NUMBER 13-17-00509-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ADALBERTO MOSQUEDA GUAJARDO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 430th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Perkes
Memorandum Opinion by Chief Justice Contreras

Appellant, Adalberto Mosqueda Guajardo, was convicted of the capital murder of Gilberto Garces, and he was sentenced to life imprisonment. *See* TEX. PENAL CODE ANN. § 19.03(a)(2). On appeal, he contends: (1) his constitutional right to a speedy trial was

violated; (2) the jury's verdict is "contrary to the law and the evidence"; and (3) the trial court erred by allowing post-mortem photographs of Garces into evidence. We affirm.

I. BACKGROUND

On June 1, 2016, a Hidalgo County grand jury returned an indictment alleging that on or about April 6 of that year, appellant intentionally or knowingly caused Garces's death by shooting him with a firearm while kidnapping or attempting to kidnap Garces. *See id.* A jury was selected and trial began on June 19, 2017.

Garces's widow testified that, on the afternoon April 6, 2016, her husband called to tell her he was going to Ramiro's Tire Shop[1] in Mercedes in order to "get money." He told her he would call her back in fifteen minutes and the two would meet at a nearby HEB store, but Garces never called her back, and he did not answer her calls. Garces's widow called police and filed a missing person report the next day.

Garces's teenage son testified that he went with his father to Ramiro's Tire Shop on more than one occasion. Another time, when he and his father were shopping at HEB, Ramiro Lopez Jr., the owner of the shop, "showed up" and talked with his father in Lopez's truck. According to Garces's son, Lopez said that he owed Garces "[a]nd some other guy" "[c]lose to" $40,000.

On the evening of April 7, 2016, police were called to a location south of Expressway 83 in Mercedes for a welfare check. The location was across a levee and was hidden from the roadway. When police arrived, they found a dead body that was later identified as Garces. Garces's abandoned car was found about twenty feet away

[1] Also known as Mid-Valley Tire Shop.

from the body. Four spent bullets were found at the scene, but no cartridge casings were recovered, which led police to suspect that a revolver was used in the shooting.

Garces's body was found with an electrical wire wrapped around his wrists. Investigators determined that the wire had a number which corresponded to a certain brand of drill set. After obtaining a warrant, police searched Ramiro's Tire Shop and found latex gloves, a pistol, several ammunition magazines, and a hydraulic floor jack with part of the handle missing. Police also found a drill set matching the electrical cord found wrapped around Garces's wrists. Although several other drill sets were found at the tire shop, this was the only one missing its charging cable. Further, police recovered a metal handle belonging to the hydraulic jack from Lopez's white truck, which was parked behind the shop.

The forensic pathologist who performed an autopsy on Garces's body testified that Garces suffered multiple gunshot wounds to his head, chest, and hand, as well as blunt-force trauma to his head and other parts of his body. According to the pathologist, the appearance of the blunt-force injuries suggested that a "cylindrical object," such as a pipe or a broom, was used to strike the victim. She opined that the gunshot wound to the head caused Garces's death, though in general, striking a person in the head with a blunt object could sometimes be deadly. Nineteen photographs depicting Garces's body as it appeared during the post-mortem examination were entered into evidence over defense counsel's objection.

Oscar Perez, an employee of Ramiro's Tire Shop in April of 2016, testified through an interpreter that Garces would sometimes come to the shop and ask for Lopez; if Lopez was not there, Garces would "leave right away," but if Lopez was there, he would "stay

and talk" inside Lopez's truck. Perez confirmed that surveillance video showed that Garces came to the shop on April 6, 2016.[2] According to Perez, appellant "would collect the money in the office" and was sometimes "in charge" of the shop. Though appellant usually parked his truck outside the shop, he pulled in to the shop on April 6, 2016. After Garces arrived, Lopez told Perez and his co-worker Hugo Martinez to leave the shop to run errands, which Perez found "kind of odd."

Investigators determined that appellant sold his green truck after the shooting. They found the truck at the house of the new owner's parents. Examination of the truck revealed that part of its back seat cushioning had been removed, and its rear window had recently been replaced.

