Affirmed and Opinion filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-99-01148-CR

ALON DAVID MORGAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 794,579

O P I N I O N

Appealing his conviction and life sentence for murder, appellant Alon David Morgan challenges the legal and factual sufficiency of the evidence and the trial court's evidentiary rulings admitting photographs of the murder victim and crime scene. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant and the State presented two very different versions of the events surrounding Lisa Holman's brutal murder in the early hours of October 4, 1998.

In his statement to the police on the morning of the murder, appellant gave the following account:

On Friday, October 2, 1998, appellant and Holman moved into an apartment on Hempstead Highway. The next day, Holman left the apartment around 1:30 p.m. with an older, "Anglo" gentleman. Shortly thereafter, appellant left with a friend, but returned to the apartment before Holman arrived at around 4:30 p.m. Holman stayed for about fifteen minutes and left again, returning a second time around 8:00 p.m. Appellant made dinner, which Holman ate before leaving for a third time.

Holman returned to the apartment around 11:00 p.m., with two Hispanic men, who were driving a "'92 or '93 beige, four-door Ford." Appellant claims Holman was in the company of the two Hispanic men in order to "turn a trick" and make some money. According to appellant, it was common for Holman to "turn tricks" in order to get money for drugs. Holman gave appellant some money and told him to find a store and purchase some beer.

Appellant left the couple's apartment and walked to a nearby convenience store, where he was informed that it was too late to buy beer. Another store patron, who also had been attempting to buy beer, told appellant that he knew of a place that would sell them beer despite the late hour. Appellant claimed to have accompanied this individual to a nearby neighborhood, where he purchased a twelve pack of beer.

Appellant testified that after purchasing the beer, he returned home to discover the beige car gone. He went into the apartment and found Holman lying in a pool of blood in the kitchen. Appellant claimed that he set the beer on the stove and kneeled down to check on Holman. When he realized Holman was dead, appellant called both his father and 911. The police arrived and appellant accompanied them to the police station and gave a voluntary statement. Soon thereafter, the police read appellant his rights and arrested him for the murder of Lisa Holman.

The State presented the following version of events:

On October 2, 1998, Lisa Holman moved into an apartment with appellant. According to testimony of her neighbors, Holman and appellant spent their entire first night together arguing and fighting, which continued throughout the next day. The neighbors testified that they saw appellant come and go from the apartment several times throughout the day. Then, around four a.m. on Sunday, October 4,1998, two neighbors heard "banging" noises. After the sound of the discord quieted, one of the neighbors testified that he could hear only appellant's voice and no longer that of his female companion. After hearing the slamming of a door, the neighbor looked out his window and saw appellant getting into the passenger side of a 1988, cream-colored Delta automobile.

A little after five that morning, appellant called 911. The police officers who were dispatched to the apartment found Holman's bloody body in the middle of the kitchen. The police asked appellant to come to the station to give a statement. Appellant told them that he had left the apartment to purchase beer for Holman and the two Hispanic men in her company, and that he had discovered Holman's body when he returned with the beer. Appellant claimed he set the beer on the stove. The investigating officer, however, did not recall seeing *any* unopened beer cans on the stove or anywhere else in the apartment that morning.

While appellant was at the police station, Officer Null noticed something peculiar about the blood on appellant's pants. It appeared as though blood had been splattered across his pants, not merely smeared. Officer Null also noticed fresh bruising on appellant's feet. After appellant gave his statement, the police read him his rights and arrested him for Holman's murder.

Appellant was charged by indictment with the offense of murder, enhanced with two prior felony convictions. Appellant entered a plea of not guilty. After the jury returned a guilty verdict, appellant plead true to both of the enhancements in the indictment. The jury

assessed punishment at confinement for life in the Texas Department of Criminal Justice, Institutional Division.

II. LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his second and third points of error, appellant contends the evidence is both legally and factually insufficient to support his conviction. More specifically, appellant contends the State did not provide sufficient evidence to show that appellant intentionally and knowingly caused Holman's death.

In evaluating a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that the defense's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1994). Nor is it our duty to re-weigh the evidence based on a cold record; rather, it is our duty to act as a due process safeguard, ensuring only the rationality of the fact finder's decision. *Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury, as the trier of fact, "is the sole judge of the credibility of witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution"

and set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). This concept embraces both "formulations utilized in civil jurisprudence, i.e., that evidence can be factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence." *Id.* at 11. Under this second formulation, the court essentially compares the evidence which tends to prove the existence of a fact with the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). "In conducting the factual sufficiency review, we consider the fact finder's weighing of evidence and can disagree with the fact finder's determination." *Clewis*, 922 S.W.2d at 133. However, we must employ appropriate deference so that we do not substitute our judgment for that of the fact finder. *See Jones*, 944 S.W.2d at 648. Our evaluation should not intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *See Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997).

