Affirmed and Memorandum Opinion filed October 25, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00373-CR
NO. 14-21-00391-CR
NO. 14-21-00392-CR
NO. 14-21-00393-CR
NO. 14-21-00394-CR

VICTOR KEVIN TOME, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 506th Judicial District Court
Waller County, Texas
Trial Court Cause Nos. 17-06-16091, 20-06-17370, 20-06-17371, 20-06-17372, 20-05-17305

M E M O R A N D U M O P I N I O N

A Waller County jury convicted appellant Victor Kevin Tome of capital murder, aggravated assault with a deadly weapon, and other crimes, after he drove his car head-on into several cyclists, killing two of them and seriously injuring a third. In three issues, appellant argues that he received ineffective assistance from

his trial counsel, that the trial court erred in permitting a witness to testify as a drug recognition expert, and that the trial court erred in admitting autopsy photos of the two decedents. We overrule each of appellant's issues and affirm the trial court's judgments.

Background

Appellant does not challenge the sufficiency of the evidence supporting the jury's guilty verdicts, so we briefly describe the pertinent facts and procedural history here, in the light most favorable to the verdicts. We discuss below more specific facts adduced at trial when necessary to address appellant's discrete appellate issues.

Appellant, an Army veteran, was honorably discharged in summer 2016, when he was twenty-four years old. Shortly thereafter, appellant moved to Houston and began regularly abusing illegal drugs, namely ecstasy and marijuana. Appellant was diagnosed with an anxiety disorder but did not take the prescribed medications to treat it. According to appellant, he stopped using all illegal drugs two or three weeks prior to the incident at issue.

In March 2017, appellant believed he heard voices on the radio telling him that Russian spies were "after" him. Appellant left his Houston apartment at 3:00 a.m., intending to drive to Dallas, where his mother lived. At some point he stopped, slept on the side of the road, and then continued driving.

In Waller County, appellant encountered a group of two hundred to three hundred bicyclists who were participating in a road race.[1] The cyclists were biking southbound on Buller Road, a two-lane, asphalt country road. Appellant was

[1] Waller County is west of Houston and not in the direction of Dallas, which is north of Houston. Appellant told one of the witnesses that he did not travel the most direct route to Dallas from Houston "because if they're looking for me, that's where they would look."

driving northbound on the same road at approximately the speed limit of thirty or thirty-five miles per hour. As he approached the oncoming cyclists, appellant accelerated his speed, crossed into the oncoming lane, and intentionally steered his car toward them. He struck three cyclists—Craig Tippit, Keri Guillory, and Michael Guillory. An accident reconstructionist testified that appellant was traveling at least fifty-four miles per hour at impact. Tippit and Keri Guillory died, and Michael Guillory suffered serious injuries.

Abandoning his car, appellant fled the scene, yelling at bystanders, "Run for your lives. It's a conspiracy." After appellant broke into a nearby house, the property owner convinced appellant to turn himself in to authorities. Appellant surrendered and admitted to law enforcement that he was the driver and that he was trying to kill "Russians." He believed the cyclists were part of an enemy Russian force pursuing him. He expressed remorse if he killed Americans but not if he killed Russians.

A Waller County grand jury indicted appellant on one count of capital murder,[2] two counts of aggravated assault with a deadly weapon,[3] one count of accident involving serious bodily injury,[4] and two counts of accident involving death.[5]

[2] Trial court cause number 17-06-16091 and appellate cause number 14-21-00373-CR. *See* Tex. Penal Code § 19.03(a)(7).

[3] Trial court cause number 20-05-17305 and appellate cause number 14-21-00394-CR. *See* Tex. Penal Code § 22.02(a). The State later dismissed one of the aggravated assault counts.

[4] Trial court cause number 20-06-17370 and appellate cause number 14-21-00391-CR. *See* Tex. Transp. Code § 550.021(a).

[5] Trial court cause numbers 20-06-17371 and 20-06-17372 and appellate cause numbers 14-21-00392-CR and 14-21-00393-CR. *See* Tex. Transp. Code § 550.021(a).

Appellant pleaded not guilty by reason of insanity.[6] At trial, the State's responsive theory was that appellant's voluntary abuse of (and withdrawal from) illegal drugs caused appellant to develop short-term mental health issues or "drug abuse psychosis," which negated his insanity defense, and also that appellant knew nonetheless that his conduct was wrong. Appellant's defense was that he suffered from mental illness, caused by traumatic brain injury and post-traumatic stress disorder ("PTSD") sustained during or as a result of his military service, which pre-dated March 2017—in other words, "he was psychotic before any drug use."

The jury found appellant guilty of all counts as charged in the indictments. The State did not seek the death penalty in the capital murder case, and the trial court sentenced appellant to life imprisonment without the possibility of parole for that offense. The court sentenced appellant to additional terms of imprisonment for the remaining offenses and assessed $30,000 in restitution.

