



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

HERMANN FULGENCE GNINIA,	§	No. 08-19-00028-CR
Appellant,	§	Appeal from the
v.	§	371st Judicial District Court
THE STATE OF TEXAS,	§	of Tarrant County, Texas
Appellee.	§	(TC# 1570670R)

OPINION

A jury convicted appellant Hermann Fulgence Gninia of murder and sentenced him to 35 years' incarceration. On appeal, he argues that: (1) the evidence is legally insufficient to support his conviction, and (2) the trial court erred by admitting several autopsy photographs because their prejudicial effect outweighed their probative value. Because we conclude that sufficient evidence supports Appellant's conviction and the trial court did not abuse its discretion in admitting the autopsy photographs, we affirm the trial court's judgment.¹

¹ This case was transferred from our sister court in Fort Worth pursuant to the Texas Supreme Court's docket equalization efforts. *See* TEX.GOV'T CODE ANN. § 73.001. We follow the precedents of the Fort Worth Court to the extent they might conflict with our own. *See* TEX.R.APP.P. 41.3.

I. BACKGROUND

Diossy Ndiaye was a 39-year old mother of 3-year-old triplets and a 5-month old infant. She had been married to Appellant over ten years. On January 10, 2017, paramedics were called to the couple's residence and they found Ndiaye's unresponsive body in the master bedroom. After medical professionals attempted to gain a heartbeat for over an hour, the attending emergency room physician at Texas Health Arlington Memorial Hospital pronounced Ndiaye dead. Appellant initially claimed that his wife fell and hit her head on the bed frame, but two pieces of physical evidence alerted authorities that something more was at play. First, crime scene photographs depicted signs of a struggle in the master bathroom, including two doors being separated from their hinges. Second, while the Tarrant County Medical Examiner's Office found evidence of a brain bleed and contusions to her arms occurring prior to death, it concluded that Ndiaye was manually strangled. And as we elaborate below, Appellant gave conflicting accounts for what transpired that evening.

As a result, a grand jury indicted Appellant for intentionally or knowingly causing the death of his wife, Diossy Ndiaye, by strangulation, or applying pressure to her throat or neck or impeding her breathing with his hand or arm. A jury returned a guilty verdict. Because Appellant has challenged the sufficiency of the evidence to support their verdict, we recount the evidence in some detail.

A. Appellant Goes Out with a Friend Following a Domestic Dispute.

Godefroy Gbery called Appellant around 5 p.m. on the night that Ndiaye was killed. Appellant complained about issues with Ndiaye and suggested they meet for a drink. Gbery met Appellant at the Gninia residence, and Appellant and Ndiaye were not speaking to each other.

Gbery and Appellant left to get drinks and were gone for roughly an hour. Gbery declined to go back to Appellant's residence because of the tension in the home.

Gbery testified that Ndiaye later called him and stated, "Hermann m'a tapé." Gbery translated Ndiaye's statement to mean that Appellant hit her. During trial, Gbery indicated that the statement could also mean Appellant slapped Ndiaye.²

Gbery called both Ndiaye's and Appellant's cell phones 20 minutes later and received no answer. He drove back to the Gninia residence and saw no lights on inside the home. Appellant called Gbery later that evening and told Gbery that Ndiaye had discomfort but did not mention that Ndiaye was taken away in an ambulance.

B. Appellant Calls on His Neighbors for Assistance

Around 10:30 that evening, Appellant knocked on a neighbor's door and said he could not find his phone, his wife had passed out, and asked the neighbor to call 911. Another neighbor joined Appellant and they all went back to Appellant's house. As they entered the bedroom, the neighbors found Ndiaye lying unresponsive on the floor of the master bedroom with her head propped up against the entry doorframe and her feet pointed towards the master bathroom.³ She had lost bowel control and her eyes had rolled into the back of her head. Appellant stepped over Ndiaye's body as it lay. They stated that Appellant repeated, "she wouldn't give me my phone" and "where's my phone" as other arriving neighbors performed chest compressions on his wife.

C. Emergency Medical Technicians Arrive

Emergency Medical Technician Destinee Leavines, who responded to the Gninia residence, testified that Ndiaye was deceased when she arrived. Appellant told the EMTs that

² Appellant, Ndiaye, and Gbery are natives of Ivory Coast and speak French. Ndiaye's mother, Soukenya Jaye, a native French speaker, testified that "Hermann m'a tapé," translates to "Hermann beat me."

