No. 01-24-00680-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

SIMON ADAMS
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1759093
From the 248th District Court of Harris County, Texas

BRIEF FOR APPELLANT

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PRESIDING JUDGE:	Hon. Denise Collins 248th District Court Harris County, Texas 1201 Franklin Houston, Texas 77002
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STATEMENT OF THE CASE

April 19, 2022	Simon Adams was indicted for the offense of murder. CR at 29.
September 3, 2024	Jury Selection took place. CR at 339.
September 4, 2024	The culpability phase of the trial began. CR at 340.
September 5, 2024	The culpability phase of the trial concluded. CR at 341.
	Adams was convicted of murder and sentenced by the Court to 30 years' imprisonment. CR at 300, 341.
	Notice of appeal was timely filed. CR at 307.

STATEMENT REGARDING ORAL ARGUMENT

The issues in this case are not complex and the Court would not be aided by oral argument. Mr. Adams does not request oral argument.

ISSUES PRESENTED

Issue One: The evidence produced at trial was insufficient to support a guilty verdict for the offense of murder because no rational factfinder could find that the state proved that Adams intentionally or knowingly caused Croom's death or that Adams intentionally or knowingly caused serious bodily injury to Croom

Issue Two: The court erred in admitting autopsy photographs that were not properly authenticated, and his harmed Adams

STATEMENT OF FACTS

A shooting on the roadway

It was a dark January evening when two motorists traveling down the Beltway 8 feeder road began driving aggressively towards each other. Accounts differed as to exactly how the cars were driving. One witness described the two vehicles—a sedan and a pickup truck—as driving fast, giving the appearance of racing. Another said that, after a traffic light at which both vehicles had been waiting side by side turned green, neither vehicle "took off." 3 RR at 20–21, 33. After driving away from the light, the sedan moved from the middle lane of the three-lane road into the right lane, getting in front of the truck. 3 RR at 36; 5 RR at St. Ex. 6. The truck then moved to the middle lane. 3 RR at 37.

One witness believed the drivers of the vehicles were arguing and yelling at each other. 3 RR at 21, 29. He also thought the truck might have been trying to push the sedan off the road just before he heard gunshots, but another did not think either vehicle tried to hit the other. 3 RR at 22, 38. During an interview with police at the scene, a witness said that the sedan had "brake checked" (slammed on its breaks with the intent to cause the driver behind to either wreck or slam on their brakes) the truck twice. 3 RR at 45, 61, 189. After a gun was fired from the truck towards the sedan, the driver of the sedan lost control of his car, crossed three lanes of traffic, and slowly rolled back into the rightmost lane before stopping. 3 at 22. The truck did not stop. 3 RR at 26.

Two witnesses called 911. 3 RR at 28, 32. One of those witnesses also recorded part of the altercation with his cell phone. 3 RR at 32. Neither witness saw the drivers of the vehicles or the shooter. 3 RR at 28, 47. Police arrived and began to process the sedan and roadway. Police found a knife in the complainant's car. 3 RR at 90; 5 RR at St. Ex. 35. Inside the door panel of the sedan, police found three bullet fragments. 3 RR at 94.

Police investigation and arrest of Simon Adams

A few days after the incident, police received an anonymous tip providing the name, age, and ethnicity of the person involved in the shooting. 3 RR at 174.

Police searched for the name given, Simon Adams, in databases, and found only one person with that name and within the age range given by the anonymous tip. 3 RR at 175. The vehicle registered to Mr. Adams was a Chevy pickup truck that matched the truck seen in the cell phone video. 3 RR at 175. The license plate number from the truck was run through a law enforcement license plate reader database, leading to several scans in an area near an apartment complex. 3 RR at 176. Police found the Chevy truck in the complex parking lot. 3 RR at 176.