Appellant filed a motion for new trial, in which he argued that he received ineffective assistance of counsel. The trial court conducted a hearing but did not rule on the motion, which was overruled by operation of law.

Analysis

Appellant presents three issues for review: (1) the trial court abused its discretion in denying his ineffective assistance of counsel arguments asserted in his motion for new trial; (2) the trial court erred in permitting a witness to testify as a drug recognition expert; and (3) the trial court erred in admitting autopsy photographs. We address each in turn.

[6] *See* Tex. Penal Code § 8.01.

A. Ineffective Assistance

1. Standard of review

To prevail on a claim of ineffective assistance, an appellant must show that (1) counsel's performance was deficient and fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Perez v. State*, 310 S.W.3d 890, 892-93 (Tex. Crim. App. 2010). Our review of counsel's representation is highly deferential, and we indulge a strong presumption that counsel's conduct fell within a wide range of reasonable representation. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *Donald v. State*, 543 S.W.3d 466, 477 (Tex. App.—Houston [14th Dist.] 2018, no pet.). To overcome the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record. *Salinas*, 163 S.W.3d at 740. When the record is silent as to trial counsel's strategies, we will not conclude that counsel's performance was deficient "unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

An appellant bears the burden of satisfying both prongs of the *Strickland* test by a preponderance of the evidence. *Perez*, 310 S.W.3d at 893. We consider the totality of the circumstances to determine whether this showing was made. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

The trial court is the exclusive judge of the credibility of the evidence presented at the new-trial hearing, regardless whether the evidence is controverted. *Najar v. State*, 618 S.W.3d 366, 572 (Tex. Crim. App. 2021). We will reverse the

judge's ruling only if the ruling is arbitrary or unsupported by any reasonable view of the evidence. *Id.*

2. Failing to present a witness

In his first argument, appellant contends that his trial counsel was ineffective for failing to investigate and call a material witness to testify during the guilt/innocence phase. When the claim of ineffective assistance is based on counsel's failure to call a witness, the appellant must show that (1) the witness was available to testify, and (2) appellant would have benefitted from the testimony. *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004); *Robinson v. State*, 514 S.W.3d 816, 824 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). An attorney's decision not to present witnesses may be strategically sound if based on a reasoned judgment that the testimony may be harmful to the defense. *See Weisinger v. State*, 775 S.W.2d 424, 427 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd).

Appellant raised an insanity defense at trial, arguing that he had a psychiatric disorder that prevented him from knowing that his actions were criminal. Appellant argued, among other things, that his time in military service caused head injuries and symptoms of PTSD. The State's expert, Dr. Michael Arambula, disagreed that appellant ever suffered from PTSD or that appellant's military service contributed to any mental illness because appellant's records did not show a history of PTSD and because appellant did not experience "significant combat." Rather, in Dr. Arambula's opinion, appellant's psychosis began with, and was exacerbated by, his abuse of illegal drugs:

> [T]his was drug related and not mental illness related because nothing in his records up to the time of the incident show that he had a severe mental disease. There was no psychosis anywhere. But you can become pretty ill when you use drugs like that. And he even told me he got pretty paranoid when he smoked too much weed.

Appellant asserts that his trial counsel, Guy Womack, failed to call Bobby Bird, an Army veteran who served with appellant. Bird would have testified that he and appellant experienced combat together, which, according to appellant, would have contradicted Dr. Arambula's testimony, would have advanced the theory that the Veterans' Administration ("VA") missed appellant's symptoms of PTSD, and, therefore, "would have been of some benefit to the defense" by corroborating appellant's defense of insanity.

Appellant, Bird, and Womack testified at the new-trial hearing. Appellant gave Womack Bird's contact information and did not identify any other fellow veteran whom Womack should contact. Bird testified that he spoke with Womack one time: "I actually called him and he talked to me, he got some information." Womack testified that he did not specifically remember speaking with Bird, although he may have done so:

> I know there was someone who had called me, who I talked to, and the tenor of the conversation was that he has PTSD, that the VA was letting him down, and he believes Mr. Tome is another soldier who hasn't been treated properly by the VA, that was not diagnosed by the Army. . . . But the gentleman may not be Mr. Bird, but the gentleman I talked to who claimed to be a fellow soldier, but I don't think he actually served with Mr. Tome.

Womack testified that the reason he did not call as a witness the person he spoke to, who may or may not have been Bird, was two-fold. Womack thought that the person seemed like a "loose cannon" and that he would not be a good witness "because he's really complaining about his treatment by the VA. It doesn't advance the ball on Mr. Tome having PTSD. . . . I didn't think the particular witness that I talked to would have been a credible witness and I didn't want him on our side at all. I chose not to use him and I discussed that with Mr. Tome."

