Affirmed and Majority and Concurring Memorandum Opinions filed June 18, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00059-CR

IRWIN PENTLAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 427th District Court
Travis County, Texas
Trial Court Cause No. D-1-DC-17-904036

MAJORITY MEMORANDUM OPINION

A jury convicted appellant of capital murder, and he was automatically sentenced to life without parole. *See* Tex. Penal Code § 12.31(a)(2). Appellant challenges his conviction in two issues, contending that the evidence is insufficient to support his conviction and that the trial court erred by admitting demonstrative evidence. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant contends that the evidence is insufficient to support his conviction for capital murder committed in the course of a burglary or robbery, as alleged in the indictment and included in the jury charge, because there is insufficient evidence of the underlying felonies. Regarding robbery, appellant contends that the State failed to prove beyond a reasonable doubt that appellant "committed theft with the intent to obtain or maintain control of the property while in the course of committing murder."[1]

A. Standard of Review and Legal Principles

When reviewing the sufficiency of the evidence, we consider all of the admitted evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding the defendant guilty beyond a reasonable doubt. *Curry v. State*, No. PD-0577-18, 2019 WL 5587330, at *6 (Tex. Crim. App. Oct. 30, 2019). The jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *Id.* Juries can draw any reasonable inference from the facts so long as each inference is supported by the evidence. *Id.* When the record supports conflicting, reasonable inferences, we presume that the jury resolved the conflicts in favor of the verdict. *Id.* The evidence is insufficient if the verdict is based on only speculation. *Id.*

[1] Because ultimately we conclude that the evidence is sufficient to support appellant's conviction under the robbery theory of capital murder, we focus our discussion of the law and facts regarding robbery rather than burglary. *See Matamoros v. State*, 901 S.W.2d 470, 474 (Tex. Crim. App. 1995) ("In a capital murder prosecution the evidence need only be sufficient to establish one of the underlying felonies in the indictment. Therefore, if the evidence in this case establishes burglary, we need not examine whether there was sufficient evidence to show robbery." (citations omitted)).

A person commits capital murder if the person intentionally commits murder in the course of committing or attempting to commit robbery. *See* Tex. Penal Code § 19.03(a)(2); *Ibanez v. State*, 749 S.W.2d 804, 807 (Tex. Crim. App. 1986). A person commits robbery if, in the course of committing theft and with the intent to obtain or maintain control of the property, the person intentionally, knowingly, or recklessly causes bodily injury. Tex. Penal Code § 29.02(a)(1). A person commits theft if the person, without the owner's effective consent, appropriates property with the intent to deprive the owner of the property. *Id.* § 31.03(a), (b)(1).

The phrase "in the course of committing" has the same meaning for purposes of capital murder and robbery. *Ibanez*, 749 S.W.2d at 807. The phrase means "conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission." Tex. Penal Code § 29.01(1); *see Ibanez*, 749 S.W.2d at 807.

In *Ibanez*, as here, the State had the burden to prove that the defendant intentionally killed the decedent with the intent to obtain control of the decedent's property. *See id.* "A killing and unrelated taking of property do not constitute capital murder under 19.03(a)(2): the State must prove a nexus between the murder and the theft, i.e. that the murder occurred in order to facilitate the taking of property." *Id.* For murder to be elevated to capital murder, the intent to rob must be formed prior to or concurrent with the murder. *Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993); *see Nelson v. State*, 848 S.W.2d 126, 131–32 (Tex. Crim. App. 1992) ("[T]he point at which appellant formulated his intent to take his victim's property is critical to differentiating, in the abstract, between his commission of capital murder in the course of robbery and his commission of first degree murder, followed by theft. . . . What elevates the occurrence of theft to robbery is the presence, at the time of, or prior to, the murder, of the intent to

obtain or maintain control of the victim's property." (quotation omitted)); *see also Griffin v. State*, 491 S.W.3d 771, 776 (Tex. Crim. App. 2016) (although murder need not be committed "in furtherance of the underlying felony," a felony "committed as an afterthought and unrelated to the murder is not sufficient to prove capital murder"). A general rule is that "a theft occurring immediately after an assault will support an inference that the assault was intended to facilitate the theft." *Cooper v. State*, 67 S.W.3d 221, 224 (Tex. Crim. App. 2002).

