TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00402-CR

Rex Allen Nisbett, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 26TH JUDICIAL DISTRICT
NO. 13-0481-K26, THE HONORABLE BILLY RAY STUBBLEFIELD, JUDGE PRESIDING

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

Appellant Rex Allen Nisbett appeals his conviction for the murder of his wife. *See* Tex. Penal Code § 19.02(b)(1), (2). A jury found appellant guilty and assessed his punishment at confinement for 42 years in the Texas Department of Criminal Justice. *See id.* § 12.32. On appeal, appellant challenges the sufficiency of the evidence, asserts that the prosecutor improperly commented on his right to remain silent, and complains about the trial court's admission of expert testimony. Because we conclude that the evidence is insufficient to support appellant's conviction for murder, we reverse the trial court's judgment of conviction and render a judgment of acquittal.

BACKGROUND

Appellant and his wife, Vicki Lynn Nisbett, were high school sweethearts that married right after high school. Ten years later, in 1991, they were in the process of getting divorced. In October of that year, Vicki moved out and into an apartment with their three sons. She

served appellant with divorce papers on November 15, 1991. However, in December 1991, Vicki agreed to let appellant stay at her apartment during the holiday season. On December 14, 1991, Vicki "went missing."

The initial police investigation into Vicki's disappearance yielded no answers about what happened to her, although appellant became a suspect due to his suspicious behavior around the time Vicki disappeared. The case remained open, and the investigation continued off and on over the years, until appellant was indicted for Vicki's murder on March 21, 2013.[1] On June 2, 2014—twenty-two and a half years after Vicki's disappearance—appellant's trial began. The jury ultimately found appellant guilty of murdering his wife and assessed his punishment at 42 years in prison.

DISCUSSION

Appellant advances four points of error. In his first point, appellant challenges the sufficiency of the evidence to sustain his conviction. In points two and three, he complains that the prosecutor improperly commented on his constitutional right to remain silent during jury argument and during witness questioning. In his final point of error, appellant contends that the trial court erred in admitting expert testimony when the State failed to give proper notice. Based on our conclusion that the evidence presented in this case, viewed in its entirety, fails to provide proof beyond a reasonable doubt of all the essential elements of murder as alleged in either paragraph of the indictment, we will sustain appellant's first point of error without reaching his remaining contentions.

[1] Appellant was arrested on the murder charge post indictment.

Sufficiency of the Evidence

Standard of Review

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *see also Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). In our sufficiency review we must consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense. *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.); *see Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *Finley v. State*, 449 S.W.3d 145, 147 (Tex. App.—Austin 2014), *aff'd*, 484 S.W.3d 926 (Tex. Crim. App. 2016). We review all the evidence in the light most favorable to the verdict and assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318; *see Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We consider only whether the factfinder reached a rational decision. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) ("Our role on appeal is restricted to guarding against the rare occurrence when a factfinder does not act rationally.").

To determine whether the State has met its evidentiary burden of proving a defendant guilty beyond a reasonable doubt, we compare the elements of the offense as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)); *Felder v. State*, No. 03-13-00707-CR, 2014 WL 7475237, at *2 (Tex. App.—Austin Dec. 19, 2014, no pet.) (mem. op., not designated for publication). A hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Thomas*, 444 S.W.3d at 8 (quoting *Malik*, 953 S.W.2d at 240); *Roberson v. State*, 420 S.W.3d 832, 840 (Tex. Crim. App. 2013). The law as authorized by the indictment consists of the statutory elements of the charged offense as modified by the factual details and legal theories contained in the indictment. *Patel v. State*, No. 03-14-00238-CR, 2016 WL 2732230, at *2 (Tex. App.—Austin May 4, 2016, no. pet.) (mem. op., not designated for publication); *see Thomas*, 444 S.W.3d at 8 ("The 'law as authorized by the indictment' consists of the statutory elements of the offense and those elements as modified by the indictment."); *Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013) ("The law as 'authorized by the indictment' includes the statutory elements of the offense 'as modified by the charging instrument.'").

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. art. 38.04; *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and

credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 198 (2015) (quoting *Clayton*, 235 S.W.3d at 778). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49. The standard of review is the same for direct and circumstantial evidence cases—circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014). "It is not necessary that the evidence directly proves the defendant's guilt; circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone can be sufficient to establish guilt." *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)).

Requisites for Proving Murder

Appellant was charged with the murder of his wife, Vicki Lynn Nisbett, in two alternative paragraphs. Specifically, the indictment alleged

> [t]hat on or about December 14, 1991, in the County of Williamson in the State of Texas, [appellant], hereafter, "defendant",

Paragraph One

> intentionally or knowingly caused the death of Vicki Lynn Nisbett by an unknown manner and means, or

Paragraph Two

> intended to cause serious bodily injury and committed an act clearly dangerous to human life, by an unknown manner and means, that caused the death of Vicki Lynn Nisbett[.]

These paragraphs track the language of subsections (b)(1) and (b)(2) of the Penal Code provision that defines the offense of murder and sets forth, in the alternative, the elements of the offense. *See* Tex. Penal Code § 19.02(b)(1), (2). These statutory elements establish the prohibited conduct, or *actus reus* ("guilty act"), and culpable mental state, or *mens rea* ("guilty mind"), of the crime of murder. *See id.*; *see also* ACTUS REUS, Black's Law Dictionary (10th ed. 2014) ("The wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability."), MENS REA ("The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.").

To show that an offense has been committed, the State must prove the statutorily required *actus reus* and the *mens rea* of the crime. *See Ramirez-Memije v. State*, 444 S.W.3d 624, 627 (Tex. Crim. App. 2014); *see also Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994) ("[T]he most basic and fundamental concept of criminal law [is] . . . that in order to constitute a crime, the act or *actus reus* must be accompanied by a criminal mind or *mens rea*."). The *actus reus*, or prohibited conduct, of murder is the causing of the death of an individual. *See Roberts v. State*, 273 S.W.3d 322, 328–29 (Tex. Crim. App. 2008), *abrogated in part by Ex parte Norris*,

390 S.W.3d 338, 341 (Tex. Crim. App. 2012) ("'Murder is a 'result of conduct' offense, which requires that the culpable mental state relate to the result of the conduct, i.e., the causing of the death.'") (quoting *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003)). The *mens rea*, or mental state, required for culpability for murder differs under sections 19.02(b)(1) and (b)(2). Section 19.01(b)(1) requires that the person act "intentionally or knowingly," *see* Tex. Penal Code § 19.02(b)(1); whereas section 19.02(b)(2) requires that the person act "with intent to cause serious bodily injury," *see id.* § 19.02(b)(2). To satisfy the *mens rea* element under the murder statute, the evidence must demonstrate that the accused possessed one of the alternate mental states when he caused the death of the individual.