Further, Womack explained that the evidence about which Bird would have testified was admitted through other witnesses:

> Much of that evidence came in. That came in loud and clear through the psychiatrists and psychologists. . . . It came out very clearly that [appellant] was receiving [anti-psychotic and anti-depressant] drugs from the doctor at the jail that addressed those two problems. All of our doctors said those are the drugs he should be receiving. . . . I think we had plenty of testimony about him having been in combat, having PTSD. We had evidence that the VA had awarded him 50 percent disability for PTSD. And that the -- you know, that the Army would not diagnose that. But people who looked at it after the fact, including the VA, say, "Yeah, you clearly have PTSD."

Based on this testimony, the trial court reasonably could have believed that appellant's counsel spoke to Bird, determined Bird would not be a credible or helpful witness, and chose not to call Bird but instead to make the same points Bird would have made through other witnesses. Viewing the evidence in the light most favorable to the ruling, the trial court's implied finding that trial counsel was not deficient in this regard was not an abuse of discretion. *See, e.g.*, *Russi v. State*, Nos. 14-14-00397-CR, 14-14-00398-CR, 2016 WL 1444040, at *2 (Tex. App.—Houston [14th Dist.] Apr. 12, 2016, pet. ref'd) (mem. op., not designated for publication) (no abuse of discretion in finding counsel was not ineffective; even though witness was available to testify, counsel's decision not to call her was strategic and did not preclude defendant from advancing a viable defense through testimony of other witnesses).

3. Failing to correct misstatements of the law

Appellant also argues in his first issue that his trial counsel was ineffective because he failed to object to or correct several misstatements of law by the State or the court.

According to the State, appellant has waived these arguments because he neither included them in his amended motion for new trial nor raised them at the hearing. An "ineffective-assistance claim may be brought for the first time on appeal." *Cannon v. State*, 252 S.W.3d 342, 347 n.6 (Tex. Crim. App. 2008). In such cases, however, the record on direct appeal is almost always inadequate to show that counsel's conduct fell below an objectively reasonable standard of performance. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Still, in rare instances, some actions may be strategically unjustifiable regardless whether the record adequately reflects the trial counsel's subjective reasons for acting as he did. *See Strickland,* 466 U.S. at 690. One such instance occurs when defense counsel fails to correct a misstatement of law. "Defense counsel has a duty to correct misstatements of law that are detrimental to his client. . . . There can be no reasonable trial strategy in failing to correct a misstatement of law that is detrimental to the client." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). When no reasonable trial strategy could justify trial counsel's conduct, the reviewing court must conclude that counsel's performance fell below an objective standard of reasonableness as a matter of law. *See Strickland*, 466 U.S. at 690. Appellant did not waive these arguments by failing to include them in his motion for new trial.

a. *First alleged misstatement*

Appellant identifies three purported misstatements of law about which his counsel remained silent. First, appellant says the State misconstrued Penal Code section 8.01(b) by leading the jury to believe that repeated commission of criminal or antisocial conduct proves sanity.

The insanity defense is set forth in Penal Code section 8.01. It is an affirmative defense to prosecution that, at the time of the conduct charged, the

actor, as a result of severe mental disease or defect, did not know that his conduct was wrong. Tex. Penal Code § 8.01(a). The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. *Id.* § 8.01(b). Further, voluntary intoxication does not constitute a defense to the commission of crime. *Id.* § 8.04(a).

Appellant argues that the State misled the jury into believing that appellant's alleged use of illegal drugs, standing alone, negated appellant's reliance on an insanity defense. As appellant states, "subsection (b) does not deny an insanity defense to one whose mental abnormality is *caused* by repeated criminal or antisocial conduct; it says one cannot prove insanity only with evidence of such conduct." *Afzal v. State*, 559 S.W.3d 204, 214 (Tex. App.—Texarkana 2018, pet. ref'd). Appellant points to the following instances during the State's voir dire and closing argument when his counsel failed to correct this confusion.

> [Voir dire] [Prosecutor]: A person can be, quote, unquote, temporarily insane as a result and meet their three prongs. But what we're talking about now is even if they meet those three prongs, there are certain things that disqualify them from prevailing a not guilty by reason of insanity.
>
> And one is that drug use or abuse is what caused the mental health defect. Another one is continuing criminal conduct. All those sorts of things. So I think I've pretty much harped on that long enough.

> [Closing argument] [Prosecutor]: Now, this is also very important going down to the term mental disease or defect, because just like Dr. Arambula told you, if drugs are involved, it's over. Because drugs, if they play any role in exacerbating or creating a mental health disease or defect that is severe, the Defense can meet all of their elements that they have to prove to you by a preponderance of the credible evidence and they still lose.

