COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00400-CR

EZEKIEL COX — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 16TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F15-913-16

MEMORANDUM OPINION[1]

A jury convicted Ezekiel Cox of committing capital murder. Because the State waived the death penalty, the trial court assessed the automatic life-without-parole sentence. *See* Tex. Penal Code Ann. § 12.31(b) (West Supp. 2016). On appeal, Cox raises four points: (1) the trial court abused its discretion by admitting two autopsy photographs, (2) the evidence was insufficient to

[1]*See* Tex. R. App. P. 47.4.

support a capital-murder conviction, (3) the trial court erred by deviating from the statutory jury oath, and (4) the trial court violated his procedural-due-process rights by not allowing him to make an allocution before it assessed his sentence. We affirm.

The indictment

In the indictment's first paragraph, the State alleged that Cox murdered Robin Bavousett while in the course of committing or attempting to commit robbery. *See* Tex. Penal Code Ann. § 19.03(a)(2) (West Supp. 2016). In the second paragraph, the State alleged that Cox murdered Bavousett while in the course of committing or attempting to commit burglary of a habitation. *See id.* The State alleged two methods of committing one offense—capital murder. *See Martinez v. State*, 225 S.W.3d 550, 554 (Tex. Crim. App. 2007) (stating that separate paragraphs within a single count allege different methods of committing the same offense).

The evidence

Ezekiel Cox, the defendant: a young man on a bad path

Cox was 22 in February 2015. He had no regular place to stay, relying on friends to give him shelter. As one friend agreed, Cox was the "kind of guy people would take in and want to look after." A drug user, Cox possessed neither a car nor a job.

To get by day to day, Cox admitted to selling drugs and to stealing from cars and from people. When stealing, however, he denied using force or threats of force.

Bridget Campbell, Cox's friend, testified that he talked constantly about "hitting licks," a phrase she took to mean hitting someone over the head and taking his money. Confirming Campbell's interpretation, Detective Casey Shelton testified that "hitting licks" was slang for robbery.

Another friend, Jamie Wallace, testified that Cox would occasionally talk about stealing things from random people.

Robin Bavousett, the victim: wrong place, wrong time

Donna Tarver, a licensed clinical social worker who had been counseling Bavousett weekly for about fifteen years, described Bavousett as a submissive woman. Bavousett had experienced significant trauma in her past and suffered from a major depressive disorder. According to Tarver, when in August 2014 Bavousett got an apartment and lived on her own for the first time, Bavousett was extremely fearful. Bavousett was approximately fifty years old, 5'5" tall, and weighed 221 pounds. Although Bavousett was pagan, Tarver saw nothing in Bavousett's paganism that gave her any reason to believe that Bavousett would harm anyone; she was not a Satanist and was not involved in sacrificing animals

or hurting people.[2] Bavousett's daughter testified that her mother, a lesbian, had had many bad experiences with men and was "squeamish" around them.

February 24, 2015: Cox's and Bavousett's paths cross

Campbell, who met Cox through a mutual friend in February 2015, learned that Cox was living on the street, so she invited him to stay with her. During the early morning hours of February 24, 2015, however, Campbell, who acknowledged that Cox could be "pretty annoying,"[3] kicked him out of her apartment.

Also on February 24, 2015, someone killed Bavousett in her apartment, which was not far from Campbell's in the Windsong apartment complex in a portion of Dallas lying in Denton County. Found with defensive wounds on her hands, Bavousett had been beaten, strangled, and her throat had been slit.

Strangulation with a ligature was the specified cause of death. Although the gash across Bavousett's throat measured four inches, it was not fatal,[4] nor was the blunt-force trauma to her face and head.

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[2]We would not ordinarily go into such personal details, but this background becomes relevant to Cox's self-defense theory.

[3]During opening arguments, defense counsel admitted Campbell kicked Cox out because Cox was "messing around" with one of her roommates.

[4]When the prosecutor asked Dr. Nizam Peerwani, the medical examiner, why such a large cut was not fatal, Dr. Peerwani answered that "it was a superficial cut that went into the soft tissues of the interior neck but had missed all the major blood vessels of the interior neck, including the carotid arteries and the jugular veins, they were all intact." "[W]e can say with a great degree of confidence," he added, "that this was not the fatal wound."

Her apartment—which had no signs of forced entry—had been ransacked.

