**Affirmed and Opinion filed August 24, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00099-CR**

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**JAMES BEEDE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 208th District Court**
**Harris County, Texas**
**Trial Court Cause No. 796,010**

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## O P I N I O N

Appellant, James Beede, was charged with murder enhanced by two prior felony convictions. A jury convicted him, sentenced him to confinement for life in the Texas Department of Criminal Justice, Institutional Division, and fined him $10,000. Appellant filed this appeal, raising seven points of error. In the first three, he contends the trial court erred in overruling his motion to suppress evidence he claims was illegally obtained, asserting: (1) there was insufficient probable cause to support his arrest; (2) there were no exigent circumstances preventing the police from obtaining a warrant; and (3) there were insufficient

attenuating factors to remove the taint of the alleged illegal action. In the last four points of error, appellant contends: (4) the evidence presented at trial was insufficient to show the grand jury exercised due diligence in its efforts to identify the instrument used to cause death; (5) the trial court erred in overruling appellant's requested jury instruction on the grand jury's use of due diligence and entering the court's own finding on that issue; (6) the trial court erred in overruling both his timely pretrial motion to force the state to elect and his sufficiency objection prior to submission of the charge to the jury, where the indictment alleged multiple means of committing the charged offense; and (7) the trial court erred in overruling appellant's objection to the state's presentation of the victim's mother as an identification witness where the identity of the victim already had been established, and the prejudicial effect of the evidence did not substantially outweigh its probative value. We affirm the rulings of the trial court.

## FACTUAL BACKGROUND

Appellant and his girlfriend, Paula Cantrell, took a trip to Louisiana with Sandy Joe Walker, and Walker's girlfriend, Kathy.[1] The four left Houston, Texas in Walker's van and drove to Louisiana to retrieve Cantrell's children and bring them back to Houston. Appellant and Cantrell did all the driving on the trip. En route to Louisiana, appellant and Walker drank a large amount of beer and smoked marijuana. During part of the trip, appellant fell asleep on a mattress in the back of the van, near a metal tire tool, or jack handle, that was lying underneath the middle seat of the van, within appellant's view.

The group picked up Cantrell's children as planned and the following day, arrived back in Houston around six o'clock in the morning. After dropping off Cantrell and her children, appellant went with Walker and Kathy to Kathy's house, where appellant slept most of the day. Walker and appellant continued to drink beer that day, and appellant also smoked more marijuana. Around six o'clock that evening, Walker and appellant returned to Cantrell's house.

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[1] The record does not mention Kathy's last name.

While they were there, appellant spoke to his sister on the telephone and learned that his tattoo gun was missing. According to Cantrell, appellant was very angry over the missing tattoo gun and began ranting and raving that Kellie Ard, appellant's ex-girlfriend, had stolen his money and his tattoo gun. Appellant told Cantrell that he was going to "fuck her [Ard] up." Appellant told Cantrell's sixteen-year old son that somebody had robbed him and asked the teenager for a pistol so that he could "take care of business." Appellant left Cantrell's house with Walker around 9:30 p.m. or 10:00 p.m. Appellant did not have a pistol.

Appellant and Walker learned that Ard was working at *Texas Cowgirls*, a gentlemen's club. After stopping at a few other bars, they went there looking for her. Ard bought each of them several mixed drinks and then accepted a ride home. On the way to her home, Ard pointed out a nearby oil rig to Walker because she knew he was a roughneck and was looking for a job. They pulled onto the board road leading to the oil rig; the board road and the land surrounding it was muddy and wet. Knowing that appellant wanted to talk to Ard about the tattoo gun, Walker dropped Ard and appellant off while he went to the rig to see if there were any job openings.

When Walker returned, he saw appellant running out of some nearby woods or piles of brush, but he did not see Ard. Appellant ran up to the van and said, "*I think I killed Kellie. I think I killed her*." Walker then saw Ard's lifeless body lying on the side of the road, face down in the mud. He thought he could see blood on the board road. Appellant pleaded with Walker to "take me to Paula, take me to Paula" and told Walker that he hit Ard too hard with a tire tool. As they drove away from the scene, appellant threw Ard's bag of clothing and his own shirt out the window of the van. Walker dropped appellant off at Cantrell's house at around three or four o'clock in the morning.