> And that's what the Judge is telling you here and that's what the law says on the third sentence. The term mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

To the extent the prosecutor simplified his argument to such a degree that he misstated the law and that it was objectively unreasonable for defense counsel not to object, we conclude based on our independent record review that appellant has not demonstrated prejudice. The prosecutor clarified specifically that the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal conduct. This is consistent with section 8.01(b). *See* Tex. Penal Code § 8.01(b). Appellant argues that the prosecutor's statements misled the jury into believing that proof of appellant's repeated criminal conduct proved he was sane at the time of the offense, but we do not agree with appellant's interpretation of the record. The prosecutor asserted that, if appellant's purported mental defect was an abnormality manifested by repeated criminal conduct, then appellant could not prevail on his insanity defense. *See id.* § 8.01(a), (b). Moreover, we note the jury charge correctly quoted section 8.01(b) in connection with appellant's insanity defense. To the extent defense counsel was ineffective by failing to object to the cited statements, we conclude appellant was not harmed.

b. *Second alleged misstatement*

Next, appellant argues that the State and the court misled the jury regarding causation of psychosis by introduction of intoxicants and that his counsel was ineffective in failing to object. Appellant first cites statements by the court during voir dire.

> VENIREPERSON: I think the State was specific about if drugs were involved, then you can't claim insanity.
>
> THE COURT: That's what the law says.

Appellant only excerpts the two lines above, but the exchange between the venireperson and the judge was much longer. And the judge explained to the venireperson:

> It's at the time the conduct was alleged -- I know that both the prosecutor and the Defense have covered this -- the defendant had a severe mental disease or defect. So it's a very close snapshot; what caused that, whether it was the introduction of drugs or the withholding of drugs, it's dealing with a very specific point in time.

Thus, the record does not support appellant's suggestion that "[t]he court misled the jury to believe that the mere inclusion of intoxicants negates the insanity defense" and that counsel, therefore, erred in not objecting.

Second, appellant cites an assertion by the State during voir dire:

> VENIREPERSON: I just have a question. So if you say -- the cocaine example, if they took it and they were high and crazy and they killed somebody, then they say I was temporarily insane, the law still says, no, you're guilty?
>
> [Prosecutor]: Correct.

Again, this excerpt was part of a longer exchange between the State and the venire panel. The prosecutor used a hypothetical example, the one referenced above by the venireperson, to explain that if "you find out that the person was suffering from cocaine -- from ingesting cocaine and that's why they were insane . . . the law says that is a guilty. Okay?" The failure to object to this exchange is not deficient because the State correctly illustrated that a "mental disease or defect" does not include an abnormality manifested only by ingestion of illegal drugs.

Third, appellant cites an exchange between the prosecutor and Dr. Arambula:

> [Prosecutor]: Now, you mentioned that once drugs come in to -- once drugs become an issue, the insanity defense is essentially gone?
>
> [Dr. Arambula]: It's over, yes.

Again, appellant has excerpted this passage without context. On the prior page of the record, Dr. Arambula explained:

> [B]ecause of [appellant's] excessive drug use, in looking at insanity in these prongs, once drugs show up, like in this case, then it's basically over. There is no insanity platform because the drugs was [sic] the issue and not the severe mental disease because in his case he doesn't have it.

Accordingly, the record does not support appellant's assertion that the State misstated the law by suggesting that "it's over"—meaning appellant's insanity defense—once drugs were mentioned, without proving that the drugs caused the mental defect. Appellant has not demonstrated that counsel's failure to object was objectively unreasonable.

c. *Third alleged misstatement*

Last, appellant argues that the court misled the jury by incorrectly using the definition of "mental illness" in the jury charge instead of "mental disease or defect" and that his counsel was ineffective in failing to object.

The jury charge included the following instructions and definitions:

> You are instructed that no act done in a state of insanity can be punished as an offense. It is an affirmative defense to prosecution that, at the time of the conduct charged, the defendant, as a result of severe mental disease or defect, did not know that his conduct was wrong.
>
> The severe mental disease or defect must have existed at the very time or times inquired about, that is, at the very time of the alleged commission of the offense.

> The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> "Mental illness" means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that substantially impairs a person's thought, perception of reality, emotional process, or judgment; or grossly impairs behavior as demonstrated by recent disturbed behavior. . . .
>
> You are instructed that voluntary intoxication does not constitute a defense to the commission of a crime. You are further instructed that under our law neither voluntary intoxication nor temporary insanity of the mind caused by voluntary intoxication shall constitute any defense to the commission of a crime.

The Penal Code provisions regarding a defendant's insanity defense do not define "mental disease or defect," and the definition of "mental illness" in the charge seems to be drawn from Health and Safety Code section 571.003, which is not referenced in the Penal Code provisions.[7] *See* Tex. Health & Safety Code § 571.003(14). Appellant argues that the trial court erred in defining "mental illness" in the charge, and that his counsel's failure to object was objectively unreasonable. Presuming without deciding that counsel's performance was deficient, appellant has not demonstrated how the result would have been different but for the error. Appellant contends that the definition of "mental illness" permitted the State to argue that substance abuse alone was enough to negate his insanity defense, but nothing in the definition of "mental illness" leads to that conclusion. Further, as explained above, the record does not support the contentions that the jury was misled in the manner suggested by appellant.