The State's Evidence

At trial, to satisfy its burden of proof, the State presented evidence about the last contact anyone had with Vicki before her disappearance, the initial police investigation into her disappearance, the forensic testing of biological evidence recovered in this case, and other evidence developed during the ongoing investigation over the years.[2]

Last Contact with Vicki

Vicki had plans to attend a company sponsored Christmas party with her co-worker, Julie Tower, on the evening of Saturday, December 14, 1991. Tower called Vicki around 2:30 that afternoon to discuss their plans. During their phone conversation, Vicki was "upset" and "agitated"

[2] During the presentation of evidence in the guilt-innocence phase, which lasted five days, the State called 28 witnesses and offered 97 exhibits. The defense called one witness, appellant's older brother.

because appellant did not want her to go to the party, and they had been arguing about it. Tower told Vicki to come to her apartment that evening to get ready and the two could leave together from there to go to the party. Tower called Vicki early in the evening, around 5:00 or 5:30, to confirm their plans. Vicki answered the phone and told Tower that she and appellant had been arguing and he had choked her. Tower described Vicki as "pretty hysterical" and "very upset" during that conversation and heard Vicki and appellant continuing to argue. Tower again instructed Vicki to get her things and come to her place to get ready. When Vicki failed to arrive at her apartment, Tower called Vicki back about 30 to 45 minutes later. Appellant answered the phone and told her that Vicki had already left, either to go to the party or to go to Tower's apartment. When Vicki still did not arrive at her apartment after another 30 minutes, Tower called Vicki's apartment again. Appellant again answered the phone and this time informed Tower that Vicki had decided to go straight to the party instead of Tower's apartment. Vicki never arrived at Tower's apartment, and Tower eventually went to the party without Vicki. Vicki never showed up at the party. The next morning at about 7:30, appellant called Tower asking where Vicki was. In response, Tower asked appellant what he had done with Vicki. Appellant just hung up.

Wayne Castleberry also spoke with Vicki on the phone on Saturday, December 14, 1991. Castleberry had recently met Vicki at a local night club. Vicki explained that she was married but separated, and the two exchanged phone numbers. Vicki and Castleberry spoke on the phone a few times and had lunch together on one occasion. On December 14th, Castleberry spoke to Vicki twice, once in the morning and again that evening sometime between 5:00 and 6:00. During the evening call, Castleberry heard appellant pick up another phone extension several times

and listen in on the conversation. Castleberry said that appellant complained about Vicki talking about him and then told Vicki to get off the phone in a "harsher tone" and "louder voice." Castleberry had plans to meet with Vicki after her company Christmas party; however, he did not hear from her after the party. He subsequently attempted to contact her—calling her at home and at her work on the following Monday and even driving by her apartment (he only saw appellant's truck)—but he never made contact with her again.

The Initial Investigation

Appellant reported Vicki missing on Monday, December 16, 1991. David Proctor, a patrol deputy with the Williamson County Sheriff's Office, was dispatched in response to the missing persons report. At Vicki's apartment, he met with appellant who informed him that Vicki was supposed to have attended an office Christmas party on December 14th while he watched their children and was supposed to return the next day, but she never did. After initially denying any disputes or arguments had occurred, appellant reported that he and Vicki were arguing that evening and she approached him aggressively so he pushed her away. He said that she left the apartment shortly after that. According to Proctor, appellant was "very forthcoming" in answering his questions and allowed him to look around the apartment. During that search, Proctor did not see any blood or blood spatter. The deputy observed that Vicki's apartment was cleaner than on previous occasions when he had been called to the apartment and it had been cluttered. He also noted that none of Vicki's clothing or personal items were missing.

Richard Elliott, Captain of the Criminal Investigation Division of the Williamson County Sheriff's Office, received Proctor's missing persons report for follow-up investigation. As

he was reviewing it, Vicki's supervisor at work, Sheila Vanderwood, called to report Vicki missing. As part of his investigation into Vicki's disappearance, Elliott met with appellant. Appellant explained to Elliott that although he and Vicki were getting a divorce, he was staying with her and their children in Vicki's apartment through the holidays. He again reported that he and Vicki had an argument the evening of December 14th, that he pushed her away when she approached him aggressively, and that she left for the Christmas party after that. Appellant indicated that he thought Vicki might have run off with another man since she had done that before.

Carol Johnson, Vicki's mother, learned that her daughter was missing when the Williamson County Sheriff's Office notified her on December 16, 1991. She had last seen Vicki the last week of November 1991 at Thanksgiving. At that time, Vicki and appellant were not living together.

During his initial investigation, Captain Elliott also made contact with Jerry Fryer, Jr., the Nisbetts' pastor, who reported that he had been counseling Vicki and appellant together and then Vicki individually. Pastor Fryer indicated that two or three days before Vicki disappeared he met with her and she was crying and fearful. He did not specify what or who she was afraid of. The pastor offered "to find a place for her to go," but Vicki declined his assistance.

As part of his investigation, Captain Elliott subpoenaed the bank records for Vicki's bank account and began monitoring it for activity. A check that appeared to be written out of sequence cleared Vicki's checking account a few days after she disappeared. When the captain questioned appellant about it, appellant admitted that he wrote the check from Vicki's account five days after she disappeared to get gas at a Diamond Shamrock. According to the captain,

appellant seemed surprised that the police were monitoring Vicki's checking account. No further checks were written on the account.

Two weeks after Vicki disappeared, on December 29, 1991, Kelly Misfeldt, a neighbor living in Vicki's apartment complex, saw Vicki outside of their apartments. He reported seeing her to appellant and was subsequently interviewed by the police. He described what Vicki was wearing ("a black-type ski jacket," black slacks, and black shoes—which matched appellant's description of what Vicki was wearing the night she disappeared) and what she was doing (standing by the covered parking outside of their apartments looking at her apartment). He gave a written statement to police indicating that he was "99 percent sure that it was her" because he saw her face. In 2008, Misfeldt gave another statement to police, again indicating that although he "could not have been 100 percent sure that that person [he] saw that day was Vicki," he was "99 percent sure." At trial, he repeated that he "saw [Vicki's] face" and was "99 percent" sure it was her. He also testified that another deputy from the sheriff's office met with him sometime after he gave both statements and tried to get him to change his statement.

In January 1992, Morris Smith, another neighbor from Vicki's apartment complex, told police investigators that appellant had borrowed his car "late one afternoon" sometime in December 1991 but he could not recall a specific date. Smith recounted at trial that the morning after appellant borrowed his car, he noticed that the chrome rims around the headlights were gone and "the trunk lock was knocked out." Smith gave a written statement to police during the initial investigation but did not note that damage in his statement. Police searched Smith's car but collected no evidence from it. Smith testified that he watched appellant's children in Vicki's

apartment while appellant borrowed his car. Smith's written statement to the police reflected that he had watched appellant's boys; however, at trial, Smith had no independent recollection of babysitting them.

Smith's sister, Lana Faye Reed, was living with her brother at the apartment complex where appellant was staying with Vicki. She told police investigators that her brother babysat for appellant's children in Vicki's apartment on December 14, 1991, for one to one-and-a-half hours while appellant borrowed his car. Reed was able to recall the exact date because she rented movies for the children to watch and was able to obtain the receipt. The receipt reflected that she rented movies, several of them children's movies, at 7:52 p.m. on December 14, 1991.

Approximately six weeks after Vicki's disappearance, appellant was evicted from Vicki's apartment. Police obtained consent to search the apartment from the apartment manager. As the crime lab personnel were processing the apartment for evidence, appellant showed up twice. According to Captain Elliott, he seemed nervous and asked if they had found anything. Appellant again expressed his belief that Vicki was alright and had just run off with somebody and suggested that the police were wasting their time. The crime lab personnel processed the apartment, took photographs, and collected carpet samples and pieces of sheetrock from the master bedroom of the apartment.

In February 1992, Vicki's car was found in a local HEB parking lot. Although the car was processed by crime lab personnel for evidence, no evidentiary items were submitted for testing.[3] During their search of the car, law enforcement officers observed that the light bulb from

[3] Several items found in the car were collected—children's clothing, shoes, a lunch box, an open map, empty cans, and some trash—but the bag containing them had been lost over the years so none of these items could be tested for DNA later.

the dome light had been removed so the light would not come on when the car door was opened. The light bulb was found on the back seat of the car.