Appellant, who was not wearing a shirt, went inside the house and immediately asked Cantrell if he could take a shower. He then asked Cantrell to fetch a pair of shorts out of his truck because he might have to "hit and run," which Cantrell understood to mean "run from the

law." Appellant told her that he had gotten in a big fight and had done something "very bad," but he did not want to be specific. He asked Cantrell to wash his clothes and then he went to sleep, leaving his muddy shoes and jeans by her bed.

Meanwhile, Walker told a friend, Jacquelyn Russell, what had happened. Russell called the police and also called Cantrell to warn her about what appellant had done so that Cantrell could get out of the house. Upon hearing Russell's report, Cantrell "freaked out;" she immediately gathered her family and exited her house, leaving appellant sleeping in her bed. Around 7:00 a.m., Officer E.E. Lewis arrived at Cantrell's house, and she told him what she knew. After giving consent to the police to enter her house, Cantrell told them that appellant already had indicated he might have to make a quick escape. The police found appellant's muddy shoes and jeans by the bed. They woke him up, arrested him, and took him to jail. While in jail, appellant admitted to Cantrell that he had killed Ard but stated that he did not know why he did it. He said he just "lost it."

Appellant gave a written statement, admitting to most of the events of the evening as described by the state's witnesses at trial. In the statement, appellant claimed he hit Ard with his hand a few times when they began arguing about the tattoo gun. According to appellant, Ard told him that he would never "find his shit," and then he "blacked out." When he awoke, Ard was on the ground; he tried to awaken her but had no success. At trial, appellant told basically the same story, although he implied that Walker might have killed Ard.

Ard suffered a crushed head, multiple lacerations and contusions, and bruising and fracturing of the bones in her head and face. The lacerations on her body indicated that she had been struck at least a dozen times with a blunt object. DNA from the blood on appellant's cap matched Ard's DNA and was recovered from Cantrell's house on the morning appellant was arrested. The tire tool that had been in the van on the trip to Louisiana could not be located.

**MOTION TO SUPPRESS**

In appellant's first three points of error, he asserts the trial court erred in overruling his

motion to suppress evidence he claims was illegally obtained. Specifically, appellant contends (1) there was insufficient probable cause to support his arrest, (2) there were no exigent circumstances preventing the police from obtaining a warrant, and (3) there were insufficient attenuating factors to remove the taint of the illegal action.

**Standard of Review**

When reviewing a trial court's ruling on a motion to suppress, we afford almost total deference to the "trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). When the ruling is on an application of the law to a fact question that does *not* depend upon an evaluation of credibility and demeanor, we review the trial court's decision *de novo*. *See id*. Determinations of probable cause are reviewed *de novo*. *See id*. at 87 (citing *Ornelas v. United States*, 517 U.S. 690 (1996)). Therefore, we review the facts that led the trial court to conclude there was probable cause using an abuse of discretion standard; we review *de novo* the application of these facts to the legal tests to determine probable cause.

**Warrantless Arrest**

In his first and second points of error, appellant claims the trial court erred in overruling his motion to suppress because there was neither probable cause nor exigent circumstances to support his warrantless arrest. The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution protect an "'individual's legitimate expectation of privacy from unreasonable government intrusions.'" *Id*. at 89 (quoting *Richardson v. State*, 865 S.W.2d 944, 948 (Tex. Crim. App. 1993)). Generally, an arrest or search without a valid warrant is unreasonable. *See Franklin v. State*, 976 S.W.2d 780, 781 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (citing *Wilson v. State*, 621 S.W.2d 799, 803-04 (Tex. Crim. App. 1981)). An exception to this rule allows an officer to arrest a suspect without a warrant when the state shows: (1) the officer had constitutional probable cause, and

(2) the arrest falls within an exception listed in Chapter 14 of the Texas Code of Criminal Procedure. *See McGee v. State*, 2000 WL 767751, at *3 (Tex. App.—Houston [14th Dist.] June 15, 2000, no pet. h.) (citing *Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989)). Article 14.04 of that statute requires the legal equivalent of constitutional probable cause. *See Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991). In this case, the police arrested appellant without a warrant. The state claims the warrantless arrest is justified because Officer Lewis had probable cause and there were exigent circumstances, an exception listed in Chapter 14 of the Texas Code of Criminal Procedure.