Appellant was interviewed by police on April 26, 2016, and he gave a written statement in Spanish which was later translated into English. The statement provided in relevant part as follows:

> I want to say that I am married to Martha Alejandra Otero Ramirez and we have 5 children. . . . Martha and I had problems lately because I [was] seeing a girl named Wendy. . . . I remember that more or less a month ago, Martha kicked me out of the house. I was driving around Mercedes when I saw an acquaintance whose name is Mauricio at a flower shop on Old 83. The flower shop is in an old gas station. Mauricio was outside the flower shop with another man who I don't know.[3] They were next to Mauricio's car, a red [M]ustang with a black top, about a 2008 model. Mauricio and the other man got into my green, Chevy Silverado and we started driving around drinking beer. . . . That night we got drunk and I slept in my truck. The next day, I went to the shop and I took Mauricio and the other man. I actually don't know the name of the other man because I really don't know him and Mauricio would call him "Compadre" like he calls everyone. I

[2] The surveillance video obtained from the tire shop showed that Lopez, Garces, and appellant were there on the afternoon of April 6. However, an officer testified that there was a gap of approximately two hours on the video—it skipped from 3:46 p.m. to 5:44 p.m. When the video recording resumed, appellant's and Garces's vehicles were no longer there.

[3] Police later identified these men as Mauricio Vidal and Sergio Cavazos Medrano.

opened the shop and the two shop workers were there, Oscar and Hugo. After a while, Ramiro got there. Ramiro, Mauricio and the man and I went into the office and we were there for a while. We started drinking beer again. Mauricio and the man and I left later because I went home to talk to my wife. My wife was mad at me and she told me to leave so we left. The three of us went back to the shop and I parked the truck inside the shop. The three of us went back into the shop with Ramiro. We were there for a while when all of a sudden a man who I know by the name of Garces showed up. Garces came in his small gray vehicle. Garces started talking to Ramiro while I, Mauricio and the other man were in the office. I was sitting and Mauricio and the other man were standing. Ramiro took Garces into the office. Garces was asking for money and Ramiro gave him $20 and I gave him $7. At that moment Mauricio asked Garces who they were going to pick up, if me or Ramiro. That made me really mad and I hit Garces a few times, knocking him down to the floor. Mauricio and the other man started hitting Garces with punches and kicks. Mauricio and the man also started hitting Garces with a tube which is part of the handle on a jack. I saw that Mauricio and the other man started hitting Garces in the back with the tube and all over his body. I saw that Garces was unconscious and I saw that Mauricio and the other man put him in my truck. The[y] put him in on the driver's side in the back seat. I got in the driver's seat and the other man got into my truck on the passenger side in the back seat. I came out of the shop and saw that Mauricio got into Garces's vehicle and he left. So I followed Mauricio to 83 and then south on 491. Garces woke up when we were on 491. Garces got up and threw himself at the man and they were fighting. During that fight there was a shot that broke the rear passenger side window near the lev[ee]. I don't know if it hit Garces or not because I didn't see blood and Garces and the man kept fighting. I followed him on the lev[ee] and then down near the river. Mauricio went down a little road and parked Garces's vehicle. I went down the little [road] and when I reached the bottom, Mauricio and the man took out Garces. I started turning the truck around for us to leave and I heard some shots but I don't know how many. Mauricio got into the front passenger side and he had a gun in his waist with brown grips. It was not an automatic, it was the other kind. The other man got into the rear passenger side and we left there. We got to the shop and I told Ramiro that I was going to drop off Mauricio and the other man because the dumbasses had killed Garces. I told Ramiro to get me the glass and I went to drop off Mauricio and the other man at the flower shop. The red [M]ustang was still there. I went home and stayed for about two days. I left my house when I realized that the police had gone to the shop. I started staying with male friends and female friends. I don't remember what day it was but Ramiro sent a man from a company to replace the glass for me. I didn't see who replaced the glass because Wendy had the truck at her house at that time. I was using the green Jeep Cherokee while Wendy had the truck. I never told Wendy or anyone about

> what had happened with Garces. I needed money so I sold the truck to Wendy's sister's boyfriend for $7,000 but he only gave me part of it. I received $1,000 and I don't know how much he gave Wendy. I wanted to talk to the investigators but I was afraid that they would deport me because they had already deported me before.