[7] Witnesses at trial were questioned regarding the Health and Safety Code definition of mental illness, as well as similar definitions from the DSM-5, which is a manual that mental health professionals use in diagnosing a person with a mental illness.

4. Other grounds

Appellant also argues that his counsel was ineffective for failing to object to the unfairly prejudicial use of autopsy photographs and failing to object to inadmissible hearsay. Unlike the failure to correct misstatements of law, these alleged failures may have been justifiable under reasonable trial strategy. They were not, however, raised in appellant's motion for new trial, nor were they litigated during the new-trial hearing. Consequently, any trial strategy that trial counsel may have had for the challenged actions is not contained in the record. Generally, a silent record that provides no explanation for trial counsel's actions will not overcome the strong presumption of reasonable assistance. *See Goodspeed*, 187 S.W.3d at 392; *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

Our review of the record reveals that, contrary to appellant's assertion on appeal, his counsel did not fail to object to the autopsy photos offered by the State on Texas Rule of Evidence 403 grounds, as we discuss below in connection with appellant's third issue challenging the admission of the photos. To the extent counsel failed to object on other grounds, the record does not indicate that counsel's alleged failures were so outrageous that no competent attorney would have engaged in them. *See, e.g.*, *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007) (holding that trial counsel's failure to object to hearsay testimony did not constitute ineffective assistance of counsel because his reasons for his actions did not appear in record and could have been part of reasonable trial strategy).

Based on the record before us, the strong presumption of reasonable assistance, and the absence of any explanation regarding trial counsel's strategy on the remaining grounds of allegedly ineffective assistance, we cannot say that appellant has met his burden under the deficient-performance prong to show by a

preponderance of the evidence that his trial counsel's alleged failures fell below the standard of prevailing professional norms or were so outrageous that no competent attorney would have engaged in them. *See Strickland*, 466 U.S. at 688-89.

We overrule appellant's first issue.

B. Expert Testimony

In his second issue, appellant argues that the trial court erred in permitting Deputy Phillip Lillibridge to testify as a "drug recognition" expert.

1. Standard of review

We review the admission of expert testimony under an abuse-of-discretion standard. *Russeau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005); *Morales v. State*, 32 S.W.3d 862, 865 (Tex. Crim. App. 2000). Even if the trial court erred, however, we will conclude that the error was harmless if, after examining the record as a whole, we are reasonably sure that the error had little or no effect on the factfinder's decision. *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004). Often, error in the admission of evidence is harmless if the evidence is cumulative of other evidence or the nature of the evidence is established through other means. *See Estrada v. State*, 313 S.W.3d 274, 302 n.29 (Tex. Crim. App. 2010) (noting that any error with respect to admission of complained-of evidence was harmless in light of "very similar evidence" admitted without objection); *McNac v. State*, 215 S.W.3d 420, 424-25 (Tex. Crim. App. 2007) (concluding in harmless-error analysis that the "unchallenged evidence [was] essentially cumulative" of the challenged evidence).

2. Analysis

The State called Deputy Lillibridge as a drug recognition expert and to elicit opinions about matters within his expertise. Appellant objected and argued that, among other things, Deputy Lillibridge did not conduct a drug recognition evaluation on appellant after appellant's arrest and thus his testimony was unreliable under Texas Rule of Evidence 702. Assuming without deciding that the trial court abused its discretion in admitting the portions of Deputy Lillibridge's testimony about which appellant complains, we conclude that any error was harmless because the evidence was cumulative of other properly admitted testimony from Dr. Arambula.

Deputy Lillibridge testified that, as a drug recognition expert, he can determine whether a person is under the influence of one or more of seven drugs because each drug category affects the body in discrete, identifiable ways. The State specifically questioned Deputy Lillibridge about the effects of drugs appellant admitted to taking or for which he tested positive—amphetamine, methamphetamine, ecstasy, and marijuana.[8] Deputy Lillibridge testified that ecstasy can cause hallucinations and agitation; amphetamine and methamphetamine can cause anxiety, restlessness, and insomnia; and marijuana can cause mood changes, panic reactions, and paranoia. Deputy Lillibridge testified that if a person is a "chronic user" of drugs and is used to being high but then stops consuming the drugs, then the person's brain can become confused, "which can cause issues," such as an inability to judge time or distance.

[8] There was evidence that appellant admitted to various witnesses to using ecstasy and marijuana. A urinalysis performed after appellant's arrest showed positive results for methamphetamine and amphetamine.

When asked about withdrawal symptoms, Deputy Lillibridge testified that a person can become very agitated, depending on the amounts of drugs that the body was used to, because "the body is so hungry for that drug. Between what the body is feeling, what the mind is doing to that person . . . an array of things [] can happen. But as far as agitation and any kind of violence or physical violence, I can see that happening very quickly." Deputy Lillibridge said that a person can develop methamphetamine psychosis, "which is caused by the amount that's been flooded into the body so much. Once it's taken away, they can get into a psychotic episode."