A person commits the offense of murder if he: (1) intentionally or knowingly causes the death of an individual or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. TEX. PEN. CODE ANN. § 19.03(b)(1) and (2) (Vernon 1994). A person acts intentionally with respect to the result of his conduct when it is his conscious objective or desire to cause the result. TEX. PEN. CODE ANN. § 6.03(A) (Vernon 1994). A person acts knowingly with respect to the result of his conduct when he is aware his conduct is reasonably certain to cause the result. TEX. PEN. CODE ANN. § 6.03(b) (Vernon 1994).

The jury may "infer intent and/or knowledge from an accused's acts, words, and conduct as well as from any facts in evidence which, to the jurors' minds, prove the existence of an intent to kill." *See Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995); *see also Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991). The jury may also infer intent to kill from the extent of a victim's injuries. *See Patrick*, 906 S.W.2d at 487.

The question of intent to kill is a question of fact for the jury. *See Hemphill v. State*, 505 S.W.2d 560, 562 (Tex. Crim. App. 1974).

Although the State's evidence was purely circumstantial, the standard of review on sufficiency of the evidence does not change with the nature of the evidence. *Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999). Regardless of whether the evidence is direct or circumstantial, after viewing the evidence in the "light most favorable to the prosecution, we determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989). Moreover, it is not necessary that every fact point directly and independently to appellant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances. *See Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993).

Appellant contends the evidence is insufficient to prove that he caused Holman's death because (1) there was inconsistent testimony regarding his defense, i.e., whether there was a twelve-pack of beer present in the apartment; and (2) appellant's acts were not consistent with that of a person who might be guilty, i.e., he called the police, voluntarily gave a statement at the police station, and did not appear to be nervous in his dealings with the police. Additionally, appellant contends that the only blood found on him was on the bottom of his pants and on his shoes, which is consistent with his testimony that he knelt down to check Holman's pulse after discovering her lying on the kitchen floor.

The record is replete with circumstantial evidence that connects appellant to the murder. Although appellant disagrees, there was testimony from two neighbors that he and Holman had been arguing for at least two days. Around four a.m. on the morning of the murder, neighbors not only heard the couple fighting, but also heard loud banging noises coming from their apartment. Soon after the banging noises stopped, one of the neighbors looked outside his window and saw appellant get in the passenger side of a beige-colored car. When the police arrived at the scene, they noted that Holman's lifeless body was still warm to the touch. There were no unopened cans of beer in the kitchen, or elsewhere in the

apartment, despite appellant's statement to police that he had purchased a twelve-pack of beer and set it on the kitchen stove. Appellant's bloody palm prints were found on the refrigerator door. Blood was splattered all over appellant's pants, yet, there was not a spot of blood on the shirt he was wearing. Appellant points to his unsoiled shirt as evidence that he could not have committed the murder. However, the police found a shirt saturated with blood lying near Holman's body. Appellant claimed he used that shirt to hold Holman's head after he found her in the kitchen.

Appellant's jeans and shoes contained blood–splatter marks, which, according to a trained bloodstain–pattern specialist, indicates that appellant actually administered blows to Holman's head and body. Appellant had several fresh injuries, including bruising on the tops of his feet. Appellant gave police no explanation for these fresh injuries. Finally, the medical examiner testified that Holman suffered approximately 114 puncture wounds, which could have been caused by a meat fork found in the apartment. According to the medical examiner, Holman died from a blunt force trauma to her head.

From this evidence, any rational jury could have found beyond a reasonable doubt that appellant intentionally and knowingly caused Holman's death or intended to cause serious bodily injury and committed an act dangerous to human life which caused Holman's death. Accordingly, we conclude the evidence is legally sufficient to support appellant's conviction for murder. We overrule appellant's second point of error.

Regarding the factual sufficiency of the evidence, we note that the jury, as factfinder, could believe the State's evidence and disbelieve appellant's statements. *See Scott v. State*, 934 S.W.2d 396, 399 (Tex. App.–Dallas 1996, no pet.). Apparently, the jury did not believe appellant's version of events or his proffered explanations of the evidence that tended to tie him to the murder, i.e., his bloody palm print on the refrigerator, the blood splatter marks on his jeans, the fresh injuries on his body, the boisterous fighting with the victim very shortly before the murder, and the absence of the twelve-pack of beer appellant claims to have placed on the kitchen stove when he returned to the apartment. Based on the evidence in the record, we conclude the jury's findings were not so contrary to the overwhelming weight of

the evidence as to be clearly wrong or manifestly unjust, and thus find the evidence is factually sufficient to support appellant's conviction. Accordingly, we overrule appellant's third point of error.