The jury, having been instructed on the law of parties, found appellant guilty of capital murder. *See id.* §§ 7.02(b), 19.03(a)(2). The trial court sentenced appellant to life imprisonment. Appellant filed a motion for new trial alleging, among other things, that the verdict is contrary to the law and the evidence. *See* TEX. R. APP. P. 21.3(h). The motion for new trial was denied by operation of law, *see* TEX. R. APP. P. 21.8(c), and this appeal followed.

II. DISCUSSION

A. Speedy Trial

By his first issue, appellant contends that the trial court "erred in allowing the State to violate" his constitutional right to a speedy trial. He notes that, following a pre-trial hearing on June 13, 2016, the trial setting was continued at least ten times. Nearly fifteen months elapsed from the date appellant was arrested to the beginning of trial.

The only legal authority appellant cites in support of this issue is "Article [sic] VI of the U.S. Constitution." *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."). Appellant does not cite any case law, or any other authority, establishing what constitutes a speedy trial or under what circumstances an accused's constitutional right thereto is violated. Accordingly, we overrule this issue as inadequately briefed. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."); *Wolfe v. State*, 509 S.W.3d 325, 343 (Tex. Crim. App.

2017) (observing that "an appellate court has no obligation to construct and compose an appellant's issues, facts, and arguments with appropriate citations to authorities and to the record").

Even if the issue were adequately briefed, it would lack merit. We analyze speedy trial claims "on an ad hoc basis," weighing and balancing (1) the length of the delay, (2) the reason for the delay, (3) the assertion of the right, and (4) the prejudice to the accused. *Cantu v. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). "While the State has the burden of justifying the length of delay, the defendant has the burden of proving the assertion of the right and showing prejudice." *Id.* "The defendant's burden of proof on the latter two factors varies inversely with the State's degree of culpability for the delay." *Id.* (quotation omitted).

A delay of more than year is presumptively prejudicial and weighs against the State. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (noting that a one year delay is presumptively prejudicial). However, the reasons for the delay in this case were largely innocuous—for example, more time was needed to obtain the autopsy report, DNA testing results, and firearms toolmark analysis. *See State v. Munoz*, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999) ("A valid reason for the delay should not be weighed against the government at all."). Moreover, appellant himself sought two continuances in order to obtain a transcript of certain proceedings in a case against Lopez,[4] and he agreed to two of the continuances sought by the State. As to assertion

[4] Lopez was also charged with capital murder and was initially a co-defendant of appellant. *See State v. Lopez*, No. 13-17-00181-CR, 2018 WL 4927271 (Tex. App.—Corpus Christi–Edinburg Oct. 11, 2018, pet. ref'd) (mem. op. on reh'g, not designated for publication) (reversing trial court's granting of Lopez's motion to suppress). Prior to trial, the case against Lopez was severed.

of the right, although appellant's trial counsel objected to trial continuances on several occasions, the record does not contain any written or oral motion for speedy trial, nor does it contain any written or oral motion to dismiss on speedy trial grounds. Finally, appellant claims that he suffered prejudice as a result of the delay because "material eye-witness[es]"—presumably Vidal and Medrano, the men discussed in appellant's written statement—"became lost and unarrested during the delay."[5] But the record does not establish what these men would have testified to or whether their testimony could have been obtained even if trial took place earlier.[6] *See Grimaldo v. State*, 130 S.W.3d 450, 453 (Tex. App.—Corpus Christi–Edinburg 2004, no pet.) (noting that "it is the accused's burden to develop a record that a speedy trial violation occurred and that it was asserted in the trial court"). Under these circumstances, we would not conclude that appellant's speedy-trial rights were violated.

B. Evidentiary Sufficiency

Consistent with his motion for new trial, appellant contends by his second issue on appeal that the "verdict of guilty by the jury is contrary to the law and the evidence." *See* TEX. R. APP. P. 21.3(h) (providing that a criminal defendant "must be granted a new trial . . . when the verdict is contrary to the law and the evidence"). Appellant does not cite authority establishing any standard of review applicable to this issue. *See* TEX. R. APP. P. 38.1(i). In particular, he does not cite any authority regarding sufficiency of the

[5] Police testimony established that Vidal and Medrano fled to Mexico after the killing.

