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COA No. 06-17-00001-CR
PD-1291-17

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KELLY, DETERRYON TYRELL Tr. Ct. No. 14-0275X

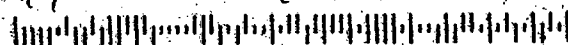
On this day, the Appellant's Pro Se petition for discretionary review has been refused.

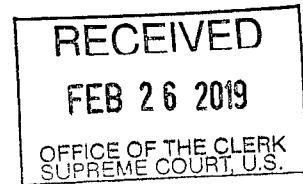
Deana Williamson, Clerk

DETERRYON KELLY
TELFORD UNIT - TDC # 02101560
3899 STATE HWY 98
NEW BOSTON, TX 75570

Appendix B

BNAB 75570





**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-17-00001-CR


DETERRYON TYRELL KELLY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 71st District Court
Harrison County, Texas
Trial Court No. 14-0275X

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

Appendix  A

MEMORANDUM OPINION

A Harrison County jury found Deterryon Tyrell Kelly guilty of the capital murder of his girlfriend's twenty-two-month-old son, Peter.¹ On appeal, Kelly argues that the evidence was insufficient to support his conviction, that the trial court erred in admitting autopsy photographs, and that the trial court erred in admitting evidence regarding Peter's prior injuries. We affirm the trial court's judgment and sentence.

I. The Evidence Was Sufficient to Prove Capital Murder

A. Standard of Review

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). Our rigorous legal sufficiency review focuses on the quality of the evidence presented. *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury “to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Legal sufficiency of the

¹We use pseudonyms in this opinion for the child victim and his mother in order to protect the family's privacy. See TEX. R. APP. P. 9.10(a)(3).

evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The “hypothetically correct” jury charge is “one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.*

A person commits capital murder if, as alleged in Kelly’s indictment, the actor “intentionally or knowingly causes the death”² of “an individual under 10 years of age.” TEX. PENAL CODE ANN. §. 19.03(a)(8) (West Supp. 2016). “Intent may . . . be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant.” *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004).

B. Summary of the Evidence

The evidence at trial showed that Kelly and Peter’s mother, Jessica, were involved in a live-in dating relationship. On the night of May 5, 2014, they rented a hotel room at the Best Western Motel in Marshall, Texas. The next morning, police were called to the motel where they found Peter stiff, cold, unresponsive, and without any pulse or respiration. Peter was transported to the hospital where he was pronounced dead at 7:15 a.m. that same morning.

1. The Surveillance Video Recordings

The State introduced surveillance video recordings from the motel’s security cameras. At approximately 10:57 p.m., video from the first camera showed Kelly exiting the room with Peter. As they exited, Kelly struck Peter on the head, hoisted him over his shoulder, and walked away,

²TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011).

carrying Peter upside down. Approximately one minute later, a second surveillance video recording showed Kelly and Peter entering the motel's vending room. The recording depicts Kelly holding the door open for Peter and Peter toddling into the vending room. During the next few minutes, Kelly and Peter were out of the camera's direct field of vision, but silhouettes in the room's windows appeared to show Kelly hitting and kicking something.

A few minutes later, a woman entered the vending room. At that point, Kelly left the vending room with the boy over his shoulder. Kelly set the boy down at one point, but he could not stand on his own. Kelly attempted to make the child stand, but he fell to the ground. Kelly eventually lifted the boy to his shoulder by one hand. The recording's last image shows Kelly tossing the boy in the air and catching him several times.

2. The Lay Witness Testimony

The motel night clerk, Wilma Laywell, testified that she "kept hearing these banging noises" at her desk. She testified, "[I] wasn't quite sure where they were coming from. So I went looking to see if I could figure out where." She continued,

It was like something hitting up against something. It was just like bang, bang. You know, once I went looking, I saw a gentleman inside of the room where the vending machines are, and I was looking at the camera so I could see the gentleman going from side to side through the window. So I thought that there was someone in there fighting because it sounded like someone might have been pushing someone up against one of the machines in there, once I saw what was going on, on the camera.