Shortly before 4:00 p.m. that afternoon, Bavousett's neighbor saw an unfamiliar male come out of Bavousett's apartment with a laundry basket full of random items, place the basket in Bavousett's car, and get in and start it. She described the male as between 5'7" and 5'9" with a slender to an athletic build. Photographs of Cox do not show his height, but do show him to appear slender and athletic.

Bavousett had an appointment with her counselor, Tarver, at 5:00 p.m. that afternoon but failed to appear. Because Bavousett never missed an appointment without calling, Tarver became anxious and drove to Bavousett's apartment. Bavousett did not answer her door, and Tarver noticed that Bavousett's car was missing. Tarver then called Bavousett's friend, Janine Hoppe, with the thought that Hoppe might know something.

That same evening, Cox met with his friend Wallace. Cox told Wallace that he had killed a woman, showed her items that he had taken, and mentioned that he had also taken the woman's car. He also claimed that he had killed the woman in self-defense after she had pulled a knife on him and talked about offering his blood to Satan. Cox admitted to Wallace that he choked the woman, hit her over the head with a radio, and cut her throat. Wallace thought Cox told her that he had slit the woman's throat because she was still breathing. Wallace's impression was that Cox was not with the woman very long before he killed her.

Around 9:30 p.m., Hoppe, concerned that she had not heard from Bavousett, went to Bavousett's apartment with her husband, found Bavousett's body, and called 9-1-1. Hoppe gave the police the information they needed to track Bavousett's car.

February 25, 2015: police and paramedics find Cox in Bavousett's car

On February 25, 2015, police and paramedics responded to a nonresponsive-person-in-a-car call. From the license plate, the police determined that the vehicle was possibly stolen. The nonresponsive person was Cox; the car was Bavousett's.

The police arrested Cox, who was found with minor scratches and cuts on his hands and fingers. A detective testified that the area in which Cox was arrested was considered a high-crime area and a good place to sell stolen goods or buy narcotics.

Cox testifies: he killed Bavousett in self-defense, and he stole from her only as an afterthought

Cox testified at trial. He admitted killing Bavousett but maintained that he acted in self-defense. Although also admitting to taking various items from Bavousett's home and stealing her car, Cox asserted that the idea of taking anything occurred to him only after she was already dead.

The evidence is sufficient to show Cox killed Bavousett in the course of committing or attempting to commit either robbery or burglary

Because Cox's second point, his sufficiency complaint, would result in greater relief if granted, we address it first. *See Mixon v. State*, 481 S.W.3d 318,

322 (Tex. App.—Amarillo 2015, pet. ref'd). Cox contends that the evidence is insufficient to support the capital-murder conviction because the offense requires that he killed the victim in the course of committing a robbery or burglary, and the only means the jury had to link the murder to either the robbery or burglary was nothing but speculation. *See Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012); *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). We disagree.

Standard of review

In reviewing the evidence's sufficiency to support a conviction, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599.

The factfinder is the sole judge of the evidence's weight and credibility. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary-sufficiency review, we may not re-evaluate the evidence's weight and credibility and substitute our judgment for the factfinder's. *See Montgomery v. State*, 369

S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based on the evidence's cumulative force when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and must defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

The standard of review is the same for direct- and circumstantial-evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Jenkins*, 493 S.W.3d at 599. In determining evidentiary sufficiency to show an appellant's intent, and faced with a record that supports conflicting inferences, we must presume—even if it does not affirmatively appear in the record—that the factfinder resolved any such conflict in the prosecution's favor and must defer to that resolution. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

Cox's version of the events

Cox testified that he and Campbell were partying—using meth, heroin, and GHB—in Campbell's apartment. According to Cox, he left Campbell's apartment after an argument, and when he returned around 4:00 a.m. she would not let him in, so he went to the apartment-complex laundry room where it was cold but where he was at least out of the wind.

Once in the laundry room, Cox testified that he fell asleep and awoke shortly before 8:00 a.m. when he saw Bavousett walking her dog. He asked her for a cigarette; they started talking and hit it off.

When they got back to her apartment, she invited him in, and Cox accepted because he just wanted to get warm. He denied having any intention to rob her when he entered the apartment.

Once inside, Cox testified that he noticed a joint roach in the ashtray, so he volunteered to share some of his marijuana with Bavousett. Bavousett got her own marijuana, and the two smoked together.