[6] The State notes on appeal that "[b]ecause of the policies of Mexico regarding involuntary repatriation of those facing a crime carrying a death sentence as possible punishment, securing return to Texas of a capital-murder suspect who has taken refuge in that nation is exceedingly difficult even if the person is located by officials."

evidence to support a conviction—an issue which, if sustained, would result in appellant's acquittal rather than a new trial. *See, e.g.*, *Marra v. State*, 399 S.W.3d 664, 673 (Tex. App.—Corpus Christi–Edinburg 2013, no pet.). Nevertheless, in our sole discretion and out of an abundance of caution, we construe the issue as raising sufficiency grounds. *See State v. Sanders*, 440 S.W.3d 94, 104 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) ("An argument under Rule 21.3(h) is essentially one of sufficiency[.]").

To satisfy constitutional due process requirements, a criminal conviction must be supported by sufficient evidence. *See Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). In reviewing sufficiency, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Griffin v. State*, 491 S.W.3d 771, 774 (Tex. Crim. App. 2016); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We resolve any evidentiary inconsistencies in favor of the verdict, keeping in mind that the jury is the exclusive judge of the facts, the credibility of the witnesses, and the weight to give their testimony. *Brooks*, 323 S.W.3d at 899; *see* TEX. CODE CRIM. PROC. ANN. art. 38.04.

We measure the legal sufficiency of the evidence against the elements of the offense as defined by a hypothetically correct jury charge for the case. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). Here, such a charge would instruct the jury to find appellant guilty if he: (1) intentionally caused Garces's death by shooting him with a firearm (2) while then and there in the course of committing or attempting to commit the kidnapping of Garces. *See* TEX. PENAL CODE ANN. § 19.03(a)(2). A person commits kidnapping if he intentionally or knowingly restrains a person with intent to prevent his

liberation by: (A) secreting or holding him in a place where he is not likely to be found; or (B) using or threatening to use deadly force. *Id.* §§ 20.01(2), 20.03(a).

A hypothetically correct jury charge would additionally instruct the jury that, under the law of parties, appellant is criminally responsible for an offense committed by another's conduct if, acting with intent to promote or assist the commission of the offense, he solicited, encouraged, directed, aided, or attempted to aid the other person to commit the offense. *Id.* § 7.02(a)(2). It would also instruct as follows:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Id. § 7.02(b).

Appellant contends that "[a]ll the evidence showed [he] had not taken part in the shooting or in any of the planning of the kidnapping and/or execution" of Garces. He asserts he "had not agreed to the commission of either offense and had no intent to participate in its eventuality." Citing *Thacker v. State*, 101 S.W.2d 247 (Tex. Crim. App. 1936) and *Morales v. State*, 466 S.W.2d 293, 303 (Tex. Crim. App. 1970), appellant argues that "[k]nowledge of an intent to kill the decease[d] is necessary" to convict someone of murder as a principal. He contends that his remarks to Lopez upon returning to the tire shop show that he did not intend for Garces to be killed. However, appellant does not address the possibility that the jury convicted him as a party to the murder under § 7.02(b), which would not require proof of intent to kill. *See* TEX. PENAL CODE ANN. § 7.02(b).