**Probable Cause**

Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that a particular person has committed or is committing an offense. *See Guzman*, 955 S.W.2d at 90; *Joseph v. State*, 3 S.W.3d 627, 634 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The Court of Criminal Appeals has refused to view information freely given by citizens who provide their names with the same suspicion usually reserved for information from anonymous police informants who have an unproven record of reliability. *See West v. State*, 720 S.W.2d 511, 513 n.2 (Tex. Crim. App. 1986). For example, when an informant gives her name, it goes a long way towards establishing credibility. *See Janecka v. State*, 739 S.W.2d 813, 825 (Tex. Crim. App. 1987). Likewise, when a named informant gives his mobile phone number and describes appellant's vehicle, location, and criminal action, probable cause is established by the officer finding the vehicle in the location described. *See Flores v. State*, 895 S.W.2d 435, 442-43 (Tex. App.—San Antonio 1995, no pet.). Here, the police received information about the crime from two identified informants, Cantrell and Russell.

Officer Lewis went out to meet Cantrell around seven o'clock in the morning. Cantrell identified herself to Officer Lewis, and told him that she had information about the murder.

She described the female victim as the friend of a friend and also described the location where the murder had occurred. In addition, Cantrell gave the officer a detailed description of appellant, telling the officer appellant was wearing a pair of muddy blue jeans when he arrived at her house that night. She also relayed appellant's remarks about how he had gotten into a fight and done "something very bad" but did not want to be specific, and how he told her to get him a pair of shorts "in case he needed to make a quick escape, a getaway." Cantrell told the police that appellant was asleep in her home at that moment and that she was scared. Officer Lewis found appellant's muddy blue jeans and muddy shoes in Cantrell's home, just as she had described. Although the police were limited in their ability to evaluate the reliability of the information Cantrell had received from Jacquelyn Russell, they were able to obtain some of the same information.

In sum, a named informant (Cantrell) described appellant's location, criminal action, and clothes as well as what the scene of the crime was like. The officer found the clothes in the condition described and appellant in the location described. These circumstances are sufficient to warrant a person of reasonable caution to believe that a felony had been committed. On these facts, we find the officer had probable cause to arrest appellant.

**Exigent Circumstances**

An officer can arrest a suspect without a warrant when exigent circumstances justify a warrantless arrest under Article 14.04, of the Texas Code of Criminal Procedure. *See Farmah v. State*, 883 S.W.2d 674, 677 (Tex. Crim. App.1994). Article 14.04 has four requirements: "(1) the person who gives the information to the peace officer must be credible; (2) the offense must be a felony; (3) the offender must be about to escape; and (4) there must be no time to procure a warrant." *Crane v. State*, 786 S.W.2d 338, 346 (Tex. Crim. App. 1990). Based on the facts in the record, we find Cantrell was credible. We also find the "felony" requirement is satisfied because Cantrell told Officer Lewis that appellant had murdered Ard.

In evaluating the third requirement (whether an offender is about to escape), we

consider temporal proximity to the crime, physical proximity to the crime scene, and the suspect's knowledge of police pursuit, although none of these factors is dispositive. *See Dejarnette v. State*, 732 S.W.2d 346, 352 (Tex. Crim. App. 1987). We may also consider "representations of imminent escape given by a credible person." *Id*. at 352-53. Because the police arrested appellant not long after the offense, the circumstances linking him to an escape were temporally proximate to the crime. Additionally, Cantrell had relayed to police appellant's request that she get him a pair of shorts "in case he needed to make a quick escape, a getaway." Although appellant argues that such comments would only indicate a plan to escape from the individuals with whom appellant claimed to have been fighting, we find it reasonable for one hearing these words in the context spoken to conclude that appellant anticipated the need to make a quick escape from the police.