Laywell then went into the vending machine room and encountered Detryon and Peter. She stated, "[H]e said something about having issues getting something out of the vending machine, but he didn't really complain or anything."

According to Laywell, Peter was on the floor "laid up against the wall sitting." Kelly asked for a snack or some food for the child, and Laywell retrieved a banana. She saw Kelly and the child again at a computer terminal in the motel lobby, and Laywell was concerned for the child because "his head would flop," as if he had no control over his movement. Laywell said Peter had the same appearance as her young grandson when he had once been "konked smooth out." She went on to testify that Peter "didn't seem right," and she was not surprised when an ambulance arrived for the boy the next morning.

The motel owner, Pete Patel, testified that he lived in an apartment above the vending room. He heard loud noises from the room, called Laywell, and then went to the lobby. He encountered Kelly and Peter there, and Patel felt that "[s]omething didn't -- didn't seem right with the kid." Patel explained, "I think he was losing consciousness maybe. Because his eyes were opening and closing. And if I remember correctly he was making some sort of noise. I cannot tell you exactly what kind of noise." Patel questioned Kelly, who told him "everything was fine" and that they were waiting for the boy's mother. Patel said the boy was sitting next to Kelly at the computer terminal, but he was propped up and not sitting under his own power. Patel saw Kelly leave, carrying Peter, and Patel agreed that Peter looked "floppy" and "not right."

Jessica testified that Kelly returned to the room with Peter asleep over his shoulder. She was surprised that Peter was asleep because when she went in for her bath, Peter was watching television and did not seem tired. Jessica said Kelly put Peter in one of the room's two beds and that she and Kelly went outside to talk without disturbing Peter. A little while later, Jessica and Kelly went to bed.

During the night, Jessica woke up and checked on Peter, whom she said was still covered in the other bed. She did not pick him up or check his breathing. She woke up a second time, and that time, Peter was not in the bed. She asked Kelly where he was, and Kelly found him on the floor between the beds. Kelly later told police that he found the boy with his head caught between the nightstand and the bed.

3. The Police Officer Testimony

Officers from the Marshall Police Department arrived about 6:30 a.m. the next morning, and they found Peter laying on the floor. Sergeant Scott Smith testified that Peter was cool to the touch. Based on his prior experiences, Smith believed this was an indication the child was already dead. Although Smith could not detect a pulse, he began to administer CPR. While doing so, Smith asked Kelly "when was the last time anybody had seen" Peter, but Kelly "really didn't give [Smith] a time." However, Kelly said he hoped Smith had not performed CPR "too hard . . . or didn't do it wrong, something to that effect." Kelly told Smith that he found Peter with his head caught between one of the beds and the nightstand, but the officers testified that the gap between them was only three inches and that Peter's head was much wider than that.

4. The Expert Testimony

Peter was transported by ambulance to Marshall's Good Shepherd Hospital, where he was treated by Dr. Justin Morris. Morris testified that Peter presented with no pulse, spontaneous respirations, or vital signs. Peter's body temperature was eighty degrees, and he did not respond to external stimuli. In Morris' opinion, Peter was dead upon arrival in the emergency room. Morris pronounced Peter deceased at 7:15 a.m. on May 6, 2014.

Morris also reviewed the motel surveillance video recordings and testified that he saw the child walk into the vending room on his own without exhibiting any pain or discomfort. Morris agreed that the movement on the vending room surveillance video looked "like someone was punching something." In Morris' opinion "something happened in that vending room The child walked in on his own, [but] was not able to walk out on his own."

