an illegal substance, which acts or omissions resulted in the motor vehicle being driven by Dorothy Holloway to collide with the motor vehicle driven by Kristian Maldonado.

Consistent with the Texas Penal Code's definition of reckless, the jury was also instructed:

> A person acts recklessly, or is reckless, with respect to the result of her conduct when she is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. 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 under all the circumstances as viewed from the actor's standpoint.

Viewing the evidence in the light most favorable to the jury's verdict, the jury could have found Holloway was diagnosed in August of 2015 with congestive heart failure after she was admitted to a hospital through an emergency room. Holloway's ejection fraction, which measures the amount of blood the heart can pump out, was between thirty and thirty-five percent. A normal ejection fraction is sixty to seventy percent, and an ejection fraction of thirty percent is considered severely depressed. With an ejection fraction of thirty-five percent, Holloway was at risk for cardiac arrest. Although the jury was presented with evidence that various factors could cause

congestive heart failure, the jury could have found Holloway's heart failure was caused by long-term use of methamphetamine. Such a finding is particularly supported by evidence showing Holloway underwent a heart catherization procedure, and the results showed the decreased ejection fraction was not caused by any blockage. The standard medical protocol for congestive heart failure is to begin a regime of medicine to determine if the patient improves. As a result, Holloway was discharged from the hospital with multiple prescriptions. None of the prescriptions contained any amphetamine. Prior to discharge, Holloway was informed about her condition and its risks. Holloway's discharge instructions did not state that she should avoid driving, and neither the treating cardiologist or hospitalist were aware of a hospital policy imposing a driving restriction on a patient with an ejection fraction of thirty-five percent.

On November 20, 2015, Holloway returned to the hospital after experiencing shortness of breath for two days. In the social history she provided at admission, Holloway denied any use of recreational drugs except her use of methamphetamine a year to a year-and-a-half earlier when she lost her mother. The hospital's emergency provider report noted Holloway was uncooperative with nursing staff while they were attempting to secure an IV. The report noted Holloway became agitated and began yelling. In response, she was told about the need to stay and possibly be admitted or risk death or respiratory failure. Although the report stated Holloway initially decided to leave against medical advice, she eventually agreed to stay and be evaluated after a lengthy discussion with the charge nurse.

The treating hospitalist testified Holloway's congestive heart failure was worsening, and the hospital records reflect Holloway's ejection fracture had decreased to twenty-five to thirty percent. The hospitalist also testified Holloway was not compliant in taking her medication. Although the hospitalist agreed Holloway's lack of insurance could have been a contributing cause of her noncompliance, he also noted the hospital system made prescriptions available on a sliding

income scale and Medicaid also would provide coverage. One of the treating cardiologists testified the medications prescribed for Holloway were "very low cost medications" and could be purchased for $4.00 without insurance.

Because of her worsening condition and her risk of sudden cardiac arrest, Holloway was provided a LifeVest on November 23, 2015. A LifeVest is an external cardiac defibrillator capable of shocking a patient's heart in the event of a cardiac arrest. The LifeVest warns the patient if the patient's heart rate is at a level where a shock is impending. The shock is intended to normalize the patient's heart so as to avoid a cardiac arrest. The patient, however, can manually override the shock. Holloway was trained on using the LifeVest and instructed to wear it at all times except when she showered. Specifically, the cardiologist who was treating Holloway at the hospital testified as follows with regard to Holloway's wearing of the LifeVest:

> Q. Okay. And how often should you wear the LifeVest?
> A. All the time except for in the shower.[1]
> Q. Okay. And does that include when you're driving?
> A. Yes.
> Q. Why is it important that they wear the LifeVest at all times -- let me rephrase that. Why is it important that Dorothy Holloway wears the LifeVest at all times?
> A. She has congestive heart failure with a depressed ejection fraction. When you have congestive heart failure with a depressed ejection fraction you're at risk for cardiac arrest, for sudden cardiac death. Generally, that's from an irregular heart rhythm and as a result this LifeVest can monitor the heart rhythm and shock the heart into a normal rhythm if the device picks up the rhythm.

The cardiologist further testified that if Holloway drove without the LifeVest upon her discharge in November of 2015, she was at risk for sudden cardiac death. When asked whether Holloway was made aware of that risk, the cardiologist testified as follows:

> A. It's my understanding when she's counseled by the fitting person, that they discuss that. I discuss that as well with my patients, typically.

[1] The cardiology fellow who treated Holloway in the hospital following the accident similarly testified that a patient prescribed a LifeVest is "told to wear it at all times except when they go to shower."

> Q. And when you say you discuss it, do you discuss that based on her diagnosis she is at risk for sudden cardiac death?
> A. For dying, yes.

With regard to the effect Holloway's use of methamphetamine would have on her heart condition, the cardiologist testified:

> Methamphetamines are a toxin to the heart. They also cause high blood pressure and hypertension. And it could cause a rhythm disturbance, it could cause congestive heart failure exacerbation and potentially cardiac arrest.