Finally, in evaluating the warrant requirement of Article 14.04, we note that Cantrell left her own home in the early morning hours because she was frightened that appellant had killed someone. Appellant had indicated to Cantrell that he might need to flee in a hurry. It would not be unreasonable for police to conclude from these circumstances that appellant might awake to find Cantrell gone, realize he was in danger of being apprehended, and act on his plan to escape. We find that a reasonable person could conclude that under these circumstances, there was no time to procure a warrant.

On this record, we find there was sufficient evidence to support a warrantless arrest under Article 14.04. We overrule appellant's first two points of error.[2]

**DUE DILIGENCE OF GRAND JURY**

In his fourth point of error, appellant claims the evidence presented at trial was insufficient to show the grand jury exercised due diligence in its efforts to identify the instrument used to cause Ard's death. The indictment alleged in the first two paragraphs that

[2] Having concluded that the arrest was legal, we do not reach appellant's third point of error, i.e., whether the taint of an illegal arrest was attenuated.

the murder weapon was a tire tool and in the next two paragraphs, that the murder weapon was an object unknown to the grand jury. "When an indictment alleges that the manner or means of inflicting the injury is unknown and the evidence at trial does not establish the type of weapon used, a *prima facie* showing is made that the weapon was unknown to the grand jury." *Hicks v. State*, 860 S.W.2d 419, 424 (Tex. Crim. App. 1993) (citing *Matson v. State*, 819 S.W.2d 839, 847 (Tex. Crim. App. 1991)). When the evidence at trial conclusively shows what instrument inflicted the injury, the state need only prove that the grand jury exercised due diligence in attempting to ascertain the weapon used. *See id*.

The evidence at trial was inconclusive as to the type of weapon that inflicted Ard's fatal injuries. Walker testified that appellant told him he used the tire tool from the van. Cantrell testified that she remembered seeing a tire tool in the van before the murder; she did not know if appellant had seen it or if he had used it to murder Ard. Additionally, appellant's statement indicated that he only hit Ard with his hands while evidence from the scene suggested that the murderer used a wooden board to inflict the fatal blows. The medical examiner who testified at trial did not know what type of weapon inflicted the injuries and could only state that it was a blunt object.

In *Hicks*, the indictment alleged that the weapon used was a hammer *and* a blunt instrument of an unknown type. *Id.* at 425. While the evidence indicated some of the victim's injuries were consistent with being struck with the hammer, some of the injuries indicated they had been inflicted by a heavy block of wood. *See id*. The pathologist who performed the autopsy testified that it was not clear from the evidence what weapon was responsible for the crushing blows that ultimately resulted in the victim's death. *See id*. The *Hicks* court held that in light of the uncertainty of the evidence offered at trial, the state did not have to prove due diligence. *See id*.

In another case, the victim was killed by strangulation, either by the use of hands or by the use of some unidentified object. *See Boyd v. State*, 811 S.W.2d 105, 123 (Tex. Crim. App. 1991). The medical testimony at trial could not establish the exact manner and means by which

the murder occurred. *See id*. Evidence at trial led to the conclusion that although hands were the most likely cause of strangulation, other explanations could not be excluded. *See id*. The appellate court found that the state had met its burden by showing the evidence at trial was inconclusive. *See id*. Because the evidence in the record now before us is inconclusive as to the type of weapon used, we find the state was not required to prove the grand jury exercised due diligence in its efforts to determine the identity of the instrument used to cause Ard's death.