³ A neighbor testified that the position of Ndiaye's body was odd because it did not permit her to breathe.

Ndiaye complained of a headache and collapsed, falling to the ground, but he did not report that she hit the bed frame.

D. Appellant Tells the First Responding Officer of an Accident

Fort Worth Patrol Officer Orlando Donovan had his bodycam on when he first talked to Appellant. In that video, Appellant stated that he was in the master bedroom and watched as Ndiaye was standing and she then fell and hit her head on the frame of the master bed. Appellant told the officer that Ndiaye suffered from a history of headache spells and had been complaining of a headache for a week. Appellant also stated that he came back into the master bedroom and found Ndiaye on the floor, so he placed his jeans under her head. He indicated that Ndiaye was awake and was able to drink her medicine.⁴

While speaking with the officer, Appellant did not inquire as to Ndiaye's condition at any point during the video. While law enforcement officers were asking questions concerning Ndiaye's medical history, Appellant attempted to log into his cellular account from an iPad and expressed concern about finding his cell phone.

E. Appellant Tells a Different Story to Detective O'Brien

Shortly after paramedics removed Ndiaye's body from the house, Appellant provided a voluntary statement to Fort Worth Homicide Detective Thomas O'Brien. The recorded statement was played for the jury. Appellant told Detective O'Brien that Ndiaye called him as he left work on the night she died. Appellant asked Ndiaye if she had gathered the money and documents necessary to petition for her United States citizenship. Ndiaye stated that she had not yet done so. Appellant complained that he would have to pay the fee for Ndiaye's petition for United States

⁴ Responding law enforcement officers reviewed the box containing the medicine that Appellant stated he administered to Ndiaye on the night she died. They concluded that the substance was a sodium and sugar effervescent tablet, much like an Alka-Seltzer.

citizenship and hung up the phone, but he subsequently claimed that this interaction was all a joke. Appellant then called his friend Godefroy Gbery to meet for a drink.

When Appellant got home, Ndiaye was mad, and he left with Gbery to a bar. Ndiaye had prepared dinner by the time he returned. Appellant stated that he ate dinner away from Ndiaye because he did not want to speak to her; he was irritated by the children and the cost of an upcoming trip to Africa. Appellant took a call on his cell phone from a female; it was not contested at trial that Appellant was involved in an affair with another woman at that point in time.⁵ Ndiaye questioned why he spent time talking to other women. At that point, Appellant decided to leave the house for the evening, and went to his closet to get some belongings.

Ndiaye followed him into the master bathroom and closet, accusing him of cheating on her. Appellant told Ndiaye that she made no sense, and that he did not want to talk, he just wanted to leave the house. He stated that Ndiaye grabbed his keys and cell phone while he was in the master closet getting dressed to leave the house.

Appellant next told Detective O'Brien that Ndiaye accused him of hitting her when he was merely trying to leave the room. He tried to take Ndiaye's house keys from her purse, and their baby started crying because the couple was yelling. Appellant stated that he picked up the baby, went into the master bathroom and closed the door. Ndiaye yelled that she wanted her baby, and Appellant stated he would return the baby if she would let him leave, but he would not talk to Ndiaye. Ndiaye called Gbery at some point. Appellant told Detective O'Brien that Ndiaye pushed her way into the bathroom asking for the baby. Appellant stated that he pushed Ndiaye, and she

⁵ Law enforcement searched Appellant's cell phone and discovered that he received text messages on the day that Ndiaye was murdered from a female that was in a romantic relationship with him. The record is not clear if this was the same female that called Appellant's cell phone directly before Ndiaye died. Appellant told Detective O'Brien that he tried to leave the marital home on the night Ndiaye died because "jealousy things, that doesn't make sense to me."

fell into the master bed. He put the baby on the bed and left the bedroom, although Ndiaye initially tried to block his exit.

Appellant indicated that when he reached the living room, he heard Ndiaye fall in the master bedroom. He heard a “boom,” and went back into the room and said to Ndiaye, “You see.” Appellant stated that Ndiaye was inside the master bedroom by the door, and the baby was on the bed.