In his written statement to police, appellant conceded that he hit Garces and

"knocked him down to the floor" before Vidal and Medrano began beating Garces with the metal jack handle. Once Garces lost consciousness, Vidal and Medrano placed Garces in appellant's car; Vidal left in Garces's vehicle; and appellant followed Vidal driving his own vehicle, with Medrano and Garces in his back seat.[7] According to appellant's written statement, when Garces regained consciousness, he started to fight with Medrano and a gunshot rang out, breaking one of the car's windows. The men then arrived at their destination—a levee in a secluded area out of sight of the nearby highway—at which point Vidal and Medrano "took out" Garces and more gunshots could be heard. Appellant then drove Vidal and Medrano back to the tire shop, where appellant told Lopez to "get me the glass" to repair his car. He then went home and stayed there for two days in order to avoid the police. *See Clayton v. State*, 235 S.W.3d 772, 780 (Tex. Crim. App. 2007) (holding that "a factfinder may draw an inference of guilt from the circumstance of flight"). Other evidence established that Garces was bound with an electrical cord; that Lopez owed Garces nearly $40,000; that appellant sold his truck shortly after the murder; and that, when the truck was found by police, its rear seat and back window—potential pieces of evidence in the murder investigation—had been altered since the murder. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Attempts to conceal incriminating evidence . . . are probative of wrongful conduct and are also circumstances of guilt.").

From this evidence, a rational juror could have found beyond a reasonable doubt that (1) Medrano intentionally killed Garces by shooting him with a firearm and (2)

[7] Contrary to appellant's claims, there was no evidence that he was "ordered" or "told by his boss" to drive the car away from the tire shop.

appellant, intending to promote or assist the killing, solicited, encouraged, directed, aided, or attempted to aid Medrano in doing so. *See id.* § 7.02(a)(2). A rational juror could also have concluded beyond a reasonable doubt from this evidence that (1) appellant was part of a conspiracy to kidnap Garces, (2) Medrano intentionally killed Garces in an attempt to carry out that conspiracy, and (3) the killing was "in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy." *See id.* § 7.02(b).

We overrule appellant's second issue.

C. Admission of Post-Mortem Photographs

By his third issue, appellant argues that the trial court erred by allowing into evidence "close-up photographs of the homicide victim, after the autopsy, as such evidence was totally without probative value" and was "gruesome and inflammatory." The only authority cited by appellant in his discussion of this issue is *Dix v. State*, in which the court of criminal appeals observed, without reference to authority, that notations written on the back of a photograph were not admissible in a theft prosecution. 124 S.W.3d 998, 1000 (Tex. Crim. App. 1939). Appellant does not cite any rule of evidence, nor does he cite any case law establishing the applicable standard of review or applying any rules of evidence. The issue is therefore overruled as inadequately briefed. *See* TEX. R. APP. P. 38.1(i); *Wolfe*, 509 S.W.3d at 343.

Again, even if the issue were adequately briefed, we would find it lacks merit. Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger" of, among other things, unfair prejudice. TEX. R. EVID. 403. When deciding whether autopsy photographs are unfairly prejudicial, we consider the number of

photographs, the size of the photographs, whether they are in color or black and white, the detail depicted, the gruesomeness, whether the body is naked or clothed, and whether the body had been altered by the autopsy in a way that would be detrimental to the appellant. *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006); *Prible v. State*, 175 S.W.3d 724, 734 (Tex. Crim. App. 2005); *Reese v. State*, 33 S.W.3d 238, 241 (Tex. Crim. App. 2000). Autopsy photographs are generally admissible as relevant in helping to explain the cause of death when there is some disputed fact concerning the victim's death. *See Rayford v. State*, 125 S.W.3d 521, 530 (Tex. Crim. App. 2003) (finding no error in the admission of autopsy photographs that showed pre-death injuries consistent with kidnapping theory).

The nineteen color photographs admitted during the pathologist's testimony did not depict Garces's body after the autopsy; instead, they depicted his body as he arrived at the pathologist's office, before the autopsy was performed. In that regard, to the extent the photographs were gruesome, that was only because they showed the results of the attack committed by appellant and his co-conspirators. *See Williams v. State*, 301 S.W.3d 675, 691 (Tex. Crim. App. 2009) (finding no error in admission of photographs which "portray no more than the gruesomeness of the injuries inflicted by appellant"). Further, the photographs were probative in that they helped to illustrate the pathologist's testimony regarding what kind of blunt-force weapon was used in the attack. The trial court did not abuse its discretion in declining to exclude the photographs under Rule 403. *See Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016) (noting that courts review the trial court's admission of evidence for abuse of discretion).

III. CONCLUSION

We affirm the trial court's judgment.

DORI CONTRERAS
Chief Justice

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

Delivered and filed the 9th
day of January, 2020.