B. The Evidence[2]

The decedent, a seventy-five-year-old man, was shot in the head while in his home on November 18, 2015. He was a retired IBM executive and, although frugal, was wealthy. He was an "incredibly detailed and meticulous" record-keeper. For example, he balanced his credit union checking account on paper and kept thirty years of checkbook registries and carbon copy receipts. He kept a notepad in which he detailed his monthly expenditures. He kept "years and years" of credit card statements, which included blank "convenience" checks.

Appellant and the decedent had been friends for about seven years. They met in an Alcoholics Anonymous support group and would see each other at least once per week. They would spend time together outside of the meetings.

At the time of the murder, appellant and his family were living "paycheck to paycheck." Appellant used his wife's income to pay the bills. Appellant told his wife that he had been unemployed since 2010 except for a summer internship. He told his wife and others that he had graduated from the University of Texas at

[2] Because appellant challenges only the aggravating theories of capital murder and not the elements of murder, we do not recite all the evidence that supports the jury's finding that appellant intentionally caused the decedent's death.

Austin, had recently completed law school, and was studying to take the bar exam. However, none of these things were true.

In October 2015, appellant's credit union account had a negative balance and was closed. By November 2015, the account was reopened with a $0 balance, He was several months in arrears on his child support payments, and he owed more than $100,000 to the IRS.

An Austin Police Department detective reviewed the decedent's financial records and concluded that the decedent had loaned appellant up to $5,000 using a promotional rate convenience check. The records dated back to at least 2012. The decedent used convenience checks to roll over the loan. The records showed that a promotional rate was expiring on the decedent's Citi credit card in October 2015, and in September 2015 the decedent paid off the balance using his credit union checking account. Many of the relevant documents—a Citi statement, the decedent's checkbook, and the decedent's monthly expenditure lists—bore handwritten notes referring to "Ernie" or "Ernie loan."[3]

Appellant's wife testified that appellant and the decedent together had purchased a used recreational vehicle (i.e., a motorhome). Detectives found a written contract regarding the transaction, dated May 2013 and signed by the decedent and appellant. It included detailed terms of the arrangement. Appellant's wife testified that at the time of the murder, appellant and the decedent had no business ventures together. If appellant had been in a business venture with the decedent, that was the kind of thing appellant and his wife would have talked about.

[3] Appellant commonly used the name "Ernie."

Beginning on November 16, 2015, and continuing until after the murder on November 18, appellant deposited or cashed checks purportedly signed by the decedent:

Deposit/Cash Date & Time	**Check Type**	**Check No.**	**Amount**
Nov. 16 at 8:03 a.m.	Convenience	101431	$5,000
Nov. 17 at 1:00 p.m.	Credit Union	6060	$5,000
Nov. 17 at 3:55 p.m.	Convenience	101432	$7,500
Nov. 18 at 9:45 a.m.	Credit Union	6059	$4,800

All the checks were dated November 15 or 16.

Detectives believed the murder occurred between 8:15 a.m. and 9:30 a.m. on November 18. A neighbor observed the decedent return home from dropping off his grandson at daycare between 8:15 a.m. and 8:30 a.m., and appellant admitted to meeting with the decedent at 9:00 a.m. on November 18. Appellant's cell phone records indicated that appellant was in the area of the decedent's home around that time. Appellant was the last person to see the decedent alive. Appellant picked up the grandson from daycare that afternoon, although he was not authorized to do so, and kept the child at appellant's mother's house overnight.

The murder weapon was never recovered. Based on the rifling characteristics of .223 bullet fragments recovered from the decedent's brain, a ballistics expert testified that the weapon was "either a Thompson/Center, which is a single-shot rifle, a Norinco, which is a .223 caliber AK, or an AR-15-style rifle."

The decedent was not a "gun person"; he never owned a gun. Appellant, on the other hand, owned a rifle case and several components that were compatible with an AR-15. In November 2015, before the murder, he purchased a .300 Blackout barrel that would fit an AR-15 rifle and a threaded adapter that would fit

the barrel on one end and an automobile oil filter on the other. Appellant had searched the Internet regarding how to put these parts together to make a home-made silencer.[4]

Detectives interviewed appellant on the day after the murder. He never mentioned the checks. After the interview and before he returned home, he withdrew $8,000 in cash from his credit union account. He showed it to his wife and said it would be bail money if he were arrested. She was surprised to see that much cash because she did not think they had $8,000 in their accounts. In the days after the murder, appellant paid off his past-due child support.