At some point they began to argue about their faiths. According to Cox, Bavousett was talking about giving or "letting" blood to call and tie the spirits to a person. Cox said he told Bavousett she was crazy, and Bavousett, who had been in the kitchen cleaning up, purportedly responded, "I'll show you crazy," and came around the corner with a knife.

Cox said that he grabbed a radio and hit Bavousett over the top of the head with it, a single blow that took her to her knees. Cox said he then struck her hard with his elbow, which "brought her down," after which he put a choke-hold on her. The alleged point of Cox's choking Bavousett was to get her to drop the knife: "[W]hen I was choking her, I was telling her to drop the knife. I kept saying, drop the knife, drop the knife."

Cox testified that he knew he had knocked Bavousett out, that his adrenaline was going, and that he took the knife from her. Cox grabbed her wrist

and could not find a pulse; he decided not to call the police because it "[didn't] look good."

Thinking that Bavousett was dead, Cox went into the bathroom and shot up with a mixture of meth and heroin. Calmed and focused again, Cox went back to Bavousett to again feel for a pulse, and when he again did not find one, he dragged her into the bathroom. Using rope that he found in her living room, he then tried to make it look like she had hanged herself but discovered that he could not lift her body.[5]

Cox then trashed the apartment to "make it look like a scene." His final act was to "cut her throat" even though by that point Bavousett was cold, stiff, and dead. Cox said that he had used so much meth that he did not really know what was going through his head, and he surmised that perhaps he was trying to change the scene to make it look like a robbery.

He did have the presence of mind to locate some rubber gloves under the sink and wipe the radio clean. At some point after his failed attempt to make it look like a suicide and while he was going through the apartment knocking things over, Cox decided to take a few things.

[5]Bavousett's autopsy photographs show obvious ligature marks around the neck. Because Dr. Peerwani linked the ligature impressions to her cause of death, Cox thus had to account for them in some way. (Although the autopsy photographs also show that Cox severely beat Bavousett's face, his story never adequately addressed how or why she would have severely beaten herself before committing suicide by hanging.)

Cox found Bavousett's purse and car key. When he pushed a button on the key, her car beeped, which enabled him to identify the right car. Cox testified that after he got high, he "skitz'd out," and even though at the time he believed he was thinking clearly, he "obviously [was] not thinking clearly at all." Cox drove away in Bavousett's car.

Cox then went looking for dumpsters so he could throw away some of the things he had taken, like the knife he had used and the rope with which he had tried to make Bavousett's death look like a suicide. This, according to Cox, was why the police never found the knife or the rope.

He started to "eat" some "benzo"[6] he had found in Bavousett's apartment. Those benzos that he did not "eat" he traded off to someone he knew in exchange for heroin.

At some point it dawned on Cox that, despite his efforts to break any connection between him and Bavousett's death, he was in a stolen car that belonged to her. Cox was torn between burning the car and not having any means of transportation.

Concocting a vague plan to rob a bank, Cox then went to a Walmart and stole a ski mask, gloves, and two BB guns. Cox explained that he was "really high" at that point, a condition in which he acts "stupid" and does "dumb things."

[6]Benzonatate.

Cox ended up at a convenience store. While in the parking lot, he started separating and cleaning Bavousett's jewelry and hung some of it around his neck as it was cleaned. At some point he became unconscious. Cox explained that he was close to overdosing and had not slept the whole day. He did not remember much about getting arrested.

When defense counsel asked if he had a pattern of having friends take care of him, Cox articulated it a bit differently: "That's really like my, I guess, my hustle to say for anything is that you rely upon people. I would rely upon -- if I met you, I would rely upon you in the best way I can."

Cox "[a]bsolutely" intended the same role for Bavousett, elaborating that "[i]f none of that happened, my plan, I would have thought of her as a friend, you know, smoke weed." He continued, "[I]t's just another person that's nearby to hang out with, to spend time. And, you know, if I need a place to go or if something happens, she seemed like a nice lady."

Cox stated that he felt "like trash for what happened to this woman." But he added, "I think about what I could have done differently, but I can't. I did what I had to do in an instant. I felt like I needed to protect myself. And that's what I did." He believed that if he had not protected himself, she would have harmed him.