Appellant told Detective O’Brien that Ndiaye was face down, and he turned her over. She was still awake. Her eyes were open, and she was making noises. Appellant indicated that Ndiaye had fainted in this manner before when she was anxious and took medicine for such occurrences. He asked Ndiaye where her medicine was, but she could not tell him. He complained that he had to take care of Ndiaye and the baby, and he told Ndiaye to get up. He recalled making the baby’s food and retrieving Ndiaye’s medicine in narratives that involved him speaking to and interacting with Ndiaye, but also claimed that Ndiaye was not responsive. He later claimed that Ndiaye sat up several times after she fainted. He then stated that, after he gave Ndiaye her medicine, she fell and hit her head on the bedframe. At this point, he sought help from neighbors.

Well into his first interview with Detective O’Brien, Appellant altered his story to report that he was now in the room when Ndiaye fell. He then claimed that the only time Ndiaye fell was after he pushed her, when she was blocking him from leaving the master bathroom as he was getting clothes to leave the house. Appellant heard Ndiaye hit the bed after he pushed her. He subsequently altered his story once again to revert to his claim that Ndiaye got back up after he initially pushed her, and she thereafter fell a second time, after he had left the room. He stated that Ndiaye was not responsive after he first pushed her.

When Detective O'Brien told Appellant that Ndiaye was dead, Appellant stated, "Diossy what do you do to me," and "I am sorry." At the close of the interview Appellant said, "Diossy, she left me alone with my babies. I got four of them. What are they going to ask me tomorrow? . . . Diossy . . . I told you this jealousy . . . If I was trying to do something with her would I pick up my phone at home? It doesn't make sense. Dang women." Detective O'Brien testified that, before he exited the cruiser, Appellant stated, "I'm so sorry."

F. Appellant Admits to Placing His Hands Around Ndiaye's Neck

Appellant provided a second voluntary interview to Detective O'Brien that the State played for the jury. The sequence of events that Appellant described occurring the night that Ndiaye died generally corresponded to the story he told previously, including that he pushed Ndiaye down and she hit her head on the bed frame. Appellant now included, however, that he pinned Ndiaye up against the wall of the bathroom, and placed his hands around her neck, squeezing for ten seconds. Appellant admitted that he was mad when he was squeezing Ndiaye's neck, and he was trying to get her to stop talking so that he could leave the house. Detective O'Brien asked Appellant during the interview, "Who killed your wife?" Appellant responded, "It's me. It's me. I should have never put my hands on her."

G. Autopsy Results Concluded Ndiaye was Manually Strangled

Tarrant County Medical Examiner's Office Deputy Medical Examiner Dr. Tasha Greenberg testified to Ndiaye's autopsy, which was performed by her former colleague, Dr. Denika Adams.⁶ Dr. Greenberg felt comfortable providing an expert medical opinion

⁶ Dr. Denika Adams performed the autopsy on Ndiaye on January 11, 2017. Dr. Greenberg was assigned Ndiaye's case after Dr. Adams left employment with the Tarrant County Medical Examiner's Office. Dr. Greenberg testified that she was familiar with Dr. Adams' work, because she assisted Dr. Adams with autopsies after Dr. Adams provided notice that she was leaving. Dr. Greenberg inherited approximately 100 cases from Dr. Adams, and she had no issues with Dr. Adams' work product, the findings and conclusions, or the way in which she performed an autopsy.

concerning Ndiaye's autopsy because she had the complete file, including all photographs taken. Furthermore, Dr. Greenberg had signed Ndiaye's autopsy report, along with Dr. Nizam Peerwani, the Chief Medical Examiner, and two additional deputy medical examiners.

Dr. Greenberg testified that Ndiaye's cause of death was strangulation, and manner of death was homicide. She stated that Ndiaye suffered visible injuries on her upper extremities. Although Ndiaye did not present external injuries to her neck area, Dr. Greenberg stated that a death by strangulation may not reveal external injuries. Ndiaye suffered physical injuries before she died that were not life-threatening. She presented with contusions on her wrists and upper arms, and bleeding under her scalp and on her brain. Underneath her scalp, Ndiaye bled in the right temporal area and also in a larger area in the back, right side of her head. Ndiaye faintly bled on the surface of the left side of her brain or suffered subarachnoid hemorrhage.