Police also found that the truck had been involved in a traffic stop shortly before the shooting. 3 RR at 177. After reviewing dash camera footage from that stop, police were able to see that the truck had the same malfunctioning brake light as the truck seen on the cellphone video taken at the scene, and that Simon Adams was the driver. 3 RR at 177. Cell phone data showed that Simon Adams's cell phone was at the location of the shooting when it occurred. 3 RR at 180. During a search of the truck after Adams's arrest, police found a firearm. 3 RR at 71, 101. An examination of the firearm confirmed that it had fired the bullets recovered from the complainant's body at autopsy. 3 RR at 146. Both parties stipulated to the deceased identity as Nicholas Croom. 4 RR at 6. The

complainant's autopsy revealed three bullet wounds — two to the head and one to the torso. 3 RR at 113.

Croom said "he would leave me right here…I wouldn't make it home"

At the time of the offense, Adams worked twelve-hour shifts six days a week as a machine operator. 4 RR at 10. On January 20, 2022, Adams got off work at 5 p.m. and went to his mother's house. 4 RR at 12. He left about fifteen or twenty minutes later and began the drive home. 4 RR at 12. On his drive home, Adams saw the complainant's vehicle pass him on the roadway. 4 RR at 13. At the time, Adams was driving between sixty and seventy miles per hour when the car moved into his lane in front of him and "slammed on the brakes," causing Adams to reduce his speed to approximately fifteen miles per hour. 4 RR at 13.

In response to this maneuver, Adams moved his truck into the right-hand lane; the car moved into the right lane as well, maintaining the slow speed. 4 RR at 13. Again, Adams attempted to move into another lane, and again the car moved in front of him. 4 RR at 15. Adams quickly exited the roadway onto the feeder road, but the car exited behind him. 4 RR at 16. Upon exiting, Adams moved into the rightmost of the three feeder road lanes; the car maneuvered

into the middle lane, to Adams's left. 4 RR at 17. When Adams saw the car's window coming down, he rolled his down as well. 4 RR at 17.

At a red light, the man in the sedan, later identified as Nicholas Croom, got out of his car with a black bag in his hands, and told Adams that he was going to shoot him. 4 RR at 24. Adams, although frightened, could not drive away because they were in the middle of traffic at a red light. 4 RR at 24. When the light turned green, Croom jumped back in his car and, as soon as the car in front of Adams pulled forward, Croom moved his car back in front of Adams's truck. 4 RR at 25. When Croom had his car once again in front of Adams, Croom slammed on his brakes. 4 RR at 25. After a few seconds of not moving, Croom began to slowly accelerate. 4 RR at 25. As soon as he could move his truck, Adams tried to move from the righthand lane into the middle lane, but Croom moved in front of Adams in the middle lane as well. 4 RR at 26.

Adams had tried to escape but Croom would not allow him to. 4 RR at 26. Just before Adams shot toward Croom's car, Croom was keeping his car even with Adams's. 4 RR at 29. Adams never threatened Croom, never tried to run him off the road, and never brake-checked him. 4 RR at 26–27. He testified that he did not do anything to provoke Croom's behavior. 4 RR at 31. Because Croom

had threatened to shoot him and had a black bag in which he could secret a gun, Adams was afraid he would be shot. 4 RR at 27.

At the moment Adams shot towards Croom, Croom was telling Adams that "he would leave me right here, and that I wouldn't make it home, and he was following me—me to the house and telling me what gang he was from." 4 RR at 45. When Adams shot at Croom, he was not attempting to kill Croom, but to escape from him. 4 RR at 28. At the time he fired the shots, Adams was ducking down beside his steering wheel. 4 RR at 29. Adams explained that it was his ducking beside the steering wheel that caused his truck to swerve as seen on the witness's cell phone video (State's Exhibit 11). 4 RR at 28. Adams told the jury that he ducked because he thought he was going to be shot. 4 RR at 28.

When the prosecutor asked Adams why he did not shoot Croom when Croom got out of his car and threatened to shoot Adams, Adams said he was "waiting on him to make a move or see what he was going to do." 4 RR at 55. He was also trying to deescalate the situation or escape from Croom. 4 RR at 56. When Adams shot at Croom, the incident had been going on too long, and "he steady was coming at me." 4 RR at 56.