Dr. Arambula testified as an expert in psychiatry and pharmacology. Dr. Arambula opined that appellant had "severe Cannibis [sic] use disorder." Dr. Arambula testified that chronic marijuana users can experience problems with mood, mood changes, irritability, and paranoia, and that these symptoms can persist even after cessation of the use. According to Dr. Arambula, appellant admitted that when he smoked "too much" marijuana, he "would get a panic attack or he would be more paranoid."

Dr. Arambula also testified that appellant had a history of "stimulant use disorder," stemming from his use of ecstasy.[9] According to Dr. Arambula, ecstasy has hallucinogenic properties and can also cause agitation and paranoia. Long-term use of ecstasy can interfere with a person's sleep and can cause "agitation, reckless impulsive behavior . . . adverse cognitive effects, [such as] how a person thinks, handles problems, makes decisions, things like that."

Dr. Arambula's testimony was admitted without objection and conveyed substantially the same material points as Deputy Lillibridge's testimony.

[9] Dr. Arambula explained that ecstasy, a composite drug, often contains methamphetamine, which metabolizes as amphetamine; all three are considered stimulants.

Accordingly, we hold that any error in admitting Deputy Lillibridge's testimony was harmless on this record. *See Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991) (stating that any objectionable testimony was harmless because "substantially the same evidence" was admitted elsewhere without objection); *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999) ("Moreover, any error in admitting the evidence was harmless in light of other properly admitted evidence proving the same fact.").

We overrule appellant's second issue.

C. Autopsy Photos

In his third issue, appellant argues that the trial court erred in overruling his Texas Rule of Evidence 403 objection to the admission of autopsy photographs of Guillory and Tippit. Appellant asserts that he did not dispute causing the victims' deaths but instead focused on his insanity defense. Thus, appellant continues, the "minimal probative value of the autopsy photographs at issue, if any, was substantially outweighed by the danger of unfair prejudice [and] confusion of the issues by unduly focusing the jury's attention upon the deaths of the victims rather than the question of insanity resulting in the needless presentation of cumulative evidence."

1. Standard of review

We review the trial court's decision to admit photographs for abuse of discretion and will not reverse the decision if it is within the zone of reasonable disagreement. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). We must uphold the trial court's decision if it is reasonably supported by the record and correct under

any theory of law applicable to the case. *Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002).

Evidence is relevant if it tends to make the existence of any consequential fact more or less probable than it would be without the evidence. *See* Tex. R. Evid. 401; *Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). To be relevant, evidence must be both material—that is, it must be offered for a proposition that is of consequence to the determination of the case—and probative, such that it makes the existence of the fact more or less probable than it would otherwise be without the evidence. *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016).

Even if evidence is relevant, the trial court may properly exclude it under Texas Rule of Evidence 403 if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *See Hedrick v. State*, 473 S.W.3d 824, 830 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing Tex. R. Evid. 403).

When undertaking a Rule 403 analysis, the trial court must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006). In addition to this Rule 403 balancing test, when considering the admissibility of photographs the trial court may consider a number of other factors, including but

not limited to the number of photographs offered, their gruesomeness, their detail, their size, whether they are black-and-white or color, whether they are close-up, and whether the body depicted is naked or clothed. *Id.* The availability of other means of proof and the circumstances unique to each individual case must also be considered. *Id.*

Generally, photographs are admissible if verbal testimony about the matters depicted in the photographs would be admissible and their probative value is not substantially outweighed by any of the Rule 403 factors. *Threadgill v. State*, 146 S.W.3d 654, 671 (Tex. Crim. App. 2004). Further, autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself. *Rojas v. State*, 986 S.W.2d 241, 246 (Tex. Crim. App. 1998). However, mutilation caused during an autopsy is not necessarily fatal to the admissibility of a photograph if the photograph is highly probative of the medical examiner's findings and conclusions or when it allows the jury to see an internal injury. *See Gallo*, 239 S.W.3d at 763; *Harris v. State*, 661 S.W.2d 106, 108 (Tex. Crim. App. 1983).

Under Rule 403, it is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice. *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009). The rule envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value. *Id.* It is appellant's burden to overcome this presumption and demonstrate that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Distefano v. State*, 532 S.W.3d 25, 32 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

2. The autopsy photographs

The State offered exhibits 192-215, which were autopsy photographs of Guillory, and exhibits 217-36, which were autopsy photographs of Tippit. Appellant objected to the entire tranche of autopsy photographs based on Rule 403. The photographs are in color and of a seemingly high resolution. Their size is unclear. Generally, the photographs show the bodies of Guillory and Tippit as they looked immediately following the incident (i.e., bloodied and partially clothed), as well as the cleaned, naked, and dissected bodies during the autopsy surgeries and various close-up perspectives of the victims' internal and external injuries.