Moreover, the Court of Criminal Appeals has recently held that as long as the evidence is sufficient to support one of the "manner or means of inflicting injury," the possible failure of the grand jury to use due diligence is no longer a consideration. *See Rosales v. State*, 4 S.W.3d 228, 231 (Tex. Crim. App. 1999). The evidence presented at appellant's trial supports at least one of the "manner or means of inflicting injury." Additionally, *Hicks* is no longer viable in light of *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997). *See id.* In *Malik*, the Court of Criminal Appeals court held that sufficiency of the evidence is measured by a hypothetically correct jury charge. 953 S.W.2d at 239-40. Therefore, it would not matter if the grand jury erred by not exercising due diligence in identifying the instrument used to cause Ard's death and by drafting the actual indictment with this error.

Therefore, we overrule appellant's fourth point of error for three separate reasons: (1) the state did not have to prove the grand jury used due diligence because the evidence is inconclusive as to the type of weapon used, (2) the evidence is sufficient to support the "manner or means of inflicting injury," and (3) a *Hicks* analysis is no longer required in light of *Malik*.

In his fifth point of error, appellant contends the trial court erred in overruling his requested jury instruction on the use of due diligence by the grand jury. We already have determined that the state was not required to prove the grand jury exercised due diligence under the facts of this case, but even if it were, appellant could not prevail because he has failed to make the requisite showing of harm. Appellant must show that some harm occurred from the

error in the jury charge. *See Cathey v. State*, 992 S.W.2d 460, 466 (Tex. Crim. App. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 805, 145 L.Ed.2d 678 (2000) (citing *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App.1984)). Appellant has not identified any harm he actually suffered as a result of the omission of his requested instruction. Points of error not briefed are waived. *See* TEX. R. APP. P. 38.1(h). Accordingly, we overrule appellant's fifth point of error.

**ELECTION BY THE STATE**

In his sixth point of error, appellant claims the trial court erred in (1) overruling his pretrial motion to force the state to elect a means of charging how appellant committed the offense and (2) in overruling his sufficiency objection prior to submission of the charge to the jury. As ground for these objections, appellant asserted the indictment alleged multiple means of committing the charged offense.

Before trial, the defense urged the trial court to compel the state to elect the means of charging how appellant committed the offense. The trial court refused. "It is proper for an indictment to allege different ways of committing the offense in the conjunctive and for the jury to be charged disjunctively." *Vasquez v. State*, 665 S.W.2d 484, 486 (Tex. Crim. App. 1984), *overruled on other grounds, Gonzales v. State*, 723 S.W.2d 746 (Tex. Crim. App. 1987). The state can submit more than one theory of committing a single offense as long as there is sufficient evidence to support each one, even though the defendant brings a motion to force the state to elect. *See Franklin v. State*, 606 S.W.2d 818, 821 (Tex. Crim. App. 1978); *Speer v. State*, 890 S.W.2d 87, 93-94 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *Richardson v. State*, 766 S.W.2d 538, 541 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). When alleging one offense occurring on a particular day in one of four different ways, the state is not required to make an election of which manner it wants submitted to the jury. *See Reyna v. State*, 846 S.W.2d 498, 500 (Tex. App.—Corpus Christi 1993, no pet.) (citing *Braughton v. State*, 749 S.W.2d 528, 530 (Tex. App.—Corpus Christi 1988, pet. ref'd)).

Appellant contends that *Vasquez* requires the state to elect when two different methods

of committing the offense are pled if the defendant objects to the jury charge based on insufficient evidence or brings a motion to force the state to elect. We do not agree. *Vasquez* holds that an appellate court need not consider whether the evidence proves both methods unless the defendant brings a motion for the state to elect. *See Evans v. State*, 781 S.W.2d 376, 380 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd) (citing *Vasquez v. State*, 665 S.W.2d 484 (Tex. Crim. App.1984), *overruled on other grounds*, *Gonzales v. State*, 723 S.W.2d 746 (Tex. Crim. App. 1987); *Pinkerton v. State*, 660 S.W.2d 58, 62 (Tex. Crim. App. 1983)). Appellant's suggestion that the state must elect one method of charging how appellant committed the offense if the evidence is sufficient to support both methods merely because the defendant objects or brings a motion is contrary to case law