Dr. Greenberg stated that Ndiaye also suffered injuries that indicated she was strangled to death, including bleeding to the muscles in her neck. Photographs depicted that the sternocleidomastoid muscle, connecting Ndiaye's jaw to her collarbone, bled at the time she died. Specifically, Ndiaye bled at the right side of her neck and closer to the midline. Another photograph demonstrated that Ndiaye bled to the right of her hyoid bone at the time of her death. Dr. Greenberg testified that these injuries were consistent with manual strangulation, and Ndiaye's injuries were concentrated more on the right side of her neck than the left.

She indicated that factors such as the shape of the hand of the person strangling Ndiaye, the fat content of her neck, and how much Ndiaye resisted being strangled effected the degree of bruising visible on her neck. Ndiaye could have been rendered more vulnerable to being strangled because of the injuries she suffered to her head. Dr. Greenberg testified that Ndiaye did not have any levels of drugs or alcohol in her system that affected the determination of Ndiaye's cause and

manner of death.⁷ She indicated that Ndiaye's heart muscle was healthy and presented no scars or tumors. Dr. Greenberg reviewed a wealth of Ndiaye's prior medical records, and nothing in Ndiaye's medical history alerted her that Ndiaye had any heart condition.⁸

H. Crime scene Photographs Demonstrated that a Struggle Occurred

Detective O'Brien was concerned that Appellant manipulated the crime scene or Ndiaye's body before first responders arrived. He testified that all of the physical evidence from the crime scene indicated that a struggle occurred in the master bathroom and closet area, contrary to Appellant claimed that Ndiaye was injured in the master bedroom directly in front of the bed and entry doorway. A crime scene officer photographed the residence the night that Ndiaye died. He photographed the left leg of the master bed (where Appellant claimed Ndiaye fell and hit her head on the corner of the bed). The photograph showed that the left leg of the master bed had not moved from the original indentation of the carpet. The wooden pieces of the bed frame were still flush together and intact, and were not separated, as they would be if someone fell against them.

The crime scene officer testified that based upon his training and knowledge, the evidence indicated that no violence occurred near the foot of the Gninia master bed. He indicated that violence occurred in the master bathroom and closet, where multiple screws and wood shards were found, and a door hinge was broken. Crime scene photographs depicted that a cabinet was pulled

⁷ Dr. Greenberg testified that Ndiaye's blood alcohol level at the time of her death was two tenths below the legal limit to operate a vehicle in Texas, and the amount did not affect the Medical Examiner's conclusion concerning Ndiaye's manner or cause of death. The Medical Examiner's Office screened Ndiaye's urine for all major categories of drugs, and the results were negative. The M.E. also sent Ndiaye's blood, vitreous fluids, and urine to ExperTox laboratory to test for drugs at levels below that which the Medical Examiner's Office was capable of detecting. ExperTox laboratory detected subclinical levels of the appetite suppressant sibutramine. It also found low levels of over the counter doxylamine, a formulation of Unisom, and dextromethorphan, a cold medicine, in Ndiaye's blood and urine. Dr. Greenberg testified that these substances did not affect Ndiaye's cause or manner of death.

⁸ Dr. Peter Sakovich, a board-certified obstetrician/gynecologist who treated Ndiaye for over 4 years and performed over 42 office visits, also testified that Ndiaye was healthy and had no medical conditions, although she was technically overweight.

from its hinges in the master bathroom. The hinges to the door to the master closet, which was accessed through the master bathroom, were torn from the wall. Wood shards and screws were strewn about the bathroom floor. A bed pillow, a pair of jeans, a towel, and a blanket were on the floor of the master bathroom.

I. Ndiaye Had Previously Reported that Appellant Tried to Strangle Her

Ndiaye's mother, Soukenya Jaye, testified that Ndiaye was born in Ivory Coast. Jaye stated that Ndiaye immigrated to the United States to attend university. She indicated that Ndiaye began a relationship and engagement with Appellant in 2005. Ndiaye married Appellant in a civil ceremony in Dallas in 2006 and returned to Africa for a religious ceremony thereafter.

While the couple was in Africa for their religious ceremony, Jaye recalled that Ndiaye reported that Appellant tried to strangle her while the couple stayed in Jaye's home. Jaye testified that Ndiaye came out of the couple's bedroom choking, crying with red "blood eyes," and made a hand gesture, saying, "Mama, Hermann want to strangle me." Jaye stated that she was going to speak to Appellant; however, Jaye's sister told her to stay out of the young couple's problems.