Adams left the scene without calling 911 because he did not know if he had hit Croom. 4 RR at 29 After driving away, he expected to be arrested because there had been so many witnesses around during the incident. 4 RR at 30. Even after learning on the news that Croom had died, Adams did not destroy or hide the gun, move from his apartment, or stop going to work. 4 RR at 30–31. Adams continued to work to save money for an attorney. 4 RR at 31.

SUMMARY OF THE ARGUMENT

The State did not present sufficient evidence to prove the *mens rea* under either theory of murder — that Adams intentionally or knowingly caused Croom's death or, while committing an act clearly dangerous to human life, Adams intended to cause serious bodily injury to Croom. Because the only evidence presented at trial was that Adams intended to evade Croom's aggressions, no rational factfinder could find beyond a reasonable doubt that Adams possessed the requisite intent to convict him or murder.

During the trial, the court admitted photographs taken during Croom's autopsy. These photographs were not properly authenticated and were

admitted in error. Because the photographs were not cumulative of any other evidence at trial, Adams was harmed by their erroneous admission.

ARGUMENT

> **Issue One:** The evidence produced at trial was insufficient to support a guilty verdict for the offense of murder because no rational factfinder could find that the state proved that Adams intentionally or knowingly caused Croom's death or that Adams intentionally or knowingly caused serious bodily injury to Croom.

I. Standard of Review

The standard of review for challenges to sufficiency of the evidence claims is "whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App. 1991), citing *Jackson v. Virginia,* 443 U.S. 307, 318–19 (1979). Courts defer to the factfinder's role as the sole judge of witness credibility and how much weight to afford testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). When the record supports conflicting inferences, the

reviewing court presumes that the factfinder resolved the conflicts in favor of the verdict. *Jackson*, 433 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

In conducting a sufficiency review, this Court's role is to provide a due process safeguard, ensuring the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

Because the State indicted Adams in the alternative and because the jury returned a general verdict, the jury could have convicted Adams under either § 19.02(b)(1) or (2)—either intentionally or knowingly causing the death of an individual or by intending to cause serious bodily injury and committing an act clearly dangerous to human life that caused the death of an individual. TEX. PENAL CODE § 19.02(b)(1), (2).

II. The State did not prove that Adams intentionally or knowingly caused Croom's death

A. The Mens Rea Requirement in Penal Code § 19.02(b)(1)

The *mens rea* element of murder under Penal Code § 19.02(b)(1) requires the State to prove that a person intentionally or knowingly caused the death of an individual. Intentional murder being a result-of-conduct offense, "[w]hat

matters is that the conduct (whatever it may be) is done with the required culpability to effect the *result* the Legislature has specified." *Cook v. State*, 884 S.W.2d 485, 490 (Tex. Crim. App. 1994) (internal citations omitted). That is, Adams "must have intended or known that [the complainant] would die." *Moreno v. Dretke*, 450 F.3d 158, 172 (5th Cir. 2006) (discussing *Cook*, 884 S.W.2d 485).

A person acts intentionally, with respect to the result of his conduct, "when it is his conscious objective or desire" to cause the result. TEX. PENAL CODE § 6.03(a). A person acts knowingly with respect to the result of his conduct when "he is aware that his conduct is reasonably certain to cause the result." TEX. PENAL CODE § 6.03(b). Proof of a culpable mental state may be inferred from facts tending to prove its existence, typically: the acts, words, and conduct of the accused. *Hart v. State*, 89 S.W.3d. 61, 64 (Tex. Crim. App. 2002); see *Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1996) (holding that requisite mental state established through defendant's words, acts, and/or conduct.).

B. No Rational Factfinder Could Find Adams Intentionally or Knowingly Caused Croom's Death

Though the factfinder is charged with resolving conflicts in the testimony and drawing inferences from the basic facts to ultimate conclusions, the fact-

finder cannot come to conclusions based on mere speculation of factually unsupported inferences or presumptions. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). To prove a culpable mental state, the State will frequently rely upon circumstantial evidence. *Dillon V. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978). However, just as with any other type of evidence, evidence of a culpable mental state must be firmly founded in the record. *Bounds v. State*, 355 S.W.3d 252, 255 (Tex. App. –Houston [1st Dist.] 2011, no pet.).