When the cardiologist was asked if he would counsel patients with congestive heart failure not to use illegal drugs, the cardiologist responded, "Typically, yes."

Holloway was discharged from the hospital on November 24, 2015. The day prior to her discharge, the nursing notes in the hospital records reflect that staff had to prevent Holloway from going outside to smoke a cigarette. The notes further state Holloway became volatile and irate and refused to allow nursing staff to remove her IV before leaving the unit. Holloway eventually returned to her room after security was called to assist.

The nursing notes from the date Holloway was discharged state Holloway became very irate with staff when she was offered a Nicotine patch when she wanted to go outside and smoke. The notes further state Holloway disconnected herself from the LifeVest "stating she would put it back on again at discharge."

The hospital discharge summary states Holloway was admitted for acute exacerbation of congestive heart failure, abbreviated as CHF. The summary also notes Holloway "uses methamphetamines which likely worsened her CHF." Finally, the summary states Holloway was "advised to quit using drugs."

The trends report from the LifeVest provided to Holloway showed she wore the LifeVest the entire day on November 24, 25, 26, 29, 30, and December 1. She wore the LifeVest for a brief period on November 27, and did not wear the LifeVest on November 28. On December 2, 2015,

the trends report showed Holloway was warned of an impending shock due to her elevated heart rate. She manually overrode the alarm twelve times before she removed the LifeVest and never put it back on. Although evidence was presented suggesting the possibility that the LifeVest was functioning improperly, evidence was also presented regarding the actions Holloway should have taken to contact the company, and the records from Holloway's LifeVest showed it was working and did not show any maintenance issues. When a corporate representative from LifeVest was asked about a conscious patient's need to override the alarm twelve times, she responded:

> [I]n this particular problem of heart arrhythmias there are no symptoms. At most you may have some dizziness a half a second before you lose consciousness. It's not like having a heart attack, there's no symptoms leading up to it, which is why we enforce compliance.

The notes from the cardiologist who treated Holloway after the accident state Holloway reported she "has known heart failure with EF of 20% for which she was given a life vest to wear to prevent sudden cardiac arrest." Holloway also reported "during an argument with her boyfriend the day before admission the machine warned her of an impending shock which caused her to remove the vest out of fear and has not worn it since." The day before Holloway's admission was December 5, 2015 which was three days after the records show Holloway removed the LifeVest.

On December 6, 2015, witnesses observed Holloway passed out behind the wheel of her vehicle while the vehicle was traveling at a high rate of speed on a divided highway. Holloway's vehicle veered across the median into oncoming traffic and crashed into a vehicle driven by Maldonado, who died at the scene. Holloway was not wearing her LifeVest. A passerby, a nurse, stopped and immediately began performing CPR on Holloway until EMS arrived. After EMS administered one shock, Holloway's heart returned to a normal rhythm. Holloway was intubated and unconscious but maintained a heart rate and was breathing on her own in route to the hospital from the scene of the accident. At the hospital, Holloway tested positive for amphetamine which

the evidence established is a derivative of methamphetamine; however, the test results did not quantify the level of amphetamine in Holloway's system.[2] Although evidence was presented regarding certain over-the-counter medications containing amphetamine, the jury could have inferred the positive test results showed Holloway had used methamphetamine, especially given: (1) the cardiology fellow also testified methamphetamine could have been the cause of Holloway's cardiac arrest; (2) the notes of the cardiologist who treated Holloway after the accident state "[m]ethamphetamine use may have precipitated" the cardiac arrest; (3) Holloway's daughter reported Holloway continued to smoke methamphetamine twice a month; (4) Holloway stated during a psychiatric consultation that her use of methamphetamine had been "pretty spotty" the past few weeks, she could not recall if she used methamphetamine before the accident, but she knew her use of methamphetamine led to her heart issues that contributed to the car accident and she planned to stop using methamphetamine on her own; and (5) the cardiologist's notes state Holloway admitted using methamphetamine in the "days leading up to her hospitalization" and had "used it off and on for the last year." The evidence established the use of methamphetamine would increase Holloway's heart rate and blood pressure, and, based on the evidence, the jury could have found Holloway's use of methamphetamine caused the cardiac arrest Holloway experienced while driving.