None of the four checks that appellant deposited or cashed was listed on the decedent's ledger of monthly expenditures. Detectives noted that the decedent had logged check No. 6057 from his credit union—a payment to Sears—in the checkbook registry and on the ledger. The check was dated November 17. Check No. 6058 was still in the decedent's checkbook. The credit union checks that appellant deposited and cashed, Nos. 6059 and 6060, were not logged in the checkbook registry. The carbon copies for those two checks were missing, and those were the only two checks with carbon copies missing out of all the decedent's checkbooks over the course of thirty years.

An analyst for the Questioned Document Section of the Texas Department of Public Safety Crime Lab testified that she reviewed copies of the four checks appellant deposited or cashed, along with some comparable writing samples. She concluded that there were indications that the decedent may not have written the date, numerical dollar amount, or spelled dollar amount portions of the questioned

[4] Like the murder weapon, detectives never found the barrel and adapter. The ballistics expert testified, however, that the barrel was not used in the murder because of the caliber of the bullet.

documents, and there were indications that appellant may have written those portions of the checks. There was "no basis for an identification or elimination" of the decedent or appellant having signed the checks.

C. Analysis

Appellant challenges the sufficiency of the evidence to support the jury's findings that (1) there was a *theft* and (2) the murder was committed *in the course of committing* the theft, i.e., robbery.

1. Sufficient Evidence of Theft

Appellant contends that there is insufficient evidence that he stole the checks. Appellant focuses on the inability of the Department of Public Safety analyst to conclusively identify appellant as having written the checks based on a handwriting analysis, and appellant contends that there was "no evidence to rule out an ongoing business relationship between appellant and the victim."

The jury heard evidence, however, that would enable a rational inference that the decedent did not write the checks to appellant, and thus, appellant stole the checks and forged them in order to take the decedent's money without the decedent's consent. The jury heard about the decedent's meticulous record-keeping regarding his finances, yet there was a notable absence of documentation regarding the recent checks to appellant. In particular, the decedent did not list the credit union checks in his checkbook registry or monthly ledger. The decedent had listed a check to Sears dated November 17 in the registry and ledger, but the decedent did not document the credit union checks that appellant deposited or cashed, which predated the check to Sears. The checks were removed from the decedent's checkbook out of order, and the carbon copies were missing—the only two in thirty years' worth of checks.

Appellant's wife confirmed that there were no business ventures between appellant and the decedent at the time of the murder. There was no evidence that appellant ultimately used any of the money for a business venture. Rather, he paid off his past-due child support and told his wife that some of the money could be used for his bail. And, although the decedent had documented his prior loan and vehicle purchase with appellant, nothing in the decedent's records related to the four checks that appellant deposited or cashed, which totaled more than $22,000.

In sum, the jury could have rationally inferred that the decedent did not write or give the checks to appellant, and instead, appellant took them without the decedent's consent, forged them, and used the checks to take the decedent's money without the decedent's consent. Thus, there is sufficient evidence of theft of the checks and the money deposited into appellant's account and received in cash when he negotiated the checks. *See Johnson v. State*, 560 S.W.3d 224, 229 (Tex. Crim. App. 2018) (theft of money proven when the complainant's check was deposited); *see also id.* at 234–37 (Yeary, J., concurring) (discussing the difference between theft of a check and theft of money obtained by cashing or depositing a check).

2. Sufficient Evidence of Murder "In the Course of Committing" Robbery

Appellant next contends that no theft occurred in the course of committing the murder, so no robbery occurred in the course of committing the murder. He contends that "the checks were acquired *prior* to the murder, not during or afterward." Appellant notes that the checks were dated November 15 and 16 and claims, "Most importantly, the checks which the State claimed where [sic] stolen while in the commission of the murder predated the date of the offense."

Appellant deposited the first three checks in the days leading up to the murder. Thus, it would have been impossible for appellant to have stolen the first three checks during or immediately after the murder. And it would be unlikely, albeit possible, that appellant took the fourth check in the course of committing the murder.