No one heard what was said between Adams and Croom during their confrontation on the road. No witnesses testified that Adams admitted to purposefully killing Croom, nor was there any evidence such as text messages or other digital communications to establish that Adams's conscious objective or desire had been to cause Croom's death.

Instead, the State proved that the two men engaged in some type of confrontation while driving near each other. One witness thought Adams's truck swerved toward Croom's car. 3 RR at 22. Another disagreed with that interpretation. 3 RR at 38. Whichever the jury believed, a possible swerve is a far cry from an intentional or knowing killing. One witness told police the night of the incident that Croom had brake checked Adams's truck more than once. 3

RR at 45, 61. The only evidence put before the jury about Adams's intent was from Adams himself, who testified that he tried multiple times to avoid a confrontation with Croom, moving his truck away from Croom after Croom brake checked him, and then trying to quickly exit the beltway to get away from Croom. 4 RR at 13, 15, 16. At the moment he shot toward Croom's truck, Adams was ducked down, hiding behind his steering wheel. 4 RR at 29. He was not trying to kill Croom, but to get away from him. 4 RR at 28.

In evaluating sufficiency regarding the "intent" element, the cases that reverse are instructive. In *Sloan v. State*, a prosecution for assault with intent to murder, the defendant "snapped" a shotgun at the complainant. 76 S.W. 922 (1902). In holding this insufficient to show intent to kill, the court stated that the barrel of the gun which the defendant attempted to discharge was incapable of being discharged, although the other barrel was loaded and could have been discharged. *Id.* The court held the evidence insufficient to show intent to kill because the evidence showed that appellant could have easily killed the complainant at any time, and he did not do so. *Id.* at 923. There was no intervening cause which prevented the defendant from killing when he had the opportunity to do so and subsequent events to the "snapping" of the gun showed no intent. *Id.* Similarly, the surrounding facts and circumstances do not

demonstrate an intent to kill or cause serious bodily injury. Adams could have shot Croom while they were sitting side by side at the traffic light. 4 RR at 17. He did not.

In another Court of Criminal Appeals case, the issue was intent based upon the use of a knife. *Robinson v. State*, 172 Tex. Crim. 323, 324, 356 S.W.2d 929, 930 (1962). The State's contention was that the use of the knife itself was sufficient to show an intent to kill because there was evidence that if the stab wound had been deeper, it would have been fatal. *Robinson*, 356 S.W.2d at 930–31. But the Court of Criminal Appeals reversed the conviction determining that fact alone was insufficient to show an intent to kill. *Id*. Similarly, use of gun by itself is insufficient to prove intent to kill. The murder statute is not one of strict liability; the State must prove intent to kill beyond a reasonable doubt.

III. The State did not prove that Adams intentionally caused serious bodily injury to Croom

A. *Mens rea* in Penal Code § 19.01(b)(2)

The *mens rea* element of murder under Penal Code § 19.02(b)(2) requires the State to prove that a person intended to cause seriously bodily injury. A conviction under Section 19.02(b)(2) requires showing that the defendant

acted with the conscious objective or desire to "create a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of any bodily member or organ." *Walter*, 581 S.W.3d at 971. The intent to kill is not required.

B. No Rational Factfinder Could Find Adams Intentionally or Knowingly Caused Serious Bodily Injury to Croom

Under Penal Code § 19.01(b)(2), the State must prove both that Adams committed an act clearly dangerous to human life and did so intending to cause serious bodily injury to Croom. Firing a gun in the direction of an individual is an act clearly dangerous to human life. *Forest v. State*, 989 S.W.2d 365, 368 (Tex. Crim. App. 1999).

"When a defendant's version of the facts conflict with other witnesses' testimony or other evidence, it is the jury's prerogative to draw reasonable inferences from the evidence, and to judge the credibility of the witnesses and the weight to be given their testimony." *Ramirez v. State*, 229 S.W.3d 725, 730 (Tex. App—San Antonio 2007, no pet.). An appellant's argument that his action was not intentional is viewed in light of not only his testimony but also his actions following the incident, his statements, and forensic evidence. *Id.* at 730.