Based on the foregoing, and the applicable standard of review which allows a jury to draw any reasonable inference supported by the record, the jury could have found Holloway caused Maldonado's death by driving without the LifeVest after using methamphetamine. Given her medical history and the medical advice she had been given, the jury could have found Holloway

[2] During closing argument, the State asserted, "This is not about intoxication, that has come up. The State is not alleging intoxication in this case. We just don't think that's what is there. We're alleging recklessness. We're not saying Dorothy Holloway was intoxicated when she killed Kristian, we're saying she was reckless."

was consciously aware and consciously disregarded the "substantial and unjustifiable" risk that driving without the LifeVest after using methamphetamine would result in her experiencing a cardiac arrest while driving and cause an accident resulting in death. The jury could also have found that the risk was of such a magnitude that disregarding the risk was a gross deviation from the standard of care a reasonable person would have exercised. Accordingly, having reviewed the evidence and deferring to the jury's assessment of the credibility of the witnesses and the weight to be given the evidence, we hold the combined and cumulative force of the admitted evidence and the reasonable inferences the jury was permitted to draw are sufficient to support Holloway's conviction.[3] Our holding in this appeal is narrowly tailored to the specific evidence presented in this case and should not be read more broadly.

C. Deadly Weapon Finding

The Texas Penal Code defines "deadly weapon" as "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(a)(17). To determine whether the evidence supports a deadly weapon finding in cases involving motor vehicles, we conduct a two-part analysis. *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009). "[F]irst, we evaluate the manner in which the defendant used the motor vehicle during the felony; and second, we consider whether, during the felony, the motor vehicle was capable of causing death or serious bodily injury." *Id*. In evaluating the defendant's manner of driving, we examine whether the defendant's driving was reckless or dangerous and consider

[3] In her brief, Holloway cites this court's opinion in *Britain v. State* which was affirmed by the Texas Court of Criminal Appeals. 392 S.W.3d 244 (Tex. App.—San Antonio 2012), *aff'd*, 412 S.W.3d 518 (Tex. Crim. App. 2013). In *Britain*, an eight-year-old child's stepmother was convicted by a jury of manslaughter for recklessly causing the death of the child by failing to seek medical treatment. 392 S.W.3d at 245. This court held the evidence was legally insufficient to support the jury's verdict. *Id*. at 249. Unlike the instant case where the medical professionals consistently testified regarding Holloway's chronic medical condition and the requisite treatment to avoid sudden cardiac death, the testimony of the five medical professionals in *Britain* "was conflicting" with regard to the child's "level of risk, the cause of death, and the ease of diagnosis." 412 S.W.3d at 522. Accordingly, the facts in *Britain* are readily distinguishable from the instant case.

the defendant's ability to control the vehicle. *Id*. The second prong of the test is met if the motor vehicle caused death or serious bodily injury. *Id*. at 256.

Based on the evidence presented in this case, the jury could have found from the evidence that Holloway's driving was both reckless and dangerous because she used methamphetamine and failed to wear her LifeVest, which the jury could have inferred led to the sudden cardiac arrest and rendered her incapable of controlling her vehicle. In addition, because Holloway's vehicle caused Maldonado's death, the jury could have found the vehicle was capable of causing death. Therefore, we hold the evidence is sufficient to support the deadly weapon finding.

Holloway's first, second, and fourth issues are overruled.

EXTRANEOUS ACTS OF DRUG USE

In her third issue, Holloway contends the trial court erred in admitting extraneous acts of drug use. The State responds the trial court did not err because the drug use was "'inextricably intertwined' with three of the four specific acts alleged for recklessness under the indictment."

"Preservation of error is a systemic requirement on appeal." *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009). "If an issue has not been preserved for appeal, neither the court of appeals nor [the Texas Court of Criminal Appeals] should address the merits of that issue." *Id*. For this reason, "a court of appeals should review preservation of error on its own motion." *Id*. at 532-33.

Rule 38.1(i) of the Texas Rules of Appellate Procedure requires the argument section of an appellant's brief to be supported with appropriate citations to the record. TEX. R. APP. P. 38.1(i). As an appellate court, "we are under no duty to make an independent search of the record to determine whether an assertion of reversible error is valid." *Belle v. State*, 543 S.W.3d 871, 879 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

In support of her third issue, Holloway cites to 9 RR 139-40 and 10 RR 6. In her brief, Holloway acknowledges those portions of the record contain the trial court's ruling on "the pretrial motion *in limine*." Those portions of the record reflect that after the trial court recessed the jury, the State announced its next few witnesses would testify regarding evidence Holloway sought to have excluded in her motion in limine. Defense counsel agreed and referred the trial court to two motions in limine. The trial court then ruled on the motions in limine based on the State's proffer. The following day, defense counsel requested "clarification on your ruling from our motion in limine — from my motion in limine from yesterday."

A motion in limine "is a preliminary matter and normally preserves nothing for appellate review." *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008). "For error to be preserved with regard to the subject of a motion *in limine*, an objection must be made at the time the subject is raised during trial." *Id*. Accordingly, because the portions of the record cited in Holloway's brief relate to the trial court's ruling on motions in limine, and Holloway does not cite any portion of the record in which an objection to the admissibility of evidence of drug use was made during trial, Holloway did not preserve this issue for our review.

CONCLUSION

The trial court's judgment is affirmed.

Sandee Bryan Marion, Chief Justice

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