Discussion

Cox contends that the jury could rely only on improper speculation to conclude that he killed Bavousett as part of a burglary or robbery. We disagree, because the jury could rationally rely on the circumstantial evidence.

Based on Cox's testimony on direct examination alone, the evidence sufficed to convict him of capital murder: Cox admitted killing Bavousett and to taking her things. "[T]he factfinder had the prerogative to believe all, some, or none of any witness'[s] testimony." *Calabria v. State*, 884 S.W.2d 568, 570 (Tex. App.—Beaumont 1994, no pet.). By its verdict, the jury plainly did not believe that Cox killed Bavousett in self-defense, and it did not believe that Cox stole Bavousett's property only as an afterthought.

On appeal Cox does not contest the jury's implicit finding that he did not kill Bavousett in self-defense. If self-defense was not a factor, it would then rationally follow that Cox killed her for some other reason. Because Cox stole her property and her car, the jury could rationally conclude beyond a reasonable doubt that he indeed killed her as part of a burglary or robbery. *See White v. State*, 779 S.W.2d 809, 815 (Tex. Crim. App. 1989), *cert. denied*, 495 U.S. 962 (1990). And particularly because Cox's own testimony established that he saw Bavousett as a resource, once the jury rejected his self-defense claim his killing her made sense as a means to facilitate the theft of her property and car.

Generally speaking, we can say with some confidence that a fearful, short, overweight woman would not pick a knife fight with a significantly younger and

athletic male, and—all things considered—it is incomprehensible why a youthful male would need to severely beat, strangle, and slit a much older woman's throat in order to disarm her, especially where, according to Cox, he had staggered Bavousett with his first blow to her head, after which he could have simply left. The jury could have rationally concluded that, circumstantially, Cox selected Bavousett precisely because she was incapable of mounting any serious resistance and lived alone.

The homicide detective testified that at the scene he could tell that Bavousett's head and face had suffered severe trauma. It was apparent also that Bavousett had been struck with a radio, and based on the trail of debris from that radio, he assumed that she had been struck multiple times. Based on the facts that the radio was near the front door and the radio debris trailed back to the bedroom and inside the bathroom, the detective deduced that after Bavousett answered the door, Cox forced his way in and attacked her. Nothing at the scene led the detective to believe that self-defense was a factor. He explained, "My thinking was . . . that there was an initial attack in the front of the apartment. And my personal opinion was she fled to the back of the apartment to get away from the attacker. She fled to the bathroom to get away."

The detective thought that the murder was committed to further a burglary or robbery because of the severe violence used against Bavousett, because Cox removed her personal property and placed it in her car, and because Cox then stole her car. The detective was also aware that another witness, Campbell, had

identified Cox as a robber. Additionally, the items taken—a TV and jewelry—were ones commonly taken in burglaries. The detective testified that he had no question that Bavousett's apartment had been ransacked. And by "ransacked," the detective meant that "it looked like somebody was looking for valuables. Jewelry, money, things of value that they could take."

In this case, the jurors did not engage in guesswork or speculation but reached conclusions based on the facts and the logical consequences deduced from them. *See Gross*, 380 S.W.3d at 188 (articulating the difference between speculation and reasonable inferences); *Hooper*, 214 S.W.3d at 15–16 (same). The only evidence conflicting with the overwhelming evidence of capital murder was Cox's testimony, but the jury had a rational basis for rejecting his testimony as self-serving. *See Armstrong v. State*, No. 05-08-00938-CR, 2010 WL 551439, at *2 (Tex. App.—Dallas Feb. 18, 2010, no pet.) (mem. op. not designated for publication).[7] Viewing the evidence in the light most favorable to the verdict, we

[7]Overruling the capital-murder appellant's sufficiency complaint, the Dallas court of appeals wrote:

> The only evidence supporting appellant's self-defense consisted of his self-serving testimony claiming his ex-wife, who was terrified of him, let him into her apartment, and then attacked him first with a knife and then with a hammer. The State, however, presented evidence that the victim never would have voluntarily let appellant into her apartment. Further, the objective evidence showed that the victim was badly beaten—she had two stab wounds and multiple blunt force injuries to the head. When appellant was arrested that night, his only injuries were some scratches and a rug burn. Moreover, appellant's actions after the offense display a consciousness of guilt.

hold that a rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *See Jenkins*, 493 S.W.3d at 599.