Here, there is no evidence to support the jury's finding that Adams had the required mental state. If it had been Adams's conscious desire to cause death or serious injury to Croom, he could have shot him at the traffic light. Instead, he attempted to elude Croom, continuously moved lanes to avoid confrontation, and tried to make a last-minute exit from the Beltway to get away. 4 RR at 13–16, 26. Adams's testimony, uncontradicted by any other witness, was that he was shooting wildly in an attempt to escape the situation.

IV. In light of the *entire* record, Adams's use of a firearm does not prove that he had the required culpable mental state

The only evidence that might support the jury's conclusion that Adams's conscious objective or desire was to cause Croom's death or that he was aware that his conduct was reasonably likely to cause Croom's death was the evidence that Adams used a firearm. If sufficiency review did not consist of evaluating the entire record, then the evidence that Adams used a firearm would satisfy the standard. However, sufficiency review requires that this Court evaluate the *entire* record to determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318–19; *Nelson v. State*, 405 S.W.3d 113, 122–25 (Tex. App.—Houston [1st Dist.] pet. ref'd).

Adams's testimony failed to establish legally sufficient evidence that it was his conscious objective or desire to cause Croom's death. Instead, at its worst, his testimony establishes that he intended to do what he was able to stop Croom's vehicle from further endangering his own, or to stop Croom from shooting him, as Croom had threatened to do. While motive may not be required as an element of the offense, appellate courts may consider motive as circumstantial evidence. *Ervin v. State*, 331 S.W.3d 49, 55 (Tex. Crim. App.—Houston [1st Dist.], pet. ref'd) ("proof of a defendant's motive to commit the charged offense is significant circumstantial evidence indicating guilt"); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). Here there was no evidence of motive beyond preventing Croom from harming Adams. Accordingly, the circumstantial evidence in this case did not support a rational finding that Adams possessed the requisite mental state to have committed the offense of murder. *Hart*, 89 S.W.3d at 64. This Court should reverse Mr. Adams's conviction and render judgment of acquittal.

Issue Two: The court erred in admitting autopsy photographs that were not properly authenticated, and this harmed Adams

I. Preservation of Error and Relevant Portions of the Record

The assistant medical examiner who performed Croom's autopsy did not testify at trial. A substitute medical examiner testified instead, after having review the autopsy report and photographs. 3 RR at 112. The State sponsored exhibits 64 through 74, the photographs taken at autopsy.

> **Q (State):** You've -- have you reviewed the photographs taken in this case?
> **A (Witness):** Yes.
> **State:** Your Honor, permission to approach the witness?
> **Court:** Yes, sir.
> **Q (State):** Doctor, I'm going to show you what's been marked as State's Exhibit [sic] 64 through 74. Will you take a look at them? Take your time, and then let me know when you're ready.
> (Pause.)
> **A:** I finished reviewing them.
> **Q:** Do you recognize these images?
> **A:** Yes.
> **Q:** Are these images from the autopsy of Nicholas Croom?
> **A:** Yes.
> **Q:** Were these the photographs that you reviewed in making your independent assessment?
> **A:** Yes.
> **State**: Your Honor, at this time, the State's going to offer State's Exhibit [sic] 64 through 74, tendering to defense counsel for inspection.
> (Stat''s Exhibit Numbers 64 through 74 offered into evidence.)
> **Defense Counsel:** Your Honor, may I take this witness on voir dire?
> **Court:** You may.

VOIR DIRE EXAMINATION

Q (Defense Counsel): Good afternoon, Doctor.
A: Good afternoon.
Q: Did you take those photos?
A: No.
Q: So do you have personal knowledge of anything regarding these photographs being taken?
A:. No.

> **Defense Counsel**: Your Honor, I would object to the admission of these photos for lack of personal knowledge.