The Biological Evidence and Forensic Testing

Devane Clarke, a serologist from the Texas Department of Public Safety (DPS) crime lab, processed Vicki's apartment and observed stains on the carpet and walls of the master bedroom. He also sprayed luminal on portions of the carpet to reveal blood stains.[4] He collected five samples of sheetrock and carpet, and performed presumptive phenolphthalein testing (a "color test") for blood. Item 1 was a sheetrock sample collected from the wall near the floor next to the bedroom doorway. Two stains on this item were presumptively positive for blood. Additional testing at the lab revealed that the blood was of human origin. Item 2 was a piece of sheetrock collected from next to the light switch, with a brownish-reddish substance on it that appeared to be in the shape of a hand print. The substance tested presumptively positive for blood. Additional testing—performed subsequent to latent print analysis—revealed that the blood was of human origin. Item 3 was a piece of carpet collected from the master bedroom closet. Presumptive testing was positive for blood, and additional testing revealed that the blood was of human origin and of blood group A. Clarke

[4] Testimony at trial explained that luminal is a presumptive test for blood. Luminal is a chemical, typically sprayed on a surface, that results in a chemiluminescence (the emission of light as a result of a chemical reaction) when it reacts with the iron in the hemoglobin in blood. This "lighting up" indicates the possible presence of blood. However, luminal also reacts with other things, including iron and copper ("[a]nything that is a copper or a metal ion"), other metal oxides, cleaning agents (including bleach), peroxidase and certain vegetable enzymes, some grouts, some upholstery finishing sprays, some other chemicals, and non-human blood. For that reason, luminol is not used as much in forensic analysis today. Other chemicals that are more sensitive and more specific for blood than luminal are utilized.

preserved this piece of evidence for possible DNA analysis. Item 4 was a piece of carpet padding collected from the master bedroom closet, directly underneath the Item 3 piece of carpet. Presumptive testing was positive for blood, and additional testing revealed that the blood was of human origin. Clarke also preserved this piece of evidence for possible DNA analysis. Item 5 was a piece of carpet collected from the floor next to the master bedroom doorway. The carpet was illuminated by luminal and tested presumptively positive for blood. Additional testing for human blood was not done, nor was the carpet sample preserved for later DNA testing. Clarke also processed Vicki's car after it was recovered from the HEB parking lot, vacuuming it for trace evidence (particles such as hair and fibers). He found no indications of blood in the car and vacuumed up only "basic general debris" that was not submitted for further testing.

Oscar Kizzee worked for DPS as a latent print examiner. In January 1992, he examined a piece of sheetrock collected by Clarke from Vicki's apartment—Item 2, the piece removed from next to the light switch in the master bedroom. Kizzee exposed the brownish-reddish substance to amido black (a chemical that reacts to the proteins in blood) to enhance the print on the sheetrock sample. He then compared the prints enhanced by the amido black process to the known prints of appellant and concluded that the prints on the sheetrock sample matched appellant's right index finger and right palm. These print comparisons were repeated and confirmed in 2013 by Bryan Strong, another latent print examiner for DPS.

Megan Clement, a forensic scientist and DNA analyst, tested five samples in March of 1992, which included Item 3 (the carpet from the master bedroom closet), Item 4 (the carpet padding from the master bedroom closet), appellant's blood, Carol Johnson's blood

(Vicki's mother), and Earl Johnson's blood (Vicki's father).[5] She extracted DNA profiles from blood stains on the carpet and carpet padding samples as well as from the known blood samples. She then compared the DNA profile obtained from the carpet sample to the DNA profiles of Vicki's mother and father. She determined that the contributor of the DNA profile in the blood from the stain on the carpet could not be excluded as originating from a biological child of Vicki's parents.

Jane Burgett, a forensic scientist with DPS in the serology and DNA section, performed a DNA analysis in 2014 on the samples Clarke collected from Vicki's apartment in 1992.[6] She examined Item 1 (the piece of sheetrock removed from near the floor next to the master bedroom doorway) and found a DNA profile consistent with a mixture that included more than one DNA profile. An "unknown female" could not be excluded as the major contributor. There was so little of the minor contributor profile that no comparisons could be made. Burgett also tested scrapings

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[5] At the time of trial, Clement was the senior director at Cellmark Forensics lab. In 1992, when she did the testing in this case, she was employed by the Tarrant County Medical Examiner's Office Crime Laboratory. At that time, the Tarrant County Medical Examiner's Office had an agreement with the Texas College of Osteopathic Medicine (now the University of North Texas Health Science Center) and, specifically, Dr. Arthur Eisenberg's paternity testing laboratory. As a paternity laboratory, Dr. Eisenberg's lab worked only with whole blood samples from known individuals and lacked the capacity and procedures necessary to work with evidentiary-type items. The forensic scientists at the medical examiner's office would analyze forensic-type evidence, up to a certain point in the analysis, and then Dr. Eisenberg's lab would finish up the testing because it required radioactively labeled probes and his laboratory performed the radioactive labeling routinely for paternity testing. Dr. Eisenberg had requested that Clement assist in the analysis of the evidence in this case.

[6] The record reflects that the samples from the apartment were subjected to various types of biological testing over the years. In 1992, serology tests were performed (by Devane Clarke); no DNA testing was done. In 1997, the samples were submitted for then available DNA testing—RFLP or "Restriction Fragment Length Polymorphism" testing. In 2003, more advanced STR, or "Short Tandem Repeats," analysis (which analyzed 9 marker locations) was done. In 2014, STR analysis using the Identifier Kit with 16 locations was performed by Burgett. The test results from the 1997 and 2003 testing were not discussed in detail at trial.

from Item 2 (the piece of sheetrock removed from next to the light switch that had appellant's palm print and fingerprint on it) and found a mixture of DNA profiles. She compared the mixture to appellant's DNA profile and found that appellant could not be excluded at 13 of the 16 marker locations, so she could not exclude him as a possible contributor to the mixture.[7] She explained that "there were fragments, DNA fragments, in that mixture that could be explained by the DNA fragments that [appellant] has in his [DNA] profile." Burgett then tested cuttings from two stains on Item 3 (the carpet sample taken from the master bedroom closet), which were identified as Stain A and Stain B. Stain A contained a partial DNA profile—a profile that has information only at some of the marker locations—that was a mixture of DNA profiles from two females: the same "unknown female" from Item 1 (the sheet rock from near the floor by the master bedroom doorway) and another unknown female.[8] Appellant was excluded as a contributor. Stain B was also a mixture of DNA profiles. The same "unknown female" from Item 1 and Stain A could not be excluded as the major contributor in this profile mixture. There was not enough information to make any comparisons or conclusions about the minor contributor. Burgett testified that neither stain contained enough blood

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[7] On cross examination, Burgett explained the requirements for a source-attribution statement versus an exclusion characterization, which she did here. According to Burgett, the comparison must match in a minimum of 13 of the 16 marker locations and must also have "a minimum statistical significance" before you have source attribution. If the results do not meet that minimum requirement, "then you cannot say that this person, beyond a reasonable degree of scientific certainty, is the source." She confirmed that "the numbers that [she] received for the sheetrock scrapings in item 2 did not meet the source requirements or source attribution to [identify appellant] as the contributor."