Dr. Robert Lyon, a forensic pathologist, autopsied Peter's body. Lyon described significant bruising on Peter's arms, legs, chest, and breast areas. He denied that the bruises were caused by the administration of CPR, because "CPR bruises don't have that configuration . . . are not that numerous, [and] are not scattered like that." He described the autopsy procedures and testified about photographs taken during the post-mortem procedure, which displayed substantial subcutaneous bleeding. Lyon explained that Peter's liver was torn and that he found 225 milliliters of discharged blood trapped in tissue, "free in the abdominal cavity." Lyon explained that this loss of blood was not normal and could cause death, and in his opinion, the bruises were inflicted at or just before the time of death.³ Lyon diagnosed the cause of death as blunt force trauma and the manner of death as homicide.

³Lyon reached this conclusion because he saw no indication of healing in the bruises, which "takes hours to days to show up." The fact that all he saw was blood in the bruises indicated the injuries were recent. The bruising could have been inflicted "minutes, hours, a few hours before [the child was] dead." Lyon conducted the autopsy about five hours after the police and ambulance arrived at the motel.

5. Evidence Regarding the Police Investigation, Kelly's Interviews, and Kelly's Flight

Marshall Police interviewed Kelly twice, once on May 6 and again May 7. In both interviews, Kelly denied having done anything intentionally to injure Peter. He acknowledged roughhousing, playfully tapping the child's chin, and tossing the child in the air, but he also said that Jessica checked on Peter in the middle of the night and picked him up at one point. Kelly insisted that Peter was found with his head lodged between one of the motel beds and the nightstand. He denied having moved either the stand or the bed before police arrived.

The interviewing detectives pointed out to Kelly only three inches of space lay between the nightstand and the beds on the other side. Officers also measured the distance between the nightstand and the beds in another room, and the distance was consistent with the furniture in the room Kelly, Jessica, and Peter occupied. In addition, Kelly told Smith that he had not moved either piece of furniture before he arrived at the motel. This led the officers to believe that the furniture in their room had not been moved before the police arrived.

Finally, about one month after Peter's death, an arrest warrant was issued for Kelly charging him with capital murder. When several officers attempted to arrest him at a local park, Kelly fled from the officers. Officers eventually shot him with tasers, and he was arrested.

C. Analysis

Viewing the evidence in the light most favorable to the verdict, the State presented evidence from which a rational jury could reasonably infer that Peter was not injured before Kelly took him from the motel room to the vending room, that Peter walked into the vending room with Kelly on his own, but could not stand minutes later when they left, and that silhouettes in the

vending room windows, which were recorded on the surveillance video, show Kelly hitting or kicking something. Considering that (1) other surveillance video depicted Kelly striking Peter on the head as they left the motel room, (2) Kelly and Peter were alone together in the vending room, (3) motel staff testified that they heard loud banging noises coming from the room while Kelly and Peter were there, (4) Peter did not appear to be injured before entering the vending room, and (5) motel staff testified that Peter appeared to be injured and unconscious when he and Kelly left the vending room, a rational jury could have reasonably concluded that Kelly kicked and hit Peter while they were in the vending room.

In addition, based on (1) the treating physician's opinion that something happened to Peter in the vending room based on the recording showing Peter walking into the vending room by himself but being unable to stand afterward, (2) the pathologist's testimony that Peter had a torn liver resulting in significant internal bleeding and bruising which was inconsistent with CPR, and (3) the pathologist's opinion that Peter died from blunt force trauma and that the manner of death was homicide, a rational jury could have reasonably concluded that Kelly's actions in kicking and hitting Peter while they were in the vending room caused his death.

Finally, Kelly fled from officers when they attempted to arrest him for Peter's death, and the Court of Criminal Appeals has held that evidence of flight from arrest or detention may be offered as evidence of guilt, even if the flight occurs months after the primary offense. *See Hunter v. State*, 530 S.W.2d 573, 574–75 (Tex. Crim. App. 1975). Based on this evidence, a rational jury could have reasonably concluded that Kelly fled from officers because he knew he was guilty of murdering Peter.