We overrule Cox's second point.

The trial court abused its discretion by admitting the autopsy photographs, but the error was harmless

In his first point, Cox contends that the trial court abused its discretion by admitting two autopsy photographs, State's Exhibits 191 and 192, which were photographs of the reflection of Bavousett's scalp during the autopsy. Cox complains that their probative value was substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403.

Standard of review

Rule 403 allows the trial court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. When ruling on a rule 403 objection, the trial court is entitled to broad discretion. *See State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). Generally, "autopsy photographs are admissible unless they depict mutilation of the victim caused by the autopsy itself." *Santellan v. State*, 939 S.W.2d 155, 172 (Tex. Crim. App. 1997); *see Salazar v. State*, 38 S.W.3d 141, 151 (Tex. Crim. App.), *cert. denied*, 534 U.S. 855 (2001). The rule favors the admission of evidence, and there is a

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Id.

presumption that relevant evidence will be more probative than prejudicial. *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App.), *cert. denied*, 549 U.S. 1056 (2006). In an analysis under this rule, the non-exhaustive factors to consider are:

> (1) how probative the evidence is;
>
> (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way;
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> (3) the time the proponent needs to develop the evidence; and
>
> (4) the proponent's need for the evidence.

Id. This court must decide if the trial court abused its discretion and whether its determination was reasonable in view of all relevant facts. *See id.*; *Santellan*, 939 S.W.2d at 172.

Why admitting State's Exhibits 191 and 192 was an abuse of discretion

The State introduced several photographs, State's Exhibits 179 through 183, depicting Bavousett's injuries and about which Cox does not complain; we describe them to set the stage for explaining why the trial court should not also have admitted State's Exhibits 191 and 192.

State's Exhibit 179 is a photograph of Bavousett's face. Her eyelids are greatly distended and greatly discolored, and her nose and forehead are swollen and discolored. In the middle of her forehead is a large red circle that appears to be an abrasion. Dr. Peerwani, the medical examiner, testified that the most remarkable thing about State's Exhibit 179 was "that you really see . . . this

enormous area of hemorrhage around the eyes." "[B]lows to the face"—that is, more than one—"produced these black eyes."

State's Exhibit 180 is a photograph of Bavousett's chin area. Dr. Peerwani testified that it showed the swelling and blue discoloration of the lip and a quarter-inch laceration.

State's Exhibit 181 is a side shot of Bavousett's head, neck, and left shoulder. The left side of her face has a large bruise; her throat reveals a large gash, above which is a large red area that extends to the chin and below which is a discolored band or bruise that circles the neck; and her left shoulder shows a large bruise. According to Dr. Peerwani, strangulation was the cause of death. Using State's Exhibit 181, Dr. Peerwani stated that Bavousett also suffered multiple blunt-force injuries to the head, eye area, mouth, shoulder, hand, and her lower extremities.

State's Exhibits 182 and 183 are shots from the chest area looking upwards toward the chin with the head tilted backwards. The ligature marks around the neck, the gaping gash across the throat, and the large red splotch above the gash extending to the chin are all easily visible.

None of these autopsy photographs are the ones about which Cox complains, and with good reason: crime-scene and autopsy photographs that do not reflect damage attributable to the autopsy itself are admissible. *See Santellan*, 939 S.W.2d at 171–73.

Instead, Cox complains about State's Exhibits 191 and 192. These were the cranial reflection photographs. (In his brief, Cox refers to the process as "degloving," which perhaps better describes this autopsy process in which skin is peeled back from, for example, the skull to reveal what is underneath.) Clumps of Bavousett's hair are visible where the reflecting stops. When testifying about State's Exhibit 191, Dr. Peerwani described the blood beneath the skin as "absolutely abnormal." When addressing State's Exhibit 192, he again describes an enormous area of congealed blood beneath the scalp and concluded that "one single blow would not produce such a large confluent area of hemorrhage. So she sustained multiple blows to the head." The head injuries were nevertheless not the cause of death.

State's Exhibits 191 and 192 had probative value to the extent they showed extensive bleeding caused by multiple blows. But State's Exhibit 179 already showed extraordinary bruising—bleeding beneath the skin—around the eyes, nose, and forehead, and State's Exhibit 180 already showed extensive bruising around Bavousett's lips and chin. Dr. Peerwani had already testified, while discussing State's Exhibits 179 and 181, that Bavousett had received multiple blows. In short, the probative value of State's Exhibits 191 and 192 was redundant, and the State's need for those exhibits to show multiple severe blows to the face and head causing much bleeding under the skin was nil. *See Shuffield*, 189 S.W.3d at 787.