In an initial hearing outside the jury's presence, the court reviewed each photograph and asked the State to explain the relevance and necessity of several exhibits. The trial court pre-admitted some photos (exhibits 192-203, 218-20, and 223-24), but withheld ruling on others (exhibits 204-15, 221-22 and 225-36) until the State could place them in context.[10]

The pre-admitted exhibits generally depicted pre-autopsy external injuries and means of identification. The exhibits on which the court deferred ruling primarily depicted the autopsied bodies' internal injuries and organs.

The State called the medical examiner who performed Guillory's and Tippit's autopsies to opine on cause of death. During the medical examiner's testimony, the State moved to admit and publish all of the autopsy photos "because we will be talking about complex terms and body parts and where they're supposed to be, what they're supposed to look like, not look like, forensic medical pathological testimony. And the jury will not fully comprehend or understand the

[10] The trial court sustained appellant's objection to exhibit 217, although the court reporter's exhibit list shows that it was admitted, and the State later published it to the jury. The State withdrew exhibits 204, 206, 207, 210, 212, 213, 225, 227, 234, and 235.

mechanisms of injury and death without being able to see the photos." Appellant objected, arguing that the photographs "will not help [the jury]. All they'll see is red. I just don't see how they would help." We presume for sake of argument that the trial court understood from context that appellant renewed his Rule 403 objection to all the autopsy photographs, not just those that were pre-admitted.

The court admitted all the photos, except for those the State had withdrawn, but instructed the jury, "Ladies and gentlemen of the jury, several photographs have been admitted into evidence that depict fairly graphic scenes of the human body, particularly during the autopsy process. I just caution you to be aware of that as we proceed with this. They are offered for the scientific purposes that will be established through the testimony."

In total, the court admitted eighteen photographs of Guillory's autopsy and fourteen photographs of Tippit's autopsy.

3. Analysis

We first consider the inherent probative force of the photos along with the State's need for them. *See Gigliobianco*, 210 S.W.3d at 641. Because appellant pleaded not guilty, the State had the burden to prove every element of the charged offenses, including scienter, beyond a reasonable doubt. The medical examiner agreed that the photographs would better convey his "complex medical or pathological testimony versus just describing" what they depicted and that the photos would aid the jury "in understanding the autopsy, the process, the injuries, the mechanisms of death by showing the photographs versus just describing them." Further, the medical examiner testified that "one of the goals" of the autopsy photographs and other documentation is to assist other experts, such as a forensic pathologist or a crash reconstructionist, in determining what happened to the body at the point of impact.

The medical examiner discussed the photographs and explained what was depicted. The photos in question depict Guillory's and Tippit's bodies at various stages of the autopsy process. While referring to the autopsy pictures, the medical examiner summarized the extensive internal and external trauma inflicted on various parts of the victims' bodies—including head, brain, neck, and abdomen injuries, hemorrhages, abrasions, contusions, lacerations, and bone and skull fractures—and tied those injuries to "the blunt force that has been applied to the body." In the doctor's opinion, the multiple blunt injuries sustained by both victims caused their deaths. The photos were therefore highly probative to establish the victims' identities, their causes of death, and the nature and extent of bodily injuries sustained. *See, e.g.*, *Gallo*, 239 S.W.3d at 763 (autopsy photos were "were highly probative to show the full extent of the injuries appellant inflicted on the victim"); *Escobar v. State*, No. 01-14-00593-CR, 2015 WL 6550733, at *9 (Tex. App.—Houston [1st Dist.] Oct. 29, 2015, pet. ref'd) (mem. op., not designated for publication) ("Although the autopsy photographs are gruesome, the trial court admitted only those [fifteen] photographs that the medical examiner testified were probative of the manner and method of [] Lopez's death.").

Another witness who performed a crash reconstruction testified that he relied, at least in part, on some of the autopsy photos. Based on the evidence that the victims were hit with a "strong amount of force," as evidenced by an autopsy photo showing Tippit's clothing ripped away from his body, the reconstructionist concluded that the crash was "done intentionally." Thus, the photos bore relevance to the intent element pertaining to the charged offenses involving Keri Guillory's and Tippit's deaths and Michael Guillory's aggravated assault. *See, e.g.*, *Mayreis v. State*, 462 S.W.3d 569, 578 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (holding autopsy photos admissible over Rule 403 objection because the State had

the burden to prove that appellant intentionally or knowingly caused the death of the victim).

Appellant argues that the photographs were not probative of disputed issues because identity and cause of death were not disputed. But the State retained the burden to prove the essential elements of all charged offenses, including the victim's identity, cause of death, injuries, and the defendant's intent, beyond a reasonable doubt. Evidence does not become irrelevant merely because it could be proved some other way, such as by an admission or stipulation by the defendant. *See Old Chief v. United States*, 519 U.S. 172, 179 (1997) ("[T]he prosecution is entitled to prove its case by evidence of its own choice, . . . [and] a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."); *Mena v. State*, No. 14-18-01080-CR, 2020 WL 3240784, at *5 (Tex. App.—Houston [14th Dist.] June 16, 2020, pet. ref'd) (mem. op., not designated for publication); *Peters v. State*, 93 S.W.3d 347, 356 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (Brister, J. concurring) ("The prosecution must prove its case, and may do so even if the defendant would prefer a more antiseptic version.").