[8] Burgett explained that sometimes a partial profile results "because there's just not enough blood there; or sometimes there's some dirt or other what we call inhibitors in the sample that interferes with the analysis or copying process; [or] sometimes the blood sample or the DNA is degraded over the years and it just doesn't work out and we only get a partial profile."

to indicate a person had died. Burgett did not perform any DNA testing on Item 4 (the piece of carpet padding), and performed only presumptive tests on Item 5 (the piece of carpet removed from near the master bedroom doorway). Although she found multiple stains on Item 5, none of them tested presumptively positive for blood.

Dr. Arthur Eisenberg, Chairman of the Department of Molecular and Medical Genetics at the University of North Texas and the Operational Director of the UNT Center for Human Identification, testified about the reverse parentage DNA testing performed by his lab.[9] The analysis used the known DNA samples of Earl Johnson (Vicki's father), Carol Johnson (Vicki's mother), and appellant, and the evidentiary samples of the DNA profiles extracted from the carpet (Item 3) and carpet padding (Item 4). Dr. Eisenberg said that appellant was excluded as a source of the DNA on the carpet and carpet padding. He further testified that the DNA profile extracted from these items "could not be excluded as originating from a biological child of Earl and Carol Johnson." He calculated probability statistics, which reflected that the probability of parentage was 99.999999 percent. The genetic results in the sample were "approximately 124 million times more likely to have originated from their (the Johnsons') biological child as opposed to a random, untested, unrelated individual of the Caucasian population."

Farah Plopper, a forensic DNA analyst from the University of North Texas, testified about reverse parentage DNA testing that she conducted in 2009. She also testified that Vicki's parents could not be excluded as the biological parents of the person who left the DNA on Item 3

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[9] The doctor explained that reverse parentage DNA testing determines whether two individuals could be included or excluded as parents of a donor sample, in this case the DNA on the carpet and carpet padding samples taken from the master bedroom closet of Vicki's apartment.

(the carpet from the master bedroom closet). She also calculated probability statistics and determined that the probability of parentage was 99.75 percent and that at least 99.82 percent of the population was excluded as being the child of Carol and Earl Johnson. Plopper also testified that Earl and Carol Johnson could not be excluded as the parents of the person who left the DNA on Item 1 (the sheet rock removed from the floor near the doorway) and Item 4 (the carpet padding from the master bedroom closet). She indicated that as to these items, at least 99.9999999999 percent of the population was excluded as being a biological child of Carol and Earl Johnson. She testified that the observed genetic results were "at least 396.4 billion times more likely to have occurred under the scenario that Carol and Earl Johnson [were] the true parents [of the person who left the DNA on Items 1 and 4 as] compared to someone random, untested, and unrelated."

Other Evidence Offered at Trial

Donnie Rodriguez, a patrol deputy with the Williamson County Sheriff's office, was on duty the night of December 14, 1991. Between 9:00 and 9:35 p.m., he ran a license plate check on a car with license plates matching those on Vicki's car that was driving northbound on highway 183. Deputy Rodriguez became suspicious when the car did not pass his patrol car but instead slowed down with him, even though the car was driving in the passing lane. On cross examination, the deputy testified that he observed that the driver, the sole occupant of the car, had dark-colored hair that "appeared to be cut short" or was "collar-length."[10] Even after a hypnosis attempt

[10] On cross examination, appellant's counsel showed Detective Rodriguez State's Exhibit No. 2, a photograph of Vicki at the time of her disappearance, which the detective agreed depicts "a person with short hair." That photograph also reflects that Vicki's hair was dark brown.

conducted during the investigation to facilitate the deputy's memory recall, Deputy Rodriguez was unable to remember if the driver was male or female.

Robert James, appellant's former co-worker, told the jury that he once had a conversation with appellant in which appellant said that he had caught his wife cheating on him and thought about killing her but that was not the Christian thing to do. Only appellant and James were present for this conversation, and James was unable to recall where they were nor could he give a date or time frame of when the conversation occurred. He said this was the only conversation he and appellant had about his relationship with Vicki, and acknowledged that other people might feel the same way if they caught their spouse cheating on them. James never reported appellant's comments to his employer or the police.

Mark Johnson, Vicki's brother, testified that he and appellant, along with a friend and two of appellant's sons, had once visited property that he believed belonged to appellant's brother. Johnson said there were large excavation holes dug on the property, and appellant had commented that you could "bury a body" on the property and "no one would ever find it." Johnson also testified that on two occasions—prior times when appellant and Vicki were having "marital troubles"—appellant told him that he would kill Vicki before he let her divorce him and take their children. Johnson admitted that he did not take appellant seriously and therefore never told Vicki or the police about appellant's comments.

Heidi Prather, employed by the Missing Persons Clearing House of DPS, detailed all the steps taken over the past two decades to locate Vicki. The clearinghouse conducts continuous database searches to try to find activity on a missing person or possibly look into the records of an

unidentified person as a possible match to a missing person. These databases include such things as Texas and out-of-state driver's license files; vehicle registration records; employment records; records concerning criminal history or encounters with law enforcement (such as any arrests, any traffic stops, or any other incidents involving law enforcement); vital statistic records (to search for marriages, divorces, or the birth of children); records of possible hospitalization events; pawn transactions; applications for utilities services; banking records; credit applications; and other transaction-related activities that might leave "an electronic footprint." Prather told the jury that all of the search results for Vicki "netted negative results," indicating that there has been no observed activity on her since the date of last contact, December 14, 1991. She said that "[Vicki's] whereabouts are still unknown." She also testified that her organization is still actively looking for Vicki, and that she did not know if Vicki was dead or alive.

Carol Johnson, Vicki's mother, said that despite the circumstances of Vicki's disappearance, she did not hear from appellant until several months after Vicki disappeared. She next spoke with him in May 1992. During that conversation, appellant said he did not know where Vicki was, told Johnson that he suspected that McDuff had abducted Vicki and she was probably dead,[11] and indicated that he had hired a private investigator to find her and had already paid $30,000

[11] The record reflects that appellant was referring to Kenneth McDuff, the infamous and notorious serial killer, who was suspected of at least fourteen murders, including the murder of at least six young women in the central Texas area between September 1991 and February 1992, one of whom was kidnapped from a car wash in Austin on December 29, 1991. McDuff was convicted of capital murder for the murder of the Austin woman and received the death penalty, despite the fact that neither her body nor her remains were recovered before trial. *See McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

cash in efforts to find Vicki (although Johnson was not able to verify this).[12] Johnson also testified that appellant told her that no blood was found in the apartment because when he moved out, he and his mother "cleaned it thoroughly." Johnson said that appellant did not allow her to see her grandsons until seven or eight months after Vicki's disappearance, and then only with him present. After that she only met with the boys on one other visit at the home of a woman appellant and the boys had moved in with. When Johnson asked why she was not allowed to spend time alone with her grandsons, appellant said that he had to "protect himself."

Appellant's Insufficiency Claim

In his first point of error, appellant asserts that the evidence is insufficient to support his conviction for murder because "the State failed to prove any of the elements of the offense." He maintains that "[i]n the absence of any evidence to show [his] mental state, that he acted intentionally or knowingly, that a death in fact occurred, or that [he] committed an act clearly dangerous to human life, no rational trier of fact could have found the essential elements of the offense of murder beyond a reasonable doubt."