Consequently, a rational jury could have found Kelly guilty of capital murder beyond a reasonable doubt. The first point of error is overruled.

H. The Trial Court Did Not Err in Admitting the Autopsy Photographs

Kelly argues that the trial court erred in admitting into evidence seventeen photographs taken during Peter's autopsy. Kelly argues that the photographs are so graphic that any probative evidentiary value they may have had was substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. We overrule this point of error.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Abuse of discretion occurs only if the decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). We may not substitute our own decision for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). We will uphold an evidentiary ruling if it was correct on any theory of law applicable to the case. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Under Rule 403 of the Texas Rules of Evidence, even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." TEX. R. EVID. 403. "Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial." *Montgomery*, 810 S.W.2d at 389 (op. on reh'g). Rule 403 requires both trial and reviewing courts to analyze and balance "(1) the

probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; [and] (4) the proponent's need for the evidence." *Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004). "In making this determination, we consider factors including: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up shots, whether the body is naked or clothed, the availability of other means of proof, and other circumstances unique to the individual case." *Santellan v. State*, 939 S.W.2d 155, 172 (Tex. Crim. App. 1997).

Regarding photographic evidence, the Court of Criminal Appeals has held,

A photograph should add something that is relevant, legitimate, and logical to the testimony that accompanies it and that assists the jury in its decision-making duties. Sometimes this will, incidentally, include elements that are emotional and prejudicial. Our case law is clear on this point: If there are elements of a photograph that are genuinely helpful to the jury in making its decision, the photograph is inadmissible only if the emotional and prejudicial aspects substantially outweigh the helpful aspects.

Erazo, 144 S.W.3d at 491-92.

B. Analysis

The State introduced numerous autopsy photographs, but Kelly only objected to seventeen of them. The pathologist, Lyon, testified about all but one of the photographs to which Kelly objected. He used these photographs to demonstrate to the jury the nature of Peter's injuries in order to explain how he reached his opinions in this case. Specifically, he used the photographs to demonstrate that Peter had blood beneath his skin and had sustained significant internal injuries as a means of supporting his opinion that Peter died from blunt force trauma.

In *Gallo v. State*, the appellant likewise challenged the trial court's admission of autopsy photographs which showed "injuries discovered during the internal examination of the victim's body." *Gallo v. State*, 239 S.W.3d 757, 763 (Tex. Crim. App. 2007). There, as here, "[t]he medical examiner used the photographs to show the massive amount of damage that was inflicted on the victim before h[is] death." *Id.* Also, as with Lyon's testimony at Kelly's trial, the medical examiner in *Gallo* "used the photographs to show the injuries that could not be seen on the surface of the body." *Id.* In rejecting the appellant's challenge to the evidence, the Court of Criminal Appeals held, "A visual image of the injuries appellant inflicted on the victim is evidence that is relevant to the jury's determination. The fact that the jury also heard testimony regarding the injuries depicted does not reduce the relevance of the visual depiction." *Id.* at 762.

As in *Gallo*, an examination of the *Erazo* factors in this case demonstrates that the trial court did not err in admitting the challenged autopsy photographs. The first and fourth factors—probative value and the proponent's need for the evidence—weigh in favor of admission. Lyon found that Peter died from blunt force trauma as a result of a homicide. Although bruising was visible on Peter's skin, the full extent of his injuries could only be known by examining the inside of Peter's body. The photographs reveal that those injuries were extensive. Accordingly, the photographs were probative of the issue of Peter's cause of death.

The photographs were also probative of Kelly's intent. Namely, the severity and extensive nature of the injuries provided the jury with evidence that the injuries were inflicted intentionally and did not result from an accident. They also serve to rebut any inference that the injuries were

accidental. Inasmuch as the State's case was largely circumstantial, the State's need for such proof was high.

Additionally, the State did not spend an inordinate amount of time on the challenged photographs. The State's case-in-chief took two days. The State's witness testimony during its case-in-chief constitutes approximately 744 pages of the reporter's record. Lyon's direct examination constitutes sixty-two pages of the State's witness testimony, and the testimony regarding the photographs in question only covers twelve pages of Lyon's testimony. This factor weighs in favor of admission.

Finally, we do not find that there was any significant danger of the autopsy photographs impressing the jury in an irrational or indelible manner. While the photographs are explicit, they were no more explicit than any autopsy photographs showing a body's internal organs. Moreover, they were consistent with Lyon's testimony and necessary to explain his findings and opinions that Peter died as a result of blunt force trauma. And, as noted above, they were also necessary to rebut any inference that the injuries were accidental or were not severe enough to cause Peter's death. In this context, introduction of the photographs would not impress the jury in an irrational or indelible manner.

Considering the circumstances in which the photographs were presented to the jury in this case, we cannot say that the autopsy photos had a prejudicial effect that substantially outweighed their probative value. The trial court did not abuse its discretion in admitting the photographs to which Kelly objected. Point of error two is overruled.

III. The Trial Court Did Not Err in Admitting Evidence of Peter's Prior Broken Arm

Kelly argues the trial court erred in allowing evidence of a broken arm suffered by Peter a few months before the murder. The State gave pretrial notice of extraneous-offense evidence which might be offered at trial.⁴ One such instance was an allegation that "[o]n or about November 13, 2013[,] . . . [Peter] sustained [a] fractured wrist while under the supervision of the defendant." Kelly argues that the trial court erred in admitting this evidence.

A. Standard of Review

As noted above, a trial court's ruling on admission or exclusion of evidence is reviewed for an abuse of discretion. "That is to say, as long as the trial court's ruling was at least within the zone of reasonable disagreement, the appellate court will not intercede." *Montgomery*, 810 S.W.2d at 391 (op. on reh'g). Generally, an accused is entitled to only be tried for the offenses at bar. "[A]n accused is entitled to be tried on the accusation made in the state's pleading[,] and . . . he should not be tried for some collateral crime or for being a criminal generally." *Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972). However, evidence of prior bad acts or offenses may be admissible under certain circumstances, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2).⁵

⁴See TEX. R. EVID. 404(b)(2).

⁵Additionally, Article 38.36 of the Code of Criminal Procedure states,

In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

TEX. CODE CRIM. PROC. ANN. art. 38.36 (West 2005).

B. Analysis

Despite the State's notice to Kelly that it might offer evidence of a prior injury to Peter suffered while in Kelly's care, the State did not introduce this evidence as part of its case-in-chief. Rather, the prior injury was first mentioned by Kelly when he cross-examined Jessica. The record demonstrates that Kelly questioned Jessica about Peter's medical records that identified numerous doctor visits. Sometime between September 5 and November 13, 2013, Peter was taken to the emergency room for a broken arm. Kelly discussed this episode to establish that "no abuse [was] suspected at the time" and that the injury was attributed to Peter falling down some stairs. The State only mentioned the broken arm during its redirect examination of Jessica, and then it mentioned the arm in passing while establishing that, during the thirty-six doctor visits, Peter had been seen by different physicians, and none had ever diagnosed liver problems.

Accordingly, Kelly introduced evidence that Peter previously sustained a fractured arm while in his care, not the State. A party cannot be heard to complain of evidence he himself proffered. "[T]he law of invited error estops a party from making an appellate error of an action it induced." *Pryash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999). Therefore, the trial court did not err in admitting the evidence. This point of error is overruled.⁶

⁶Further, we cannot say that the trial court abused its discretion in allowing this evidence. Although Kelly preemptively objected to this topic before it was brought up at trial, the State never mentioned this incident. Kelly did.

IV. Conclusion

For all of the foregoing reasons, the trial court's judgment is affirmed.

Ralph K. Burgess
Justice

Date Submitted: August 31, 2017
Date Decided: November 15, 2017

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