Jaye testified that sometime between 2013 and 2015, when she was visiting in the house where Ndiaye died, she woke to a big noise, like shouting. Jaye found Ndiaye outside the master bedroom crying with red eyes, and Appellant was violent and acting angry. Jaye did not witness Appellant make physical contact with Ndiaye, but she heard a loud noise, and she was worried about Ndiaye. Jaye stated that Appellant told her he was angry because Ndiaye shredded a \$7,000 receipt.

Jaye testified that she arrived in the United States three days after Ndiaye died, and Appellant provided her with at least three explanations as to what happened. Appellant first told Jaye that he threw Ndiaye on the master bed, and later heard a loud noise when he was in the

kitchen and Ndiaye was in the master bedroom. He found Ndiaye lying on the floor of the master bedroom, but he ignored Ndiaye because he thought she was faking for attention. Appellant also told Jaye that Ndiaye fell down and fainted. Jaye testified that she had never witnessed Ndiaye faint, even in extremely stressful situations.

II. ISSUES ON APPEAL

Appellant raises two issues on appeal. He first argues that the evidence was insufficient to sustain his conviction. He next contends that the trial court erred by admitting several autopsy photographs, because their prejudicial impact outweighed their probative value. For the reasons set forth below, we overrule both issues and affirm the trial court's judgment.

III. SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION

Appellant first argues that the evidence was legally insufficient to support his conviction, because a jury could not have rationally concluded that he strangled Ndiaye. Alternatively, he maintains that, even if this Court determines that sufficient evidence demonstrated he strangled Ndiaye, a rational jury could not conclude that it was his conscious desire to cause Ndiaye's death or that he was aware that his conduct was reasonably likely to result in her death. We conclude the issue is without merit.

A. Standard of Review

Due process mandates that the State prove every element of the crime charged beyond a reasonable doubt. *See Nisbett v. State*, 552 S.W.3d 244, 262 (Tex.Crim.App. 2018), *citing Jackson v. Virginia*, 443 U.S. 307, 313 (1979). When reviewing a sufficiency challenge, an appellate court must ask whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Nisbett*, 552 S.W.3d at 262, *quoting Jackson*, 443 U.S. at 319. The *Jackson* standard

gives full play to the responsibility of the factfinder to weigh the evidence, resolve conflicts in the testimony, and “draw reasonable inferences from basic facts to ultimate facts.” *Nisbett*, 552 S.W.3d at 262, *quoting Jackson*, 443 U.S. at 319; *Whatley v. State*, 445 S.W.3d 159, 166 (Tex.Crim.App. 2014). An appellate court may not make its own assessment of the evidence and act as a thirteenth juror, but acts only as a safeguard to ensure that the factfinder’s verdict was based upon more than a “mere modicum” of evidence. *Cary v. State*, 507 S.W.3d 761, 766 (Tex.Crim.App. 2016), *quoting Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App. 1988) (en banc). Circumstantial evidence is as probative as direct evidence to establish guilt and is sufficient alone to sustain a conviction. *See Nisbett*, 552 S.W.3d at 262; *Guevara v. State*, 152 S.W.3d 45, 49 (Tex.Crim.App. 2004).

Juries must be permitted to draw multiple inferences, as long as each inference is supported by the direct or circumstantial evidence presented at trial. *See Hooper v. State*, 214 S.W.3d 9, 16-17, *citing Jackson*, 443 U.S. at 318-19. The court in *Hooper* explains, however, that the jury is not permitted to reach conclusions based upon mere speculation, which is “theorizing or guessing about the possible meaning of facts and evidence presented.” *Hooper*, 214 S.W.3d at 15-16. To address a sufficiency challenge, reviewing courts should apply the *Jackson* standard and determine “whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.” *Id.* at 16.

B. Murder Under the Texas Penal Code

Under the Texas Penal Code, a person commits 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.PENAL CODE § 19.02(b)(1)-(2). “Serious bodily injury” means “bodily injury that creates a substantial

risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily organ.” *Id.* § 1.07(a)(46). A person acts intentionally when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(b). A person acts knowingly when he is aware that his conduct is reasonably certain to cause the result. *Id.*

C. Application

Viewing the evidence in the light most favorable to the verdict, the evidence was sufficient to support Appellant’s conviction. *See Nisbett*, 552 S.W.3d at 262. Dr. Greenberg testified that Ndiaye died by manual strangulation. She explained that Ndiaye bled within the muscles in her neck and around her hyoid bone: injuries that are consistent with manual strangulation. Appellant admitted that he placed his hands around Ndiaye’s neck and squeezed at a time when he was “mad.” When Detective O’Brien asked who killed Ndiaye, Appellant responded, “me,” and “it was everything I did.” During his second interview, Appellant stated “It’s not right. I killed my wife.” Detective O’Brien also asked Appellant, “What happened the last time you strangled somebody and the last time you threw them against something hard?” Appellant responded, “My wife. She died.”