The State argues, however, that the cumulative circumstantial evidence demonstrated appellant's guilt. According to the State, "voluminous evidence" of appellant's guilt was presented at trial, including evidence of: appellant's violence the day Vicki disappeared, information gathered at Vicki's apartment, the "unusual cessation of contact" by Vicki, the check that cleared Vicki's bank account after her disappearance, appellant's "excursion" the night of Vicki's disappearance,

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[12] Appellant similarly told Captain Elliott that he "had hired private investigators to look for [Vicki] and spent large sums of money," but the deputy was never able to confirm these claims.

appellant's incriminating or misleading statements, appellant's behavior indicating a consciousness of guilt, and appellant's motive to kill Vicki. The State maintains that "the cumulative force of all of this evidence together allows the jury to move far beyond mere speculation into the realm in which they could reasonably infer and rationally conclude beyond a reasonable doubt that Appellant murdered Vicki Nisbett." We must disagree.

In his insufficiency claim, appellant first maintains that the evidence failed to demonstrate, among other things, that a death in fact occurred. Relying on *McDuff v. State*, the State dismisses appellant's claim that there was no evidence of death, asserting that the State's inability to produce and identify the body or remains of the victim does not preclude a murder conviction. *See McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997); *see also Fisher v. State*, 851 S.W.2d 298, 303 (Tex. Crim. App. 1993). In *McDuff*, two men kidnapped a young woman at a car wash. McDuff and his accomplice sexually assaulted the victim, and then McDuff struck her and placed her in the car trunk before dropping the accomplice off. The victim's body was never found. *McDuff*, 939 S.W.2d at 614. However, in *McDuff*, while the victim's body was not recovered, the jury was presented with, among other things, accomplice eyewitness testimony that McDuff forcibly abducted and sexually assaulted the victim and struck her so hard that the blow sounded like a tree limb cracking and had sufficient force to knock her down and "bounce" her off the ground. *Id.* at 615. After the blow, the victim was limp and non-responsive. *Id.* Expert testimony from a forensic pathologist established that such a blow under the circumstances the accomplice described, including the victim's response (or lack thereof), indicated that "something major [had] broken," that "there was probably spinal cord damage," and that fatal neurological pathway damage had been inflicted. *Id.*

The State acknowledges this distinction in its brief but maintains that Julie Tower's testimony in this case—about Vicki's demeanor during their phone conversation and Vicki's statement that appellant had choked her—is comparable to the accomplice's eyewitness testimony in *McDuff*. We cannot agree. While McDuff's accomplice witnessed the assault and observed the infliction of fatal injuries, Tower merely heard Vicki's report of appellant choking her at some point that day. Moreover, the evidence reflects that Vicki was alive and talking on the phone—first to Tower then later to Castleberry—after appellant choked her. Thus, the choking Tower heard about was not a fatal injury comparable to the one McDuff's accomplice witnessed being inflicted. Based on the material difference in the evidence presented here from that in *McDuff*, we conclude that the State's reliance on *McDuff* is misplaced. Though the State was not required to produce Vicki's body or remains to prove appellant's guilt, the State was still required to prove her death.

The State's primary source of evidence that Vicki was dead was the absence of evidence showing that she is alive—that is, the fact that she had no "electronic footprint" consistent with everyday living after December 14, 1991. Even if, for the sake of argument, we were to assume that this lack of evidence constituted evidence of Vicki's death, there is no evidence in the record demonstrating that appellant caused her death. The State alleged in the indictment, in both paragraphs, that appellant caused Vicki's death "by an unknown manner and means." The State is entitled to indict a defendant alleging that the manner and means of how the offense was committed is unknown. *Stobaugh v. State*, 421 S.W.3d 787, 864 (Tex. App.—Fort Worth 2014, pet. ref'd); *see, e.g.*, *Moulton v. State*, 395 S.W.3d 804, 811–12 (Tex. Crim. App. 2013) (Cochran, J., concurring). The term "manner and means" refers to the *actus reus* of the crime, and the jury need not

unanimously agree upon the manner and means. *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012); *see Jefferson v. State*, 189 S.W.3d 305, 316 (Tex. Crim. App. 2006) (Cochran, J., concurring) (observing that "manner and means" describes how offense was committed and is not element on which jury must be unanimous); *Ngo v. State*, 175 S.W.3d 738, 746 n.27 (Tex. Crim. App. 2005) (noting that jury must be unanimous on gravamen of offense of murder, which is causing death of person, but jury need not be unanimous on manner and means). So, here, the jury need only unanimously agree that appellant caused Vicki's death. *See Sanchez*, 376 S.W.3d at 774; *Ngo*, 175 S.W.3d at 746. But, what act—either an intentional or knowing act or an act clearly dangerous to human life—according to the evidence the State presented at trial, did appellant commit that caused Vicki's death? Appellant argues that "there is no evidence that Appellant committed an intentional act or an act clearly dangerous to human life which caused a death." After reviewing all the evidence presented by the State at trial, we are compelled to agree.

The State's law enforcement witnesses at trial suggested that Vicki's death was the result of "foul play" that occurred in her apartment, but there is no evidence demonstrating what that "foul play" was. Was it some act that caused an injury that resulted in fatal blood loss? This seems to be what the State suggested with its presentation of the DNA evidence of the blood stains on the sheetrock and carpet samples collected from Vicki's apartment. Yet, we note that during opening statement, when discussing the anticipated blood evidence, the district attorney suggested, "Maybe it's not enough blood that actually -- maybe it wasn't the blood loss that ended her life but, by God, that was enough blood loss that she should have been in a hospital." Later, in response to appellant's motion for directed verdict, the prosecutor asserted, "Regarding the lack of blood evidence, we're

not claiming she died from a lack of blood loss." In closing argument to the jury, the district attorney said that "[w]e have never contended, ever -- we have never contended that she died from a loss of blood." Just as well since the testimony of the State's experts indicated that there was not enough blood in the samples from the apartment to demonstrate a fatal blood loss. *See, e.g.*, *Hamilton v. State*, No. 07-97-0167-CR, 1998 WL 284918, at *5 (Tex. App.—Amarillo May 14, 1998, pet. ref'd) (not designated for publication) (expert testimony established that blood on bedroom floor showed that blood lost was "a considerable amount" and that whoever lost that blood had received at least four medium velocity blows from hard object, which was sufficient to break skull, and that blows of that type with that level of blood loss could be fatal).

So if the "foul play" was not an act causing fatal blood loss, what act was it? In closing argument to the jury, the prosecutor asked, "Did he (appellant) continue with the choking that he was interrupted with before that night? Was that the act that was clearly dangerous to human life that caused her death?" And in rebuttal argument, the district attorney asserted that "he (appellant) choked Vicki. We know that because she told Julie that when she was hysterical on the phone."[13] However, the only evidence of choking was Vicki's statement on the phone that appellant had, at some point during their arguments that day, choked her. But the evidence clearly established that after appellant choked her, Vicki was still alive and talking on the phone to Tower and then later to Castleberry. Thus, the evidence does not demonstrate that choking was the intentional or knowing act (or clearly dangerous act) that caused Vicki's death. The deficiency in the State's evidence is that

[13] In addition, at oral argument before this Court, the State indicated that the act (or the clearly dangerous act) causing death "could have been" choking.

it did not establish what the fatal act was, how appellant caused Vicki's death. The State's "voluminous [circumstantial] evidence" does not establish the perpetration of any fatal act by appellant toward Vicki.