But, appellant cashed the fourth check just minutes after the murder, indicating that appellant was still in the process of appropriating the decedent's *money* at the time of the murder. A rational jury, considering this evidence, could conclude that there was a nexus between the murder and the theft of the decedent's money—that the murder occurred in order to facilitate the taking of the money. *See Ibanez*, 749 S.W.2d at 807; *see also Johnson*, 560 S.W.3d at 229 (depositing check was appropriation of money); *cf. Turner v. State*, 87 S.W.3d 111, 118 (Tex. Crim. App. 2002) (holding that evidence—that "after killing his parents, appellant forged and cashed three checks from their checking account"—was relevant and not overly prejudicial because the State alleged a capital murder predicated on robbery).

Appellant's theft of the checks and depositing three of them into his account before the murder supplies ample evidence that appellant formed an intent to rob the decedent before the murder. And, the jury heard evidence of appellant's financial difficulties, which supplied a motive for the robbery. *See Nelson v. State*, 848 S.W.2d 126, 132 (Tex. Crim. App. 1992) (evidence that the defendant was in financial difficulty supplied motive for robbery, and thus, intent to rob during or before the murder). Appellant points to no other evidence to explain why he brought an AR-15 to the decedent's house and shot his long-time acquaintance in the head.

A rational jury could have found the essential elements of capital murder beyond a reasonable doubt—namely, that appellant murdered the decedent in the course of committing a robbery.

Appellant's first issue is overruled.

II. ADMISSION OF DEMONSTRATIVE EVIDENCE

In his second issue, appellant contends that the trial court erred by allowing the State's expert to demonstrate for the jury how to attach an AR-15 receiver to a .300 Blackout barrel, threaded adapter, and an automobile oil filter. Appellant contends that the demonstration's probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Tex. R. Evid. 403.

A. Preserved Error

The State contends that appellant's preserved error is limited to "the ruling by which the trial court gave the State permission to have [the expert] show the jury how the various items fit together," and that any other claim "should fail for want of preservation."

To preserve an issue for appellate review, a party must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. *Penton v. State*, 489 S.W.3d 578, 580 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *see* Tex. R. App. P. 33.1(a). The appellate complaint must comport with the specific complaint that the appellant made at trial. *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014); *Penton*, 489 S.W.3d at 580.

Outside the jury's presence, appellant described the State's proposed "demonstrative evidence" as "an AR-15, onto which is to be affixed a barrel and a threaded device and a—Judge, I believe it's an oil filter for an automobile."

Appellant objected that "any probative value is substantially outweighed by the nature of prejudice showing to be a black weapon when all hooked up." Appellant clarified that he "wouldn't have any objection if it was—if it was the gun used, I mean, obviously." He elaborated that the demonstration was speculative and misleading "because one of three types of weapons were used, we don't know if this was used at all."

Appellant's preserved error is limited to these complaints raised in the trial court. *See* Tex. R. App. P. 33.1(a); *Bekendam*, 441 S.W.3d at 300.

B. Legal Principles and Standard of Review

Rule 403 of the Texas Rules of Evidence allows for the exclusion of relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *Colone v. State*, 573 S.W.3d 249, 266 (Tex. Crim. App. 2019); *see* Tex. R. Evid. 403. A Rule 403 analysis generally balances the following four factors, though they are not exclusive: "(1) how probative the evidence is; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence." *Colone*, 573 S.W.3d at 266.

Generally, an in-court demonstration must be substantially similar to the event. *Wright v. State*, 178 S.W.3d 905, 919 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing *Valdez v. State*, 776 S.W.2d 162, 168 (Tex. Crim. App. 1989)); *Warfield v. State*, No. 03-15-00468-CR, 2017 WL 2628563, at *4 (Tex. App.—Austin June 14, 2017, pet. ref'd) (mem. op., not designated for publication). It is not essential that the conditions of the demonstration be identical; dissimilarities go to the weight and not to admissibility. *Wright*, 178 S.W.3d at

919; *Warfield*, 2017 WL 2628563, at *4. All parts of the demonstration must be supported by the evidence. *Wright*, 178 S.W.3d at 919; *Warfield*, 2017 WL 2628563, at *5. Similarly, an object such as a weapon "that is not an exact replica or duplicate of the original is admissible if it is relevant and material to an issue in the trial and is not overly inflammatory, and the original, if available, would have been admissible at trial." *Simmons v. State*, 622 S.W.2d 111, 113 (Tex. Crim. App. [Panel Op.] 1981).