Aside from the direct evidence of Appellant’s guilt, a rational juror could have concluded Appellant murdered Ndiaye based upon circumstantial evidence. *See id.*, (noting that circumstantial evidence is sufficient to sustain a conviction). Appellant’s actions before, during, and after Ndiaye’s death cumulatively demonstrated his guilt. *See Guevara*, 152 S.W.3d at 49. Appellant had a motive to kill his wife. He had been engaged in an extramarital affair for at least several months prior to Ndiaye’s murder, and Appellant intended to leave the marital home on the day Ndiaye was killed because he could not tolerate Ndiaye’s jealousy. “Marital difficulty can

establish a motive for murder,” which is a significant circumstance indicating guilt. *Nisbett*, 552 S.W.3d at 265; *see Guevara*, 152 S.W.3d at 50 (finding that the defendant had a motive to kill his wife because he had been engaged in a long-standing affair). Appellant was also angry that he was going to have to pay for Ndiaye’s petition for United States citizenship and an upcoming trip to Africa and did not want to be near Ndiaye or speak to her.

Appellant was the last person to see Ndiaye alive, and his behavior implicated himself in Ndiaye’s death. Ndiaye called Gbery shortly before she died to report that Appellant hit her. *See Nisbett*, 552 S.W.3d at 266 (indicating significance that the defendant was the last person to see the victim alive). The call alarmed Gbery enough that he drove to the Gninia’s home. Appellant and Ndiaye were home at the time; however, no lights were on, no one answered the door, and neither Ndiaye nor Appellant answered their cell phones.

Dr. Greenberg testified that Ndiaye bled in her brain and presented contusions to her arms prior to her death. A rational jury could have concluded that Ndiaye sustained her head injuries when Appellant pushed her, as he claimed in his interview with Detective O’Brien. A jury could have also concluded that Appellant inflicted the injuries on Ndiaye’s arms when he grabbed her, as he reported in the same statement. An accused’s culpable mental state may be inferred from the extent of the victim’s injuries. *See id.* at 267. Moreover, this was not the first violent encounter Appellant had with Ndiaye, as Ndiaye’s mother testified that Ndiaye previously reported that he strangled her. *See id.* at 265-66 (noting that prior behavior of the defendant towards the victim can be relevant to determining guilt). Appellant provided inconsistent statements concerning what happened on the night Ndiaye died, and law enforcement officers believed Appellant altered the crime scene or moved Ndiaye’s body. Attempts to conceal incriminating evidence, implausible explanations, and inconsistent statements are circumstances of guilt. *See Guevara*, 152 S.W.3d at

50. Appellant told first responders that Ndiaye experienced a headache and collapsed, but he did not mention that she hit a bed frame. When Appellant spoke to law enforcement officers, he described with detail how Ndiaye fell and hit the bed frame. He told Detective O'Brien in his first interview that Ndiaye fainted when he was in the living room, and he did not see her fall, but only heard a loud "boom." Appellant changed his story in the middle of the interview and stated that Ndiaye hit the master bed when he pushed her.

Detective O'Brien did not believe Appellant was honest in his statements, and he believed that Appellant manipulated the crime scene and moved Ndiaye's body. Detective O'Brien's belief was corroborated by crime scene photographs that demonstrated a struggle occurred in the master bathroom, where two doors were broken from their hinges and shards of wood and screws were on the floor. A pillow and the clothing Appellant stated he used to prop up Ndiaye were on the floor of the master bathroom, as if to support a body. In addition, the frame of the master bed had not moved and showed no signs that a body had fallen against it.

Appellant's behavior at the scene also raises fair inferences of guilt. Appellant stepped over Ndiaye's body to look for his cell phone while neighbors performed CPR on his wife. He did not ask about Ndiaye's condition while law enforcement officers asked questions concerning Ndiaye's medical history, but instead complained that he could not find his cell phone and attempted to log into his cellular account from an iPad.