As evidence of appellant's violent behavior toward Vicki the day she disappeared, which the State contends is circumstantial evidence of appellant's guilt, the State cites to the testimony of Jerry Fryer, Jr., Wayne Castleberry, and Julie Tower. Fryer, Vicki's pastor, testified that Vicki was upset, fearful, and crying when he met with her a few days before her disappearance. Although Fryer did not testify about what Vicki was afraid of or testify that Vicki indicated that she was afraid of appellant, he did testify that he offered Vicki help by offering "to find a place for her to go." This testimony does not demonstrate a fatal act of violence perpetrated against Vicki on the day she disappeared. The State also cites to the testimony of Castleberry, the man Vicki had recently begun dating, about the phone conversation he had with Vicki the evening she disappeared. During that conversation, appellant listened in on the phone, chastised Vicki for talking about him, and commanded her in a "harsh tone" and "loud voice" to get off the phone. Again, this testimony does not demonstrate a fatal act of violence perpetrated against Vicki on the day she disappeared. Next, the State points to Tower's testimony about her conversation with Vicki when she called to confirm their evening plans. Tower testified that Vicki was "hysterical," that she heard appellant and Vicki arguing, and that Vicki reported that appellant had choked her. While this testimony does indicate that appellant committed an act of violence toward Vicki, it also established that Vicki was still alive after the choking incident. Thus, the only evidence that appellant perpetrated an intentional or knowing act (or clearly dangerous act) against Vicki the day she disappeared (the date the State

alleged as the date of her murder) also demonstrates that it was not an act that caused her death. This circumstantial evidence does not support an inference that appellant is guilty of Vicki's murder; rather it directly refutes an element of the offense necessary to prove his guilt—that his act caused her death.

The State also relies on evidence gathered at Vicki's apartment as further circumstantial evidence of appellant's guilt. The State notes the evidence showing the clean state of Vicki's apartment after her disappearance. First, Officer Proctor testified about the apartment when he responded to the missing persons call: the apartment was clean when, on prior occasions, the apartment had been cluttered; the bathroom was clean and organized; the closet did not have large quantities of clothing missing; and Vicki's personal items were not missing. Second, Carol Johnson testified that appellant told her that there was no evidence in the apartment because he and his mother cleaned the apartment "thoroughly" when he moved out. The State also notes the forensic evidence collected from the apartment: appellant's fingerprint and palm print "in Vicki's blood" on the sheetrock sample removed from the bedroom and Vicki's blood on the carpet in the bedroom closet and on the carpet padding underneath. The cleanliness of Vicki's apartment—even if it was the result of appellant's nefarious cleaning in an attempt to hide or remove evidence—does not in any way demonstrate that appellant perpetrated a fatal act against Vicki in the apartment or support an inference of such. The forensic evidence collected from the apartment demonstrates that at some point Vicki bled in the apartment. However, it does not reflect when she bled, why she bled, how much she bled, or what injury caused her to bleed. Further, none of the experts could attribute the minimal amount of blood found in the stains on the carpet or carpet padding to fatal blood loss.

At best, this evidence raises only a suspicion that appellant might possibly be connected to or involved with some sort of injury to Vicki, at some time, that resulted in blood loss.

In addition, the State points to the testimony of several witnesses—Vicki's mother, her pastor, and her co-worker—who opined that Vicki was a good mother who would not abandon her children. The evidence further showed that no one has had any contact with Vicki since the night she disappeared, and the State presented evidence demonstrating that official steps to locate her—via the Missing Persons Clearinghouse procedures—have yielded no results in the twenty-two years since her disappearance. The State maintains that this evidence of "unusual cessation of contact" by Vicki constituted additional circumstantial evidence demonstrating appellant's guilt. However, while this evidence undoubtedly raises suspicions about Vicki's disappearance, it does not constitute evidence that she is in fact deceased. Moreover, even if the inference can be made that the absence of evidence of active living means she is dead, this evidence still does not show how Vicki died or who caused her death. It is a wholly speculative argument to suggest that evidence of Vicki's disappearance somehow demonstrates that appellant caused her disappearance. Evidence of her disappearance is simply that: evidence of her disappearance. Such evidence does not constitute evidence of what—or who—caused her disappearance.

The State presented evidence at trial that showed that appellant wrote a check on Vicki's bank account, which cleared several days after she disappeared. The check appeared to be written out of sequence and to have come from a checkbook that was found in Vicki's car when it was discovered in the HEB parking lot several months after her disappearance. The State suggests that the check raised the inference that appellant had access to the checkbook because he had access

to Vicki's car after her disappearance, which contributes to the circumstantial evidence demonstrating appellant's guilt. However, the fact that appellant cashed a check on Vicki's account after she disappeared or that he had access to Vicki's car after her disappearance does not demonstrate that appellant perpetrated a fatal act against Vicki in her apartment the night she disappeared. While this evidence raises suspicions about appellant, it does not establish the wrongful conduct alleged. Such suspicious behavior after the fact might corroborate evidence of wrongful conduct; it cannot alone establish that wrongful conduct. Even suspicion of appellant under these circumstances does not constitute proof of Vicki's death or that appellant caused her death.

The State also relies on evidence of appellant's "excursion" the night of Vicki's disappearance, noting that appellant initially lied about being home all evening that night when in fact he borrowed his neighbor's car and had the neighbor, who was merely an acquaintance, watch his children in Vicki's apartment while he was gone. The evidence reflected that the headlights and the lock to the trunk were damaged when appellant returned the car. The State contends that these activities are indicative of appellant's attempt to hide evidence of a crime, further circumstantial evidence demonstrating appellant's guilt. However, this suspicious behavior does not, by itself, demonstrate that appellant perpetrated a fatal act against Vicki nor is it sufficient to support an inference that the commission of a separate crime or wrongful conduct has occurred. *See Stobaugh*, 421 S.W.3d at 865–66 (observing that attempts to conceal incriminating evidence may be considered as affirmative evidence of guilt only when commission of crime is established by evidence other than concealing of evidence) (citing *Hacker v. State*, 389 S.W.3d 860, 870–71 (Tex. Crim. App. 2013)).

Only once the commission of a crime is established may attempts to conceal incriminating evidence be considered as evidence linking a defendant to the crime that has been established. *See id.* at 866 (citing *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004)).

At trial, the State presented evidence of appellant's incriminating or misleading statements. The evidence showed that, at various times, appellant made threatening comments concerning Vicki. On one occasion, he told his co-worker that he had caught his wife cheating on him and thought about killing her. (There was no time frame establishing when this statement was made.) Appellant also told his brother-in-law that he would kill Vicki before he let her divorce him and take the boys. This threat was made on two occasions when appellant and Vicki were having marital problems. The evidence also reflected that neither of these men took appellant's comments to be serious threats to Vicki. In addition, the State presented evidence of a comment appellant made to his brother-in-law at some undisclosed time about being able to "bury a body" in excavation holes dug on his brother's property. While these threatening comments raise suspicions about appellant, they fail to demonstrate that appellant perpetrated a fatal act against Vicki in her apartment that night. The lack of evidence of a fatal act renders these statements corroborative evidence with nothing (no event or wrongful conduct) to corroborate.

The State also points to the lies or inconsistent statements appellant told to various individuals as circumstantial evidence of appellant's guilt. According to the State, these lies included telling Vicki's mother that he hired a private investigator but not providing his name or information to her; telling Vicki's mother that she could have Vicki's personal items but never giving them to her; telling Julie Tower on the phone that Vicki had left for her apartment or the party

but then later saying she went straight to the party; initially denying to police that any altercations or disputes had occurred but then admitting that he and Vicki argued and he pushed her; claiming that he pushed Vicki away defensively, which contradicts her report to Tower on the phone that he choked her; initially telling Detective Elliott that he stayed home all evening when he borrowed his neighbor's car and left his boys with him; and telling Detective Elliott that he paid a large sum of money to a private investigator but not offering any information to verify this claim. As with attempts to conceal evidence, "the utterance of false statements or inconsistent statements is, by itself, not sufficient to support an inference that the commission of a separate crime or wrongful conduct has occurred." *See Stobaugh*, 421 S.W.3d at 866 (citing *Hacker*, 389 S.W.3d at 870–71).