III. ADMISSIBILITY OF PHOTOGRAPHS

In his first point of error, appellant argues the trial court abused its discretion in allowing the State to introduce several photographs which appellant claims were highly inflammatory and whose prejudicial effects were not outweighed by any probative value. We review the trial court's decision to admit photographs under an abuse of discretion standard. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997); *see also Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998). We will reverse the trial court's decision to admit photographs only if the decision was outside the "zone of reasonable disagreement." *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995).

Under Texas Rule of Evidence 403, all relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, by considerations of undue delay, or needless presentation of cumulative evidence." *Long v. State*, 823 S.W.2d 259, 271 (Tex. Crim. App. 1991). The court abuses its discretion only when the probative value of the photographs is small and the inflammatory potential is great.

In determining the admissibility of photographs under Rule 403, we consider several factors: (1) the number of exhibits offered; (2) their gruesomeness, detail, and size; (3) whether they are black-and-white or color; (4) whether they are close-up; (5) whether the body is naked or clothed; and (6) the availability of other means of proof and the circumstances of each case. *Long*, 823 S.W.2d at 272. "A trial court does not err merely because it admits into evidence photographs which are gruesome." *Sonnier v. State*, 913 S.W.2d 511, 519 (Tex. Crim. App. 1995). Photographs are generally admissible where verbal testimony about the same matters would be admissible. *Emery v. State*, 881 S.W.2d 702, 710 (Tex. Crim. App. 1994).

At trial, the State offered sixty photographs. These depict the crime scene, Holman's nude and bloody body at the crime scene, the autopsy of Holman's body, the injuries on appellant's body, and appellant's clothing. None of the pictures were duplicates. The photographs were taken from different angles and ranges.

Appellant contends that all sixty of the crime scene and autopsy photographs admitted at trial are "gruesome and somewhat detailed" and that the State could have presented far fewer photographs. Appellant claims that he repeatedly objected to the introduction of seventeen of these photographs, alleging that they were disproportionately prejudicial in nature. Appellant argues that the State could have limited its presentation to the remaining 43 photographs and that the admission of all sixty photographs had only one effect—to inflame the minds of the jury.

Although appellant does not specifically identify the exhibit numbers to the photographs which form the basis of his appellate complaint, the record shows that appellant objected to seventeen photographs. Twelve of these seventeen are crime scene photographs and five are autopsy photographs. Appellant objected to pictures of the crime scene (State's Exhibit No.'s 36, 38, 44, 45, 50, 51, 53, 55, 57, 58, 59, 60) on the basis that: (1) no issue as to identity had been raised; (2) the pictures are inflammatory and prejudicial and can serve no purpose except to inflame the jury; (3) the pictures have no probative value to the identity of the defendant or anyone else who perpetrated this offense; and (4) the pictures are cumulative. Appellant objected to the autopsy photographs (State's Exhibit No.'s ML-21 through ML-25), stating that they are highly inflammatory, and are duplicates of pictures which already had been admitted.

Once a defendant objects to photographic evidence on the basis of unfair prejudice, the trial court must balance the probative value of the photographs against their potential for unfair prejudice. *Narvaiz v. State*, 840 S.W.2d 415, 429 (Tex. Crim. App. 1992). In undertaking this task, the trial court must consider several factors affecting probativeness, including the relative weight of the evidence and the degree to which its proponent might be

disadvantaged without it, and the trial court must balance these factors against the tendency, if any, of the photographs to encourage resolution of material issues on an inappropriate emotional basis.

Crime Scene Photographs

The photographs in this case depict in graphic detail the viciousness and brutality of a bloody, gruesome crime. The crime scene photographs are in color, five by seven inches in size, and were all taken at different distances and angles. At trial, the State throughly explained that each of the disputed crime-scene photographs had probative value because each depicted something that the others did not.