We conclude that the jury's verdict was based upon more than a "mere modicum" of evidence. *See Cary*, 507 S.W.3d at 766. The factfinder did not need to draw inferences to consider the direct evidence of Appellant's statement that he squeezed Ndiaye's neck and the autopsy conclusion that Ndiaye died by manual strangulation. Although circumstantial evidence including Appellant's inconsistent and implausible statements to law enforcement, his prior attempt to

strangle Ndiaye, and motive, may have required the factfinder to draw inferences, the evidence did not require impermissible speculation. *See Hooper*, 214 S.W.3d at 16-17.

The evidence was also sufficient to prove that Appellant acted intentionally or knowingly when he placed his hands around Ndiaye's neck and squeezed. *See* TEX.PENAL CODE §§ 19.02(b)(1), (2); 6.03(b). The Court of Criminal Appeals has indicated that "[t]he culpable mental state for murder can be inferred from a defendant's motive, his attempts to conceal the body, and implausible explanations to the police." *Nisbett*, 552 S.W.3d at 267. A culpable mental state may also be inferred from the extent of the victim's injuries. *See id.* In *Nisbett*, the court recognized that an appellant grabbing his wife in a choking motion was "potentially life threatening," and even if the victim survived the encounter, a rational jury could view the choking as indicative of the appellant's mental state. *Id.*

Detective O'Brien testified that Appellant's statement detailing how he applied pressure to Ndiaye's neck constituted strangulation, impeded Ndiaye's breathing and circulation of blood, and could cause death. He stated that, based on his experience investigating homicides, a person who strangles a victim intends to cause serious injury or death. Evidence that Appellant performed the "potentially life threatening" act of choking his wife, coupled with the motive and inconsistent statements to law enforcement officers demonstrated sufficient evidence that he intended to commit murder. *See Nisbett*, 552 S.W.3d at 262.

Given Appellant's admission that he placed his hands on Ndiaye's neck and squeezed, the autopsy findings that Ndiaye was manually strangled, and Appellant's actions before, during, and after Ndiaye's death, we conclude that sufficient evidence supports his conviction. As such, Issue One is overruled.

IV. NO ERROR IN ADMISSION OF AUTOPSY PHOTOGRAPHS

In his second issue, Appellant argues that the trial court erred by admitting five autopsy photographs at trial, because their prejudicial nature substantially outweighed their probative value. The State maintains that Appellant did not demonstrate that the trial court abused its discretion by admitting the photographs, because the photographs were probative to explain the injuries Ndiaye suffered at the time of her death. We agree and conclude that this issue is also without merit.

A. Introduction of the Photographs

When the State attempted to introduce photographs taken during Ndiaye's autopsy, Appellant objected that the evidence would inflame the jury. Outside the jury's presence, the trial court heard argument whereby Appellant acknowledged that photographs of Ndiaye's neck were "relevant," but "kind of gruesome." The State explained that Exhibit 89, a photograph of the head with the skin pulled back, was relevant to show that Ndiaye suffered a contusion to the back of her head underneath her skin. The State argued that Exhibit 90 showed injury to Ndiaye's brain and Exhibits 91 and 92 showed bleeding in her neck.

Appellant objected that Ndiaye did not die from blunt force trauma to the brain. The State responded that evidence that Appellant inflicted blunt force trauma to Ndiaye's brain was relevant to show that Appellant violently assaulted Ndiaye when he killed her. The State noted that these injuries were only visible on autopsy photographs.

The trial court allowed the photographs and explained its rationale:

And I'm looking at all of the pictures. Court is--weighs the prejudicial aspect, which it is somewhat prejudicial. They're pictures of an autopsy, and autopsies are upsetting because people are used to seeing dissected bodies. They're not unduly inflammatory as far as it's just an autopsy. Nothing has been done to them to make them worse. Further, the probative value outweighs the prejudicial effect, such that

it is, because these are acute injuries present on the injured party at the time of her death. So I'm going to overrule your objection and admit the pictures.