3 RR at 114–15.

The trial court then asked the attorneys to approach the bench, stating "I'm going to allow them, but I'd like you to make your argument for the record why you think they're admissible." 3 RR at 116. The State responded, "I will be arguing multiple things: (1) This doctor has gone over the process of being a medical examiner and what the substitute medical examiner process does; he's testified under oath that he went through that process for this case; he's testified that in his entire experience, there has never been a duplicate ML number he's ever seen; he's testified that these pictures are for the examination of Nicholas Croom whose medical number is unique to any other cases he's ever had." 3 RR at 116. The Court then asked the State to address the photographs in relation to the autopsy report being inadmissible:

> **Court:** Okay. I just want you to address you know the law disallows introduction of the actual report --
> **State:** Yes, Your Honor.

> **Court:** -- correct? He can testify to it, but not anything -- you can't offer anything that's – just tell me how the photographs are different.
> **State:** Photographs are different, Your Honor, because they're not the opinion of the underlying author; they are -- just like when the officers take the scene, any photographs that they are able to articulate are from the scene depict [sic] the situation as they know it. They can authenticate because authentication is based on being able to articulate that they are what they purport to be, which this doctor has done.

3 RR at 116–17.

The trial court then admitted the photographs, stating that the witness "is a medical doctor; he is a medical examiner, and he sees photographs all the time, that is what he does, so because of that, I—I'm allowing it.: 3 RR at 117.

Objection based on lack of personal knowledge preserves the issue for appeal. *Watts v. State*, No. 01-86-0045-CR, 1986 WL 13391, at *9 (Tex. App.—Houston [1st Dist.] Nov. 26, 1986, no pet.) (not designated for publication) (citing *Goss v. State*, 549 S.W.2d 404 (Tex. Crim. App. 1978)).

II. Standard of Review

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). "The test for whether the trial court abused its discretion is whether the action was arbitrary or unreasonable." *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005).

"An appellate court should not reverse a trial judge whose ruling was within the zone of reasonable disagreement." *Id*.

III. The Autopsy Photographs were Not Properly Authenticated

The issue of authentication "arises whenever the relevancy of any evidence depends upon its identity, source, or connection with a particular person, place, thing, or event."*v. State,* 167 S.W.3d 98, 104-05 (Tex. App.--Waco 2005, pet. ref'd). Authentication as a rule is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. TEX. R. EVID. 901(a).

There is no requirement that the medical examiner who testified at trial be the same one who performed the autopsy and prepared the report on the complainant. *Sandles v. State*, 857 S.W.2d 932, 946–37 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). The autopsy report can be admitted if the testifying substitute medical examiner is a custodian of records for the medical examiner, if the requisite predicate is laid for the business records exception to the hearsay rule. TEX. R. EVID. 803(6); *Sandles* at 937.

The prime condition on admissibility of a photograph is that it be identified by a witness as an accurate portrayal of certain facts relevant to the issue and verified by such witness on personal knowledge as a correct

representation of these facts. 3 Wigmore, Evidence, Sections 790–798a. *Haas v. State*, 498 S.W.2d 206, 211 (Tex. Crim. App. 1973). Autopsy photographs must also be properly authenticated to be admissible:

> Before being admitted into evidence, photographs must ordinarily be shown to be a correct representation of the subject at a given time. However, the only identification or authentication required is that the offered evidence properly represent the person, object, or scene in question. This may be testified to not only by the photographer, but by any other witness who knows the facts, even though the witness did not take the photograph himself or see it taken.

Quinonez-Saa v. State, 860 S.W.2d 704, 706 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (internal citations omitted).

1. Goss v. State

In *Goss*, the Court of Criminal Appeals addressed the required predicate for admission of autopsy photographs. *Goss*, 549 S.W.2d 404. The sponsoring witness was the medical examiner at the time of trial and was the custodian of records at the medical examiner's office. *Id.* at 405. The doctor testified that the photographs she was shown were the photographs taken both at the scene of the offense and at the medical examiner's office, and that the photographs were labeled with the same autopsy number. *Id.* at 405. She testified that the entries in her records were made at or near the time of the recorded events, as they were dictated during the time the autopsy was being performed. *Id.* The doctor

was then asked to compare the description of the complainant in the autopsy report with the appearance of the person in the photographs, and the doctor concluded that the "picture truly depicts the physical outward appearance of the person as described in the autopsy." *Id.* The witness testified to multiple identifying characteristics of the person depicted in the photographs, as detailed in the autopsy report. *Id.*