Although the time needed for the State to develop this evidence was minimal, the impact of showing Bavousett's reflected skin was exponentially greater than the few minutes it took to present those two photographs to the jury. The autopsy photographs admitted without objection were disturbing enough, but they depicted only the direct consequence of Cox's own actions. The mutilation on display in State's Exhibits 191 and 192 was attributable uniquely to the autopsy procedure itself.

Despite the mutilation attributable to an autopsy, in certain circumstances reflection photographs have been properly admitted into evidence. For example, admitting a reflection photograph of a child's head was not an abuse of discretion where a pathologist testified that the injury was not visible just by looking at the head. *See Harris v. State*, 661 S.W.2d 106, 107–08 (Tex. Crim. App. 1983). Similarly, admitting autopsy-reflection photographs was not an abuse of discretion where the complainant's injuries were not externally apparent; that is, where the victim's head was not visibly bruised. *See Richards v. State*, 54 S.W.3d 348, 350 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd); *see also Drew v. State*, 76 S.W.3d 436, 451–53 (Tex. App.—Houston [14th Dist.], pet. ref'd), *cert. denied*, 537 U.S. 1047 (2002); *Salazar*, 38 S.W.3d at 144–45, 150–53. In contrast, Bavousett's injuries—including the extraordinary bleeding beneath the skin—were evident from the external photographs.

We hold that admitting State's Exhibits 191 and 192 falls outside the zone of reasonable disagreement and that the trial court thus abused its discretion.

See Prible v. State, 175 S.W.3d 724, 736 (Tex. Crim. App.),[8] *cert. denied*, 546 U.S. 962 (2005); see *also Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). Given the other evidence already admitted, their probative value was redundant at best, and given the gruesomeness of the photographs, the redundant probative value was substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403.

Standard of review: harm

The erroneous admission of evidence is nonconstitutional error and is subject to a harm analysis under Texas Rule of Appellate Procedure 44.2(b). Tex. R. App. P. 44.2(b); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *Moreno Denoso v. State*, 156 S.W.3d 166, 179 (Tex. App.—Corpus Christi 2005, pet. ref'd). That rule provides that "[a]ny other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Tex. R. App. P. 44.2(b). "In other words, after examining the record as a whole, the appellate court must disregard this error if it has fair assurance

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[8]The court of criminal appeals wrote:

> The State did not need the autopsy photographs of the children's dissected internal organs to fully explain the crime scene or to corroborate [other] testimony. Sufficient corroboration was provided by witness testimony, autopsy reports, crime scene photographs, and other autopsy photographs of the children's bodies before their internal organs had been removed. Furthermore, the cause of the children's death was not disputed. Most important, appellant was not charged with murdering them.

Id.

that the error did not influence the jury or had but a slight effect." *Drew*, 76 S.W.3d at 453; *see Johnson*, 967 S.W.2d at 417.

Why the error here was harmless

Where State's Exhibits 179 and 180 already showed that Cox had not hit Bavousett just once on the head as he testified but instead that Cox brutally beat her about the head; where other evidence showed that Cox slit Bavousett's throat either to ensure that she was dead or to somehow mask the fact that he had strangled her to death; and where Cox's story that Bavousett was the one preying on him was—to put it bluntly—ludicrous given all the other evidence, we hold that the admission of State's Exhibit 191 and 192 did not influence the jury or had but a slight effect and was therefore harmless. *See Jenkins*, 493 S.W.3d at 601 (stating that defendant's proffered scenario that he had sexual intercourse with complainant but someone else murdered her "strains credulity"); *Prible*, 175 S.W.3d at 737 (holding that improperly admitted autopsy photographs of children was harmless); *Salazar*, 38 S.W.3d at 153. ("[A] conviction will not be reversed 'merely because the jury was exposed to numerous admittedly gruesome pictures.'"); *see also Moreno Denoso*, 156 S.W.3d at 179 (quoting *Drew*, 76 S.W.3d at 453).

We overrule Cox's first point.