The State also refers to evidence of appellant's behavior "indicating consciousness of guilt," including:

- When appellant called Julie Tower looking for Vicki the morning after Vicki's disappearance, he hung up when Tower asked what he had done with Vicki;
- When Tower brought some medicine for appellant's son (at appellant's request), appellant met her at the door to the apartment and she observed a "shrine" on the kitchen bar with pictures of Vicki and a burning candle;
- Appellant did not contact Vicki's mother for several months after Vicki disappeared, notwithstanding the circumstances of her disappearance, and did not allow her to see her grandsons alone because he had to "protect himself";
- Appellant showed up twice while the police were searching Vicki's apartment, suggesting that the police were wasting their time;
- When the police discovered Vicki's car in the HEB parking lot, they asked appellant for consent to search the car (because he was also on the registration) but he refused to give consent;

- After his arrest, when Chief Elliott interviewed appellant in jail, he expressed anger at being labeled homeless (by the district attorney in a press conference) but not at being accused of murder; and

- When appellant's brother visited him in jail after his arrest, appellant never asked for his brother's help in finding Vicki.

Once again, however, these suspicious behaviors, like attempting to conceal evidence, telling lies, or making inconsistent statements, are indicative of guilt only when linked to wrongful conduct. Without evidence of that wrongful conduct—a fatal act perpetrated by appellant against Vicki—these suspicious behaviors have nothing to corroborate. By itself, the evidence of these suspicious behaviors does not support an inference that appellant engaged in the wrongful conduct alleged against him.

Finally, the State asserts that appellant had a motive to kill Vicki—she had left him and moved on with her life, establishing a separate home with their sons, filing for divorce, opening a separate bank account, and dating other men—which is also circumstantial evidence of his guilt. However, while evidence of motive helps link a defendant to wrongful conduct or is supportive of other evidence of such conduct, "without evidence that wrongful conduct has occurred, there is nothing for motive . . . evidence to link the defendant to." *See Stobaugh*, 421 S.W.3d at 865 (citing *Hacker*, 389 S.W.3d at 870–71).

"[T]he corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another." *McDuff*, 939 S.W.2d at 615. Here, the State's evidence failed to show that Vicki's allged death resulted from a criminal act of appellant. Even if it can be inferred that Vicki is dead, there is no evidence of the criminal act that caused Vicki's death

or that appellant perpetrated that criminal act. The circumstantial evidence presented by the State raised only suspicions about appellant; it did not demonstrate a criminal act nor support an inference of such. There is no evidence, direct or circumstantial, to prove beyond a reasonable doubt that appellant caused Vicki's death—an essential element of the offense. Thus, the evidence failed to establish the *actus reus* of the charged murder offense.

Furthermore, even if we accept the inference that Vicki is dead, and the further speculative inference that appellant somehow caused her death by some unknown and unidentified act, the evidence remains insufficient to support appellant's conviction for murder. The evidence failed to demonstrate that appellant committed such fatal act with the requisite *mens rea*. The *mens rea* element of the offense of murder—as charged in the indictment here—required proof that appellant *intentionally or knowingly* caused Vicki's death by a manner and means unknown or that *with intent to cause serious bodily injury to Vicki* appellant committed an act clearly dangerous to human life, by an unknown manner and means, that caused Vicki's death. *See* Tex. Penal Code § 19.02(b)(1), (2). The State was required to prove that appellant possessed one of the alternate mental states to satisfy the element of intent under the murder statute. *See Stobaugh*, 421 S.W.3d at 861; *see, e.g.*, *Jefferson*, 189 S.W.3d at 313.

As noted previously, murder is a "result of conduct" offense, which requires that the culpable mental state relate to the result of the conduct, i.e., the causing of the death. *Roberts*, 273 S.W.3d at 328–29; *see Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). A person acts "intentionally, or with intent" with respect to a result of his conduct when it is his conscious objective or desire to cause the result. *See* Tex. Penal Code § 6.03(a). A person acts

"knowingly, or with knowledge" with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b).

The requisite culpable mental state, or *mens rea*, is almost always proved by circumstantial evidence. *Stobaugh*, 421 S.W.3d at 862; *see Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991) ("[M]ental culpability is of such a nature that it generally must be inferred from the circumstances under which a prohibited act or omission occurs."); *Tottenham v. State*, 285 S.W.3d 19, 28 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("[B]oth intent and knowledge may be inferred from circumstantial evidence and proof of a culpable mental state almost invariably depends on circumstantial evidence."). Intent may be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant. *Guevara*, 152 S.W.3d at 50. A defendant's overt acts are generally reliable circumstantial evidence of one's intent. *See Laster*, 275 S.W.3d at 524. Likewise, the specific intent to kill may be inferred from the use of a deadly weapon. *Cavazos*, 382 S.W.3d at 384. In addition, intent can be inferred from the extent of the injuries to the victim, the method used to produce the injuries, and the relative size and strength of the parties. *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995); *Duren v. State*, 87 S.W.3d 719, 724 (Tex. App.—Texarkana 2002, pet. struck); *see Stobaugh*, 421 S.W.3d at 862 ("An intent to kill may also be inferred from the wounds inflicted or from an autopsy on the body."); *see, e.g.*, *Ex parte Henderson*, 384 S.W.3d 833, 838 (Tex. Crim. App. 2012) (Cochran, J., concurring) (noting that State's primary evidence to prove intent to kill victim consisted of circumstantial evidence produced by autopsy of victim).

Evidence and facts from which to infer appellant's mental state do not exist in the record before us. As discussed previously, the State failed to present evidence of precisely what fatal act appellant committed. Without evidence of how appellant caused Vicki's death, his mental state cannot be gleaned from the act or conduct itself or any associated words. Vicki's body has never been found and no autopsy has been performed, so no evidence exists concerning the types of injuries purportedly inflicted upon Vicki. Without evidence of the injuries, there is no way to discern the method of producing fatal injuries, how such injuries were inflicted, or the extent of the injuries. Thus, the jury could not infer appellant's mental state from facts relating to the injuries as none were shown. Further, the record contains no evidence that a deadly weapon was used; thus, no deadly-weapon facts exist from which the jury could infer appellant's intent. There are simply no facts from which the jury could infer appellant's intent. No evidence in the record supports the inference that appellant intentionally or knowingly caused Vicki's death or with intent to cause serious bodily injury to Vicki committed a clearly dangerous act that caused her death.

So, even if—based on the cumulative force of all of the circumstantial evidence presented by the State—the jury could have inferred that something happened to Vicki at her apartment on the night of December 14, 1991, and could have further inferred that appellant was responsible for that something and that the something caused Vicki's death, no facts or evidence exist from which the jury could—based on these inferences and the surrounding circumstances—also have reasonably inferred that while that something was occurring, appellant possessed the requisite *mens rea* for the offense of murder. *See Stobaugh*, 421 S.W.3d at 867–68. In other words, the circumstantial evidence, even if it supported an inference that appellant did something to Vicki and

that Vicki died as a result of that something, nonetheless wholly failed to provide the jury with any facts from which the jury could also reasonably infer that the *mens rea* appellant possessed when he did that something to Vicki was the requisite *mens rea* for murder, as opposed to some other *mens rea*. *See id.* at 868. Thus, the evidence failed to establish the *mens rea* of the charged offense.