Despite these efforts at authentication, the Court found that the photographs were inadmissible:

> A review of Dr. Erickson's testimony reflects that she pointed to factors in Exhibits 15, 16, 19, and 20 which were consistent with the autopsy report's description of the body of the deceased but, other than the statement of Dr. Erickson that each of the exhibits was numbered "75-38," no connecting factor is shown between the autopsy report and Exhibits 14, 17, and 18. The fact that certain factors depicted in the photographs were consistent with the autopsy report, standing alone, would not render the photographs admissible. The admissibility of a photograph is conditioned on its identification by a witness as an accurate portrayal of facts relevant to the issue and on verification by such witness or person of knowledge that the photograph is a correct representation of such facts. The evidence in this case clearly does not meet such test. Assuming that the photographs could have been proven up by the autopsy report, a review of such report does not make any reference to photographs having been taken of the body of deceased before, after, or at any point during the autopsy, nor is any mention made of photographs.

Id. 406 (internal citations omitted). Proper authentication of photographic evidence requires that the witness, based on personal knowledge, identify the picture as accurately and correctly portraying the relevant facts. *Id.*

2. *Quinonez-Saa*

This Court addressed the admissibility of autopsy photographs in *Quinonez-Saa v. State*. 860 S.W.2d 704 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). In *Quinonez-Saa*, the trial court admitted autopsy photos when the autopsy report and photographs were not done by the testifying medical examiner. *Id*. Appellant had not objected to the autopsy report, but did object to the admission of the photographs on the grounds that "the testifying doctor had not seen the body or done the autopsy, and the autopsy report made no reference to photographs having been taken." *Id.* at 705.

This Court distinguished *Goss* because "(1) the corroborative predicate evidence in the instant case is greater than the simple correlation between the autopsy report and the photographs in *Goss*; and (2) the record in the instant case is not 'devoid of proof', as was the case in *Goss*, that the photographs are admissible under the current business records exception of Tex. R. Crim. Evid. 803(6)." *Id*. at 706 Unlike *Goss,* the testifying medical examiner in *Quinonez-Saa* laid the predicate for the autopsy photographs' admissibility under the business records exception to the hearsay rule. *Id.* at 706. The medical examiner

testified that the business records relating to the autopsy included "any photographs that would have been taken during that autopsy report" and that these records were "entered by a person who has knowledge at or near the time that the events occurred." *Id.* He also testified that the records were kept under his care, custody, and control and were kept as a normal course of business with the medical examiner's office. *Id.* Because the autopsy photographs were part of the autopsy report, they were admissible as business records of the medical examiner's office.

In *Quinonez-Saa*, the deceased died of a single, small caliber gunshot wound to the head, and the only difference between the autopsy photographs and other photographs of the deceased in the record, is that the blood was washed from the deceased's face in the autopsy pictures. *Id.* at 706. The trial court had admitted, properly authenticated and without objection, other photographs of the decedent from the scene and the morgue; these provided "additional evidence of the fairness and accuracy of the autopsy photographs" in that case. *Id.*

3. Medical Examiner's Testimony

Business records are excepted from the rule against hearsay if they are made at or near the time of the act or event by someone with knowledge, are kept in the course of regularly conducted business activity, the making of the

record was a regular practice of that activity. TEX. R. EVID. 803(6)(A)–(C). The foregoing conditions must be testified to by the custodian or records or another qualified witness, or be self-authenticated. *See* TEX. R. EVID. 902.

Dr. Phatak testified that he did not perform the autopsy of Croom. 3 RR at 111. To prepare to testify, he reviewed the autopsy report prepared by another medical examiner, as well as the photographs taken during autopsy. 3 RR at 112. Phatak identified Croom's autopsy as the one assigned number ML22-0359. 3 RR at 113. Phatak confirmed the photographs were "images from the autopsy of Nicholas Croom" and he reviewed them in making his independent assessment. 3 RR at 115. Phatak admitted he had no personal knowledge of the photographs. 3 RR at 115. This contrasts with the strictures of the *Goss* court, that admissibility of a photograph "is conditioned on its identification by a witness as an accurate portrayal of facts relevant to the issue and on verification by such witness or person of knowledge that the photograph is a correct representation of such facts." *Goss*, 549 S.W.2d at 406.