The trial court was to weigh the probative value of the photos against the danger of unfair prejudice, based on the factors mentioned above. There is no question that autopsy photos are inherently gruesome and disturbing. That is the nature of an autopsy. There is blood and viscera in many of the photos, and they show horrible, traumatic, extensive injuries to the victims' bodies. But these particular images are gruesome because the injuries that would be reasonably expected to result from appellant's conduct—intentionally driving a car head-on into a human body at high speed—are gruesome. *See Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999); *Emery v. State*, 881 S.W.2d 702, 710-11

(Tex. Crim. App. 1994). Otherwise, the challenged photos were no more gruesome than ordinary autopsy photos and reflect accurate, non-enhanced depictions of the inflicted injuries. They are also no more disturbing than the crime scene photos, which were admitted and published to the jury without objection. It is true that some of the photos show removed organs. But a photograph depicting internal organs that have been removed from the decedent is not considered a depiction of mutilation of the decedent because there is no danger the jury would attribute the removal of the organs to the defendant. *See Williams v. State*, No. 14-10-00209-CR, 2011 WL 2083970, at *2 (Tex. App.—Houston [14th Dist.] May 19, 2011, pet. ref'd) (mem. op., not designated for publication). And any photos depicting removed organs were addressed and explained by the medical examiner. Those photos were not merely gratuitous; they supported the medical examiner's testimony and ultimate conclusion that the decedents died from multiple life-threatening injuries, including loss of blood and blunt force trauma. *See Rayford v. State*, 125 S.W.3d 521, 530 (Tex. Crim. App. 2003) ("[A]lthough some of the photos reflected alterations of the victim's body or organs due to the autopsy procedures, these were fully explained to the jury as necessary to a thorough examination of the injuries."). Where elements of a photograph are genuinely helpful to the jury in making its decision, and the photograph's power "emanates from nothing more than what the defendant has himself done[,] we cannot hold that the trial court has abused its discretion merely because it admitted the evidence." *Sonnier v. State*, 913 S.W.2d 511, 519 (Tex. Crim. App. 1995); *see also Rayford*, 125 S.W.3d at 530 ("While the photos may be graphic, they depict the realities of the crime committed.").

Appellant makes no additional challenge to the prejudicial nature of the photographs, such as the number of them, other than the fact of their

gruesomeness. We note, in any instance, that the State minimized the number of photographs and used only those necessary for witnesses' testimony, and the photographs were not particularly numerous.[11] *See Gallo*, 239 S.W.3d at 762 (thirty-six autopsy photos admissible despite defendant's complaint that they were "numerous, repetitious, [and] gruesome"). Based on our record review, we also do not believe that the photographs or the medical examiner's reliance on them confused or distracted the jury or led the jury to decide the case on an improper basis, consumed an inordinate amount of time, or merely repeated evidence already admitted. *See Gigliobianco*, 210 S.W.3d at 641-42.

In sum, "[a]lthough certain pictures depicted aspects of the autopsy that an ordinary person would find gruesome, and the emotional impact of seeing a [person's] corpse being clinically dissected cannot be denied, this was a trial for [capital] murder. Jurors are constitutionally called to assess the guilt or innocence of their peers, and images of death and tragedy are par for the course." *Dawkins v. State*, 557 S.W.3d 592, 606 (Tex. App.—El Paso 2016, no pet.). After considering and balancing the Rule 403 factors, we cannot say that the trial court's decision veered outside the zone of reasonable disagreement. *See Rayford*, 125 S.W.3d at 530; *Dawkins*, 557 S.W.3d at 606; *Williams*, 2011 WL 2083970, at *2-3.

Finally, we note that appellant's reliance on *Prible v. State*, 175 S.W.3d 724 (Tex. Crim. App. 2005), is misplaced. The facts in this case are distinguishable from the facts in *Prible*, where the Court of Criminal Appeals concluded the trial court abused its discretion in admitting autopsy photographs of child decedents (although the error was harmless). *Id.* at 736-37. In *Prible*, not only was the cause of the children's deaths not contested, but "[m]ost important, appellant was not

[11] The prosecutor represented to the court that "there were about twice as many autopsy photos, about three times, so we've cut it down quite a bit."

charged with murdering them." *Id.* at 736. Here, in contrast, appellant was charged with murdering two people by intentionally driving his car into them. It is the autopsy photographs of those decedents that appellant challenges. Thus, the autopsy photographs were relevant to a contested issue at trial (in addition to the reasons explained above).

We overrule appellant's third issue.

Conclusion

We affirm the trial court's judgments.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer.
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