We review the trial court's decision to admit evidence, including whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Id.* We may not substitute our own decision for that of the trial court. *Id.*

C. Analysis

As noted above, the murder weapon was never recovered, but bullet fragments indicated that the weapon was one of three types of rifles. The State used evidence of appellant's purchases and possession of items that could be used with an AR-15 rifle to attempt to link appellant to a weapon of the type that was used during the murder. For example, the jury heard evidence that appellant purchased a .300 Blackout barrel and threaded adapter that could be attached to an AR-15 rifle. Although the adapter could be used with other firearms, the barrel could only be used with an AR-15 rifle. The jury heard that appellant researched how to use these items to make a silencer with an automobile oil filter. The expert's demonstration of assembling these items, therefore, was based on the evidence and had some probative value to show that appellant owned an AR-15 before the murder. The demonstration also had probative value in showing the

jury that appellant had knowledge of AR-15 rifles and how they work. As the expert explained, to attach these items to an AR-15 receiver, "You have to have at least some knowledge of AR-15 rifles and how they work and be comfortable, basically, building a gun."

Appellant focuses on the fact that the murder weapon could have been a different type of rifle; as he argued to the trial court, he would not have objected if the expert intended to use the actual murder weapon. Based on the evidence that would lead to an inference that appellant owned an AR-15 rifle, coupled with the evidence that an AR-15 rifle was one of three possible types of rifles that was used as the murder weapon, the trial court acted within its discretion to allow the jury to see an AR-15 receiver during the demonstration. *See Simmons*, 622 S.W.2d at 113.

However, as the expert acknowledged, a .300 Blackout barrel was not used during the murder in this case because the bullet fragments were of a different caliber. Thus, a demonstration of how to connect the parts that appellant purchased to make a silencer was tangential to the main issues in the case.

Even if the probative value of the demonstration was not significant, neither was the potential to impress the jury in some irrational, but nevertheless indelible way. As the trial court explained when it ruled the demonstration would be admissible, the State was prohibited from "parad[ing] it" in front of the jury and had to make the demonstration in "as an educational form as it can be." The court cautioned the State about deviating into something "more prejudicial": "And so, you know, if we go too far down that road and if the State makes too much of it, then I certainly would assume that [appellant] is going to reurge his argument and I would be quick to find that it would be [inadmissible]." Appellant did not reurge his objection, and the record does not show that the demonstration itself was

emotional or encouraged the jury to make a decision based on an improper basis. *See Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Crim. App. 1993) (noting that "unfair" prejudice refers to a tendency to suggest a decision based on an improper basis, often an emotional one).

On appeal, appellant "concedes the fact that the demonstration took very little time." He acknowledges that the demonstration lasted only a few seconds. The record does not indicate that the State had a particularly strong need for the demonstration, given that the .300 Blackout barrel and other components were not used during the murder. Exemplars of the barrel and adapter had been previously admitted as exhibits without objection, and the jury heard testimony about how appellant researched making a silencer with these components and an oil filter.

Considering the relevant factors in total, we cannot say that the danger of unfair prejudice substantially outweighed the probative value of the demonstration. The trial court did not act outside the zone of reasonable disagreement. *Cf. Wright*, 178 S.W.3d at 912–28 (upholding admission of a twenty-minute demonstration of the murder during which one prosecutor was tied to the victim's bed and another prosecutor got on top of him, straddled him, and held a knife while appearing to stab him repeatedly, including in his penis); *Warfield*, 2017 WL 2628563, at *6 (upholding admission of a police officer's demonstration of the pointing of a gun when the officer's gun was substantially similar to the actual gun described by witnesses).

Appellant's second issue is overruled.

III. CONCLUSION

Having overruled both of appellant's issues, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Jewell, and Poissant. (Poissant, J., concurring).

Do Not Publish — Tex. R. App. P. 47.2(b).