Unlike in *Quinonez-Saa*, the State did not prove up the autopsy report as a business record, nor lay the required predicate to show that its witness was a custodian of record for the medical examiner's office. After the photographs were already admitted, the State asked some questions relating to their

authentication, but did not complete the required predicate (For example: "They depict the autopsy and the information you used to make your independent assessment on both the manner and cause of death for Nicholas?" and "Are they photographs taken in the normal course of business at the lab where you do medical examinations?"). 3 RR at 119.

The photographs were not—and indeed could not be—admissible as business records of the medical examiner's office given the state of testimony at trial. Phatak did not establish that the photographs were "entered by a person who has knowledge at or near the time that the events occurred," or that the records were kept under "his care, custody and control and were kept as a normal course of business with the medical examiner's office." *Quinonez-Saa*, 860 S.W.2d at 706. He did not say whether the photographs were kept in the same file as the autopsy report, or that the photographs themselves were business records.

The only identification or authentication required is that the offered evidence properly represent the person, object, or scene in question, and "this requirement may be met by the photographer or any other witness who knows the facts, even though the witness did not take the photograph himself or see it taken." *Delacerda v. State*, 425 S.W.3d 367, 393 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). In *Delacerda*, the testifying medical examiner testified that he

was the custodian of records for the medical examiner's office, that the autopsy reports are made at or near the time the autopsy is conducted by the medical examiner who conducted the autopsy and are kept in the regular course of the officer's business. *Id.* at 394. The witness also testified that he recognized the photographs in question as photographs from the decedent's autopsy and that the photographs were kept in the same file as the admitted autopsy report. *Id.* Further, he said that the "medical examiner's office keeps records of autopsy photographs 'just like [it] keeps records of the autopsy report,' and that the photographs are also business records kept within the particular autopsy's file." *Id.* None of those assurances are present in our record.

The fact that the photographs show injuries similar to the ones described by Phatak is of no moment. Consistencies between photographs and an autopsy report, standing alone, does not render photographs admissible. *Goss*, 549 S.W.2d at 406. Unlike in *Quinonez-Saa*, there were no other photographs from the scene of the accident to provide evidence of "fairness and accuracy" of the autopsy photos. *Quinonez-Saa*, 860 S.W.2d at 706.

IV. The Erroneous Admission of the Photographs Harmed Adams

The *Quinonez-Saa* Court, although finding the admission of the autopsy photos was not error, engaged in a harm analysis nonetheless. The Court found the admission of the photographs would have been harmless because they

"were, at the most, cumulative of the other evidence adduced at trial." *Id.* at 707. While in *Quinonez-Saa*, photographs of the decedent at the scene and on arrival at the morgue were admitted into evidence, this is not the case for Adams. *Id.* at 706. The scene photographs were taken after Croom's body had been removed from the vehicle. *See* 5 RR at St. Ex. 17–18. There were no other photographs admitted by the State showing the purported body or person of Croom. One defense exhibit showed Croom's car at the scene with his body in it, but the face, head, or any identifying details are not visible. 5 RR at Def. Ex. 1. Adams was therefore harmed by the erroneous admission of the autopsy photos.

PRAYER

Adams prays this Court find that the evidence produced in the trial court is insufficient to support a guilty verdict, reverse Adams's conviction, and render a judgment of acquittal. Alternatively, Adams prays this Court find the trial court erred in admitting unauthenticated purported autopsy photographs, and reverse and remand this case to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing brief was e-filed with the First Court of Appeals, was served electronically upon the Appellate Division of the Harris County District Attorney's Office, and was sent on the same date by first-class mail to:

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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i). Exclusive of the portions exempted by Tex. R. App. Proc. 9.4 (i)(1), this brief contains 6,300 words printed in a proportionally spaced typeface.

/s/ Miranda Meador
Miranda Meador

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