Without question, circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Carrizales*, 414 S.W.3d at 742; *Hooper*, 214 S.W.3d at 13. However, as the Court of Criminal Appeals has explained,

> While juries are permitted to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial, "juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Hooper*, 214 S.W.3d at 15. "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them," while "[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id.* at 16. "A conclusion reached by speculation . . . is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id.*

Winfrey v. State, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013); *see Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012) ("Juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation."). Because the evidence in this case failed to establish either the *actus reas* or the *mens rea* of the charged murder offense, the State's circumstantial evidence was mere "suspicion linked to other suspicion." *See Hacker*, 389 S.W.3d at 874.

This was an extremely unusual case, and the record reflects the jury's struggle with the difficult task thrust upon it—the jury submitted multiple questions to the court throughout the course of its deliberations and twice indicated that it was deadlocked.[14] The evidence before the jury

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[14] The case was submitted to the jury for deliberation on guilt-innocence at approximately 11:00 a.m. on June 10, 2014. At 5:05 p.m., the jury asked for the "definition of reasonable inference" and "definition/clarification on intentionally and knowingly." The trial court referred the jury to the instructions already given by the court. At 9:00 p.m., the jury asked for the "transcript for David Proctor testimony," specifically, the "prosecution questioning." The court instructed them that the court reporter's notes could not be furnished unless the jury disagreed about the statement of a witness, and provided instructions about the process for certifying to such disagreement and requesting the transcript of the point in dispute. At 9:40 p.m., the jury indicated that the jurors were "split 7-5" and "[had not] changed decisions since 2." The note expressed that some jurors were tired and asked if they should "keep deliberating or take a break to sleep." The note also asked "about [the] possibility of hung jury." The trial court recessed deliberations and sequestered the jury for the night.

The jury resumed deliberations the next morning at 10:00 a.m. At 11:50 a.m., the jury asked if they could "convict on a lesser charge than murder" or was "it (murder) the only option at this time." The trial court again referred the jury to the court's charge, then specifically to a line in the charge that stated: "The Defendant is on trial solely on the offense alleged in the indictment," and instructed the jury to continue its deliberations. At 1:43 p.m., the jury indicated that it had a disagreement about the timeline of phone calls to Vicki on the day she disappeared and asked for the witness testimony of Julie Tower and Wayne Castleberry during the prosecution's questioning. The court had the court reporter transcribe the requested portions of the testimony, which were provided to the jury. At 4:00 p.m., the jury sent out a note indicating that it was unable to reach verdict: "We have come to an impass [sic], we are still dead-locked [sic] at 7-5 and no new info or evidence is changing anyone's mind. What do we do?" In response, the trial court gave a supplemental jury charge. *See Brewer v. State*, No. 03-10-00076-CR, 2014 WL 709549, at *2 n.1 (Tex. App.—Austin Feb. 21, 2014, no pet.) (mem. op., not designated for publication) ("The supplemental charge, known as an '*Allen* charge,' attempts to break a deadlocked jury by instructing jurors that the result of a hung jury is a mistrial and that jurors at a retrial would face essentially the same decision, encouraging them to resolve their differences without coercing one another or violating their individual choices.") (citing *Allen v. United States*, 164 U.S. 492, 501 (1896)). At 9:12 p.m., the jury indicated that it had a disagreement about the timeline and locations of Mark Johnson living with appellant and Vicki, and asked for the witness testimony of Mark Johnson during the defense's questioning. The court had the court reporter transcribe the requested portions of the testimony, which were provided to the jury. The jury eventually reached its verdict at 9:30 p.m. that night, finding appellant guilty of murder "as alleged in the indictment."

showed that Vicki had been missing for over two decades. The evidence also strongly suggested that something bad had happened to her and showed that appellant engaged in suspicious behavior around the time of her disappearance. Unfortunately, the deficiencies in the State's evidence forced the jury to engage in speculation about what happened to Vicki and appellant's connection to (or involvement in) whatever happened to her in order to reach a verdict—understandable given the circumstances of this unusual case. *See Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013) (citing *Hooper*, 214 S.W.3d at 16) ("While a conclusion that is reached by speculation may not be completely unreasonable, such conclusion is not sufficiently based upon facts or evidence to support a conviction beyond a reasonable doubt."). However, in assessing the sufficiency of the evidence, we have a duty "'to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged.'" *Winfrey v. State*, 323 S.W.3d 875, 882 (Tex. Crim. App. 2010) (quoting *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007)).

The fundamental problem with the State's case here is that it presented no evidence to demonstrate that appellant engaged in any particular conduct or committed any specific act—an intentional or knowing act or an act clearly dangerous to human life—directed at Vicki that caused her death. Furthermore, because there is no evidence of a specific death-causing act, no facts exist in the record concerning appellant's conduct from which the jury could have reasonably inferred that appellant possessed the requisite mental state to support a conviction for murder.

After reviewing all of the evidence in the light most favorable to the verdict, we hold that the cumulative force of all of the circumstantial evidence presented in this case and any reasonable inferences from that evidence merely raised suspicions of appellant's guilt and are

insufficient to support a finding beyond a reasonable doubt that appellant committed the murder as alleged in the indictment.[15] We sustain appellant's first point of error.

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[15] We note that in a recent unpublished opinion, the Court of Criminal Appeals addressed an insufficiency claim that involved similar evidentiary deficiencies. *See Walker v. State*, Nos. PD-1429-14 & PD-1430-14, 2016 WL 6092523 (Tex. Crim. App. Oct. 19, 2016) (not designated for publication). In those cases, the Walkers were convicted of injury to a child where it was alleged that they caused second degree burns to their almost three-year-old grandchild by immersing her legs and feet in a hot liquid. *Id.* at *2–11. In its opinion, the high court reaffirmed that juries are permitted to make reasonable inferences from facts supported by the evidence but are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *Id.* at *11 (citing *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *Hooper v. State*, 214 S.W.3d 9, 15–17 (Tex. Crim. App. 2007)). Upon reviewing the evidence, the court observed that "[w]hile many of the witnesses set out what they believed had happened, none of the nineteen witnesses could testify as to what actually happened, who was present when the injuries occurred, or who was at fault." *Id.* at *12. The court noted that the case relied on the testimony of competing expert witnesses to establish how the child was injured and whether those injuries were intentionally inflicted. *Id.* at *14. The court ultimately concluded,

> Given the number of outstanding questions about whether the injury was accidental or intentionally inflicted, how this alleged offense might have been committed, and who might have committed it, we conclude that a rational jury would have had at most only a strong suspicion of guilt under these circumstances.

Id. at *16. We mention this case briefly here because in its unpublished opinion the Court of Criminal Appeals aptly summarized the situation confronted by this Court in this case: "The legal sufficiency standard of review does not require us to decide 'what happened'; we only have to be satisfied that a jury could rationally answer that question for themselves beyond a reasonable doubt." *Id.* at *14. The deficiencies in the State's evidence in this case leave a number of outstanding questions about whether Vicki is dead and, if so, when she died, how she died, what caused her death, and who caused her death. Thus, like the Court of Criminal appeals in the *Walker* cases, we cannot be satisfied that the jury in this case could have answered the question of "what happened" to Vicki beyond a reasonable doubt based on the evidence presented.

CONCLUSION

Having concluded that the evidence is legally insufficient to support appellant's conviction for murder, we reverse the trial court's judgment of conviction and render a judgment of acquittal.

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Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Field

Reversed and Acquittal Rendered

Filed: December 15, 2016

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