Although the cause of Holman's death was blunt impact trauma to her head, she suffered 114 stab wounds – 9 puncture wounds to her face, 16 to her neck, 55 to her chest, and 34 wounds to her lower abdomen. In addition, several syringes were found stuck in various parts of her body, some in the pubic area. Each photograph is different, showing the various types of wounds inflicted on Holman's body and possible instruments that may have been used to inflict those wounds, e.g. a large, barbeque-style meat fork. Moreover, each photograph shows a different angle of the crime scene. Some of the photographs portray Holman's body close-up, while others show her body in the context of the crime scene.

Photographs showing a victim's wounds may be admitted to clarify and support observations and conclusions about the victim's injuries and to reveal the cause of death as alleged in the indictment, so long as they are not admitted solely to inflame the minds of jurors. *See Madden v. State*, 799 S.W.2d 683, 696-97 (Tex. Crim. App. 1990). Merely because some the photographs depicted Holman's nude and bloody body does not render them more prejudicial than probative. *See Hicks v. State*, 860 S.W.2d 419, 426 (Tex. Crim. App. 1993). Sergeant Binford provided detailed testimony regarding the crime scene. The disputed crime scene photographs depicted the same matters Sergeant Binford described and assisted the jury in understanding his testimony.

Autopsy Photographs

Generally, autopsy photographs are admissible unless they depict mutilations of the victim due to the autopsy itself. *See Rojas v. State*, 986 S.W.2d 241, 249 (Tex. Crim. App. 1998). Photographs that depict the nature, location, and extent of a wound have been declared probative enough to outweigh any prejudicial effects such photos may have on the jury, and these types of photographs are therefore properly admissible. *Etheridge v. State*, 903 S.W.2d, 21 (Tex. Crim. App. 1994). Where pictorial evidence will help the jury understand the testimony and the injuries sustained by the victim, a trial court does not abuse its discretion in admitting these photographs. *Bailey v. State*, 532 S.W.2d 316 (Tex. Crim. App. 1975). The autopsy photographs are more probative than prejudicial because they reflect the enormous number of wounds inflicted on Holman. Many of the disputed autopsy photographs show the "unique characteristics" of the various wounds she suffered in the assault. The photographs, taken at different angles, also show different injuries to different parts of her body. Moreover, the photographs, which reveal the entire skull, capture the degree and depth of the blunt trauma injuries to Holman's head, which the medical examiner testified was the actual cause of her death. *See, e.g.*, *Harris v. State*, 661 S.W.2d 106 (Tex. Crim. App. 1983) (holding that admission of color photographs showing the child's skull after skin had been pulled back was not error). We find that the procedures used during the autopsy did not distort the results of the crime, but enabled the jury to actually see the injury which caused Holman's death. *See e.g.*, *Bailey*, 532 S.W. 2d at 321.

Probative Value and Prejudicial Effect

Holman suffered an exceptionally brutal and bloody death. The medical examiner identified over a hundred puncture wounds to her body. Severe blunt trauma to her head caused her head to bleed profusely, resulting in a large pool of blood. Any photograph of the aftermath of this horrific event would necessarily be bloody and gruesome, but no more gruesome than the crime itself and no more gruesome than the facts to which both the medical examiner and Sergeant Binford testified at trial.

Appellant suggests that, because one of the jurors told the court that the photographs upset her, this is proof that the photographs were highly prejudicial to the point of substantially outweighing any probative value they might have. This argument is without merit. First, the juror testified that all the photographs upset her, not merely the disputed ones. Second, the court, outside the presence of the jury, questioned the juror as to whether she could still be fair and impartial. She indicated that although she was initially upset by the photographs, she was in a much better frame of mind and would ensure that appellant received a fair trial. Third, merely because a juror states that some photographs disturbed her does not render them inadmissible.

Although the photographs showing that Holman suffered an extremely brutal death are disturbing and graphic, they reflect no more than the gruesome crime committed and are admissible. *See Chamberlain v.State,* 998 S.W.2d 230, 237 (Tex.Crim.App. 1999); *see also Sonnier v. State,* 913 S.W.2d 511, 519 (Tex. Crim. App. 1995) (stating that "photos, while gruesome, are powerful visual evidence"); *Sendejo v. State,* 953 S.W.2d443, 446 (Tex. App.–Waco 1997, pet. ref'd) (holding photographs, although gruesome, are admissible to show the brutal nature of the crime). The photographs depicted the horror of the event and added to the probative value of the State's case by assisting the jury in understanding the testimony presented from both Sergeant Binford and the medical examiner. Considering the requisite factors, we cannot conclude that the prejudicial effect of the disputed photographs substantially outweighed their probative value. Accordingly, we find the trial court did not abuse its discretion in admitting the photographs. Appellant's first point of error is overruled.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 10, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

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