The trial court granted a running objection to photographs 89 and 90.⁹

Dr. Greenberg later testified that Exhibit 88 was a photograph of Ndiaye's face taken on the day of the autopsy for the purposes of identification. She explained that Exhibit 89, taken after the skin was pulled away from the scalp, revealed two areas where Ndiaye bled beneath her scalp, caused by blunt force trauma. Dr. Greenberg elaborated that one injury caused Ndiaye to bleed within her scalp, while the second injury traveled into the connective tissue that envelopes the skull. Dr. Greenberg testified that Exhibit 90 showed that Ndiaye bled into the subarachnoid membrane adherent to the surface of her brain near the back, occipital lobe. Dr. Greenberg stated that these traumatic injuries possibly could have incapacitated Ndiaye or affected her ability to fight back, but did not cause her death.

Dr. Greenberg testified that Exhibit 91 showed that Ndiaye's neck muscles bled at the time of her death, and also depicted the layers of fat on her neck. Exhibit 92 was a close-up photo of the portions of the muscles on Ndiaye's neck that bled at the time she died.

B. Standard of Review and Controlling Law

The admissibility of a photograph is within the sound discretion of the trial court. *See Gallo v. State*, 239 S.W.3d 757, 762 (Tex.Crim.App. 2007). Generally, if testimony concerning a matter depicted in a photograph is admissible, the photograph is admissible. *See id.*; *see also* TEX.R.EVID. 401 (defining relevant evidence as that having "any tendency to make a fact more or less probable than it would be without the evidence"). A photograph depicting injuries that the

⁹ Any claim of error on appeal concerning Exhibits 88, 91, and 92 is procedurally defaulted, because the trial court granted a running objection only for Exhibits 89 and 90, and trial counsel did not object when Exhibits 88, 91, and 92 were introduced at trial. TEX.R.APP.P. 33.1. We nonetheless conclude that the trial court did not abuse its discretion in admitting any of the exhibits.

Appellant inflicted on the victim is relevant evidence for the jury's consideration. *See Gallo*, 239 S.W.3d at 762. The fact that the jury heard verbal testimony concerning injuries does not reduce the relevance of a visual depiction. *See id.*

Texas Rule of Evidence 403 "favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *Gallo*, 239 S.W.3d at 762 (allowing for the exclusion of otherwise relevant evidence when its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.")). In determining whether the probative value of photographs is substantially outweighed by the danger of unfair prejudice, a court may consider: (1) the number of exhibits offered; (2) their gruesomeness; (3) their detail and size; (4) whether they are in color or black and white; (5) whether the body is clothed; (6) the availability of other means of proof; and (7) the unique circumstances to each individual case. *Gallo*, 239 S.W.3d at 762.

In *Gallo*, the Court of Criminal Appeals concluded that the trial court did not abuse its discretion in admitting autopsy photographs depicting various views of the victim's scalp, skull, brain, and removed rib, to show injuries the appellant inflicted before the victim died. *See id.* at 763. Although photographs of the victim's skull and brain were gruesome, the court found no danger that the jury would attribute the removal of the skullcap or ribs to the appellant. *See id.* The court also determined that trial court did not err by admitting a larger photograph of the victim's vagina, although vaginal injuries were not the direct cause of death. *See id.* at 763-64. Appellant inflicted the injury during the same transaction that caused the victim's death, and the evidence was probative of appellant's mental state at the time of the murder and the specific circumstances of the murder. *See id.* at 764.

C. Application

Appellant has not demonstrated that the trial court abused its discretion by admitting the autopsy photographs. The photographs depict injuries that Ndiaye suffered at a time when Appellant was the only person with her. *See Gallo*, 239 S.W.3d at 763 (noting that photographs were not erroneously admitted when they showed injuries the victim suffered shortly before her death while appellant was the only adult in her presence). Moreover, Appellant admitted to placing his hands around Ndiaye's neck and pushing her down, acts that could have caused the bleeding in her brain and bleeding in the muscles in her neck depicted in the photographs. As such, the photographs were probative to appellant's "mental state at the time of the murder and the specific circumstances of the murder." *See id.* at 764. These internal injuries were not visible through any other means of proof and were probative to show the extent of injuries Appellant inflicted on Ndiaye during the same continuous transaction that resulted in her murder. *See id.* at 763 (indicating that the trial court did not err by admitting autopsy photographs to show injuries that could not be seen on the surface of the body).

Because the trial court did not err by admitting the autopsy photographs, and we overrule Issue Two.

IV. CONCLUSION

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

JEFF ALLEY, Chief Justice

July 8, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

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