Cox's attack on the allegedly improper jury oath was not preserved

In his third point, Cox argues that the trial court erred by deviating from the statutory jury oath. We hold that Cox failed to preserve this alleged error.

Under Texas Code of Criminal Procedure article 35.22, once a jury is selected the trial court must administer the following oath to the jury: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God." Tex. Code Crim. Proc. Ann. art. 35.22 (West 2006). Here, once the jurors were selected, the trial court gave them this variation of the oath: "Do you and each of you solemnly swear or affirm that in the case of the State of Texas versus Ezekiel Cox that you will a true verdict render according to the law and the evidence admitted before you, so help you God?"

In claiming that this slightly paraphrased oath resulted in an improperly impaneled jury, Cox relies entirely on nineteenth-century cases. But our review of twentieth- and twenty-first-century cases shows that the law has changed since the 1800s.

It is true that a complete failure to give the proper oath is a reversible error that may be raised for the first time on appeal. *White v. State*, 629 S.W.2d 701, 704 (Tex. Crim. App. 1981) (holding that verdict not void when oath given untimely), *cert. denied*, 456 U.S. 938 (1982); *Mapps v. State*, No. 06-16-00156-CR, 2017 WL 541143, at *2 (Tex. App.—Texarkana Feb. 10, 2017, pet. ref'd) (mem. op., not designated for publication); *Mendez v. State*, No. 04-15-00311-CR, 2016 WL 3030969, at *7 (Tex. App.—San Antonio May 25, 2016, no pet.) (mem. op., not designated for publication). But this case does not involve such a complete failure.

Alleged irregularities when giving the oath, as distinguished from failing to give it altogether, must be objected to. *See White*, 629 S.W.2d at 704; *Mapps*, 2017 WL 541143, at *2 (holding error waived when juror refused to take oath but agreed to take variation of oath); *Mendez*, 2016 WL 3030969, at *7 (holding error waived when record was unclear whether juror refused to take oath and when juror later took oath separately without objection from defendant); *see also Battie v. State*, 551 S.W.2d 401, 406 (Tex. Crim. App. 1977) (holding that immaterial variations in oath were not reversible error), *cert. denied*, 434 U.S. 1041 (1978). As the court of criminal appeals stated in 1950:

> The question presented is this: Will this court reverse a judgment for these [swearing-in] irregularities, when the defendant made no objection at the time, taking his chance of being acquitted by this jury thus sworn, and holding in reserve this matter to be used in his motion for new trial, and, on failure then, to be used in this court as ground for reversal of the judgment? We think not.

Northcutt v. State, 154 Tex. Crim. 600, 603, 229 S.W.2d 373, 375 (1950). We hold that Cox failed to preserve the alleged error.

We overrule Cox's third point.

Right-to-allocution complaint not preserved

In Cox's fourth point, he contends that Texas's allocution statute is constitutionally inadequate to satisfy his procedural-due-process and due-course-of-law rights to be heard. U.S. Const. amend. XIV; Tex. Const. art. I, § 19. Because Cox does not assert that his due-course-of-law rights under the Texas constitution afford him any greater rights than the due-process clause of the

United States Constitution, we analyze his contention under the United States Constitution only. *See Hale v. State*, 139 S.W.3d 418, 421 (Tex. App.—Fort Worth 2004, no pet.).

Cox did not object at trial.[9] Due-process rights may be forfeited by a failure to object. *See Ladd v. State*, 3 S.W.3d 547, 569–70 (Tex. Crim. App. 1999) (holding that complaint about State's argument violating defendant's right to due process was forfeited for failure to object), *cert. denied*, 529 U.S. 1070 (2000); *Robles v. State*, Nos. 05-15-01214-CR, 05-15-01215-CR, 05-15-01216-CR, 05-15-01217-CR, 2017 WL 56399, at *1 (Tex. App.—Dallas Jan. 5, 2017, no pet.) (mem. op., not designated for publication). We hold that Cox has not preserved this alleged error.

We overrule Cox's fourth point.

Conclusion

Having overruled all of Cox's points, we affirm the trial court's judgment.

[9]In fact, the record reflects that Cox moved his head from side to side, in a negative gesture, when the trial court asked if there was "any legal [reason] why sentencing [should] not be pronounced against" him.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, KERR, and PITTMAN, JJ.

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DELIVERED: September 21, 2017