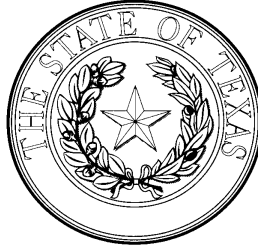


**Opinion issued December 1, 2016**



**In The  
Court of Appeals  
For The  
First District of Texas**

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**NO. 01-15-00767-CR**

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**JOHN A. KAMENICKY, Appellant  
V.  
THE STATE OF TEXAS, Appellee**

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**On Appeal from the 232nd District Court  
Harris County, Texas  
Trial Court Case No. 1477613**

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**MEMORANDUM OPINION**

A jury found Appellant, John A. Kamenicky, guilty of the offense of murder.<sup>1</sup> The jury assessed Appellant's sentence as life in prison. In one issue,

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<sup>1</sup> See TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (Vernon 2011).

Appellant contends that the evidence was not sufficient to support the judgment of conviction.

We affirm.

### **Background**

The complainant, 60-year-old Mark Ellis, lived in a one-bedroom apartment in Houston. At 5’8” and 147 pounds, Ellis was not a large man, and he suffered from diabetes and hepatitis. His friends and neighbors described Ellis as a “weakling,” who could not walk very far.

In November 2013, Ellis was permitting 38-year-old Appellant to stay in his apartment as a roommate. However, under his rental agreement, Ellis was not permitted to have a roommate, and he was under threat of eviction for this and other reasons. Ellis told his friend, R. Coit, that he was afraid of his roommate—who was Appellant—and wanted him to move out.

On Sunday, November 17, 2013, Coit took Ellis to church. Coit brought Ellis back home to his apartment around noon. Later that night, after 9:00 p.m., Ellis’s neighbor, A. Trejo, saw Ellis outside his apartment smoking a cigarette.

On Monday, November 18, Appellant’s father, H. Kamenicky, woke up late and realized that his truck was missing. Kamenicky called the police and reported his truck as stolen. Kamenicky’s brother-in-law, who lived with Kamenicky, told

him that Appellant had been at the house earlier that day. Around 5:30 or 6:30 p.m., Kamenicky went to Ellis's apartment looking for his truck and for Appellant.

When he arrived at the apartment complex, Kamenicky saw his truck parked outside. He went to Ellis's apartment to find Appellant. At first, Appellant did not answer the door, but eventually he did open it. When Appellant opened the door, Kamenicky took five or six steps into the apartment. Kamenicky was upset with Appellant for taking his truck without permission and raised his voice at Appellant. Kamenicky did not hear or see Ellis while he was at the apartment. Kamenicky would later state that he did not notice that the apartment was in disarray or notice anything unusual in the apartment at the time. Kamenicky would also state that he was angry with Appellant and was focused on him at the time.

Kamenicky got the keys for the truck from Appellant. As he left the apartment complex, Kamenicky saw Appellant walking down the street. Kamenicky and his wife went to the apartment complex that evening and picked up the truck.

Later that same night, Appellant went to Kamenicky's house. Kamenicky thought that Appellant was acting abnormally. Kamenicky was still upset with Appellant regarding the truck and did not want to talk to Appellant. Kamenicky shut his front door on Appellant, but Appellant continued to knock, requesting to speak to him. This continued into the early morning hours.

Meanwhile, Ellis's brother, Cecil, had been calling Ellis for a couple of days but could not reach him. Around 6:00 p.m. on Monday, November 19, 2013, Cecil went to Ellis's apartment to determine if Ellis's phone was working. When he arrived, Cecil found the door of Ellis's apartment was unlocked. Cecil thought this was very unusual because Ellis always kept the door locked.

Cecil entered the apartment and saw that the furniture was in disarray and out of place. A dresser, which usually sat against a wall, was pulled out into the middle of the living room. As he walked into the apartment, Cecil looked down and saw Ellis on the floor wrapped in a blanket. Cecil knew immediately that Ellis was dead and called 9-1-1.

When they arrived, the police noticed that there did not appear to be any sign of forced entry into the apartment. Ellis's body was lying on the floor behind the dresser in the middle of the living room. The dresser blocked the view of Ellis's body from the front door. Ellis's body was nude and had been wrapped in a blue blanket. His body had been bound with cords and wires that had been cut from a fan and a stereo in Ellis's apartment. Ellis's face had suffered blunt force trauma and was almost unrecognizable. The police also recovered a cigarette butt that was lying on top of the blanket in which Ellis was wrapped.

Plastic bags were found near Ellis's body, containing clothing, some of which appeared to have bloodstains, towels, including a towel that appeared to

have been used to clean up blood, a broken cell phone, and Ellis's wallet, containing his driver's license, social security card, and insurance cards.

In the bedroom, the police found a backpack, containing patient records and a hospital band with Appellant's name on them. The backpack also had clothing, including jeans size 34 x 34. A pair of rolled-up jeans, size 33 x 36 were found rolled up in the corner of the living room. The jeans appeared to contain a blood stain. The jeans also appeared to be too long for 5'8" Ellis.

A note was found in Ellis' mailbox, dated November 19, 2013, at 1:20 p.m. It said, "Came by to take you to your appointment. Sorry we missed you. Please call and reschedule." Ellis's calendar noted that he had an eye doctor appointment on Tuesday, November 19th.

The police also observed that, while most areas of the apartment were dirty, certain areas, such as the sink and bathtub, appeared clean. This indicated to them that someone had attempted to clean up the blood evidence associated with Ellis's murder.

Ellis' autopsy, performed on November 20, revealed that he had suffered blunt force trauma to his face, fracturing his nose; however, this had not killed Ellis. The assistant medical examiner ruled Ellis' death a homicide, finding the cause of Ellis's death was asphyxia due to compression of the neck, that is, strangulation. The assistant medical examiner could not determine the exact time

of death. However, the autopsy showed that Ellis had been dead at least 24 hours. At trial, the assistant medical examiner agreed that the appearance of Ellis' body was consistent with a theory that he had been killed soon after the last time he was seen alive on Sunday night or early Monday morning.

During the course of their investigation, Appellant's name came to the attention of the police. When they researched Appellant's name, the police found the report filed by Appellant's father regarding the theft of his truck. Cooperating with the police, Appellant's father agreed to meet Appellant at a store where the police would be waiting. After he arrived at the store, Appellant agreed to speak with the police. When asked how long it had been since he had seen Ellis, Appellant said that he had not been to Ellis's apartment in two weeks. Appellant claimed that he had been staying at a Salvation Army shelter. The police contacted the shelter to determine whether Appellant had been staying there. The shelter's records showed that, although he had stayed at the shelter many months earlier, Appellant had not been staying there for the two weeks before Ellis's death as he claimed he had been.

Appellant voluntarily went to the police station where he agreed to provide a DNA sample. The police also photographed Appellant's hand, which was injured. His knuckles were swollen, and he had cuts on his hand. Appellant also gave the police the clothing that he was wearing.

Appellant was charged by indictment with Ellis's murder. The case was tried to a jury. During the guilt-innocence phase, the State offered the testimony of 17 witnesses, including Ellis's friends, neighbors, and family; Appellant's father; the investigating police officers; the forensic investigator; a DNA analyst, and the assistant medical examiner who performed Ellis's autopsy. The State also introduced nearly 200 exhibits, which included many photographs from the scene and from the autopsy. After hearing the evidence, the jury found Appellant guilty of the offense of murder as charged in the indictment.

Following the punishment phase, the jury assessed Appellant's punishment at life in prison. This appeal followed.

### **Sufficiency of the Evidence**

In his sole issue, Appellant asserts that the evidence is not sufficient to support the judgment of conviction.

#### **A. Standard of Review**

We review the sufficiency of the evidence establishing the elements of a criminal offense for which the State has the burden of proof under a single standard of review. *Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013) (citing *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010)). This standard of review is the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307,

319, 99 S. Ct. 2781, 2789 (1979). *See Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013).

Pursuant to the *Jackson* standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We can hold evidence to be insufficient under the *Jackson* standard in two circumstances: (1) the record contains no evidence, or merely a “modicum” of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 & n.11, 320, 99 S. Ct. at 2786, 2789 & n.11; *see also Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicts



in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793.

## **B. Analysis**

The evidence offered at trial was sufficient to prove each element of the offense of murder beyond a reasonable doubt. As charged in this case, a person commits the offense of murder if he intentionally or knowingly causes the death of an individual or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes death. TEX. PENAL CODE ANN. § 19.02(b)(1)–(2) (Vernon 2011).

“Although motive and opportunity are not elements of murder and are not sufficient to prove identity, they are circumstances indicative of guilt.” *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). Here, the State presented evidence suggesting that Appellant might have been motivated to kill Ellis because Ellis wanted Appellant to move out of the apartment. Ellis’s friend, A. Coit, testified that Ellis indicated to him he was afraid of Appellant and wanted him to move out. The evidence also showed that Appellant had the opportunity to kill Ellis.

Ellis’s neighbor, A. Trejo, saw Ellis outside his apartment smoking a cigarette sometime after 9:00 p.m. on Sunday, November 17, 2013. She did not see Ellis after that; however, she did see Appellant. Trejo recalled seeing

Appellant after 5:00 p.m. on Monday, November 18, approximately 24 hours before Ellis's body was discovered in the apartment by Ellis's brother.

Another neighbor, E. Gutierrez, testified that, before his body was found on Tuesday, November 19, she had not seen Ellis for a couple of days. Gutierrez stated that she usually saw Ellis every day, and it was out of the ordinary for her not to see Ellis for a couple of days. Gutierrez also testified that, even though she did not see Ellis during that time period, she did see Appellant coming and going from the apartment. She also stated that she saw Appellant with a dark SUV at that time. Gutierrez said that Appellant had never had a vehicle at the apartment before then, and she characterized it as "just weird."

Appellant's father, H. Kamenicky also testified that he saw Appellant at the apartment early in the evening on Monday, November 18. Kamenicky had gone to the apartment to retrieve his truck that Appellant had taken without permission. Although he testified that he did not notice that the apartment was in disarray, Kamenicky testified that he was focused on Appellant because he was angry with him for taking his truck without his permission.

The assistant medical examiner, Dr. M. Hines, who performed Ellis's autopsy, testified he could not pinpoint the exact time of Ellis's death. However, he was able to determine that Ellis had been dead for at least 24 hours when his body was discovered on Tuesday, November 19 at 6:00 p.m. Dr. Hines agreed that

the appearance of Ellis's body would be consistent with a scenario in which Ellis was murdered Sunday, after Trejo had seen him, or a scenario in which he had been murdered early Monday morning. In any event, the State presented evidence showing that Appellant was at the apartment as late as Monday evening, approximately 24 hours before Ellis's body was discovered. And Appellant had been seen coming and going from the apartment after Ellis was last seen.

Other physical evidence also connected Appellant to the apartment. A backpack was found in the bedroom, containing a hospital identification band and hospital records bearing Appellant's name. The backpack also contained clothing, including pants that were a size 34 x 34. A pair of rolled up jeans in the corner of the living room were size 33 x 36 and contained what appeared to be a bloodstain.<sup>2</sup> As one of the State's witnesses noted, the pants would be too long for Ellis, who was 5' 8" in height. In contrast, Appellant is 6'2" tall. The evidence showed that the clothes in the backpack were of a similar size to the clothes Appellant wore to his police interview and had given to police.

DNA evidence also placed Appellant at the scene. DNA analysis of what appeared to be a blood stain on the front door of the apartment could not exclude Appellant as a contributor. DNA analyst, C. Davis, testified that the probability

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<sup>2</sup> With respect to the bloodstain, the State's DNA analyst, C. Davis, testified that Ellis "cannot be excluded as a possible contributor to the major component. [Appellant] is excluded as a possible contributor to the major component and insufficient on the minor component."

that the DNA belonged to someone other than Appellant was approximately 1 in 39 quintillion for Caucasians, 1 in 2.2 sextillion for African-Americans, and 1 in 10 quintillion for Southwest Hispanics. Ellis was excluded as a possible contributor to the sample. The State pointed out that, when Appellant met with police, Appellant's hand had a recent injury. The State argued that Appellant injured his hand while murdering Ellis. The evidence showed that Ellis had suffered blunt force trauma to his face, breaking his nose. The State theorized that Appellant transferred the blood from his injured hand as he was leaving the apartment after murdering Ellis.

DNA analysis of the cigarette butt found on top of the blanket in which Ellis's body was wrapped also supports an inference that Appellant was at the scene post-murder. Clay testified that he found a mixture of DNA from two people on the cigarette butt. He stated that he could not exclude Appellant "as a possible contributor to the major component of this DNA mixture." According to Clay, the probability that the DNA in the major component belonged to someone, other than Appellant, was approximately 1 in 1.2 quadrillion for Caucasians, 1 in 39 quadrillion for African-Americans, and 1 in 890 trillion for Southwest Hispanics. Clay stated that Ellis was excluded as a possible contributor of DNA. Clay testified that he had "insufficient data on the minor component" of the DNA mixture.

In addition, homicide detective S. Murdoch testified that Appellant told him that he did not know when he had last seen Ellis. Appellant also told police that he had not been at the apartment for two weeks and had been staying at the Salvation Army's shelter during the period when Ellis was murdered. The detective testified that, when they checked with the shelter, the police determined that Appellant had not stayed there during that time period. The State also offered the testimony of a representative of the shelter, who confirmed that Appellant had not stayed there during the period of November 16 to November 20, 2013. The jury could have found that Appellant's false statement regarding his whereabouts at the time of the murder indicated a consciousness of guilt and an attempt to cover up the crime. *See King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000) (considering defendant's false statements as evidence of consciousness of guilt in its sufficiency analysis).

The State also presented evidence from which the jury could have reasonably inferred that Appellant was attempting to conceal the murder. Appellant's father testified that Appellant had taken his truck without his permission. The evidence indicated that Appellant took the truck after Ellis was last seen and before his body was discovered. The evidence also showed that it was out of the ordinary for Appellant to have a vehicle at the apartment complex. The State theorized that Appellant had taken his father's truck to dispose of Ellis's

body. After his father retrieved the truck, Appellant had no way to dispose of the body.

The evidence also was such that a reasonable inference could be made that Ellis's body had been prepared to be transported and disposed of. Ellis's body was found behind a dresser, which had been moved from its usual position to the middle of the living room. As it was positioned, the dresser blocked the view of Ellis's body from the front door. Ellis's body was nude; his clothing and identification had been removed. Ellis's identification was found in a plastic bag near the body with clothing, some of which had what appeared to be bloodstains.

The evidence further showed that, while most of the apartment was dirty, the bathtub and sinks were clean. Other spots in the apartment also appeared to have been cleaned. Detective Murdoch testified that, in homicide cases, it is common for attempts to be made to clean up the blood evidence.

The evidence also showed that Ellis's body was bound with cords and wires cut from a fan and stereo that were in the apartment. Dr. Hines testified that it did not appear that the bindings had caused or contributed to Ellis's death. He testified that, although he could not say for certain, it appeared that the bindings had been placed on Ellis's body post-mortem.<sup>3</sup>

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<sup>3</sup> DNA analysis of the bindings showed a mixture DNA. Appellant could not be excluded as contributor of DNA for three of the bindings but could be excluded for two of the bindings. However, the probability that the DNA could belong to

In short, based on the evidence, the jury could have reasonably inferred that Appellant had prepared Ellis's body for transport and disposal in an effort to cover up the murder. An attempt to conceal incriminating evidence is "probative of wrongful conduct" and is also a "circumstance[] of guilt." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004).

On appeal, Appellant assails the evidence by pointing out that there were no witnesses to the murder. He complains that "[a]ny evidence that it was Appellant who committed the murder was entirely circumstantial." However, in our review of the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. Importantly, "[e]ach fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Thus, Appellant's circumstantial-evidence argument is unavailing.

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another person was much better for the bindings than for the other DNA evidence. For example, on one the bindings, the probability that the DNA could have been from another, randomly chosen, unrelated individual was 1 in 27 for Caucasians. In any event, even not considering the DNA evidence from the bindings, the other circumstantial evidence, when viewed appropriately, is sufficient to support Appellant's conviction as discussed *infra*.

Appellant also minimizes the evidence showing that he was seen at the apartment in the days preceding the discovery of Ellis's body. He points out that, because he admittedly had lived at the apartment, "[i]t would not be unusual for him to be seen coming and going." However, as discussed, Appellant was seen at the apartment during the time period that the assistant medical examiner agreed was consistent with when Ellis was murdered. Appellant also denied being at the apartment during this period, although two neighbors and his father testified that they had seen him there. Appellant also claimed that, at the time of the murder, he was living at a shelter, but the shelter's records showed that he was not living there at that time. In any event, this evidence was presented to the jury, and we defer to the factfinder to resolve conflicts, weigh the evidence, and draw reasonable inferences. *See id.*

Appellant further asserts that the DNA evidence was "hardly incriminating enough to prove beyond a reasonable doubt that Appellant had murdered the complainant." Appellant points out that it was not surprising to find his DNA on items in the apartment involved in the murder because he had been living there. The DNA evidence, however, is not viewed in isolation. In addition to DNA evidence, the jury heard evidence regarding Appellant's activities around the time of the murder and regarding the opportunity Appellant had to kill Ellis. The jury also heard testimony that Appellant told police that he had not been at the



apartment for two weeks and had been living at a shelter when other evidence showed that he had been at the apartment and had not been living at the shelter. Evidence was also presented showing that Appellant had a recent injury to his hand. And the jury heard testimony that Ellis wanted Appellant to move out because he was afraid of him. When all of the circumstantial evidence is taken together, and viewed in a light most favorable to the verdict, we conclude a rational fact finder could have found, beyond a reasonable doubt, each element necessary to support the finding that Appellant committed the offense of murder. Accordingly, we hold that the evidence was sufficient to support the judgment of conviction.

We overrule Appellant's sole issue.

### **Conclusion**

We affirm the judgment of the trial court.

Laura Carter Higley  
Justice

Panel consists of Justices Keyes, Higley, and Lloyd.

Do not publish. TEX. R. APP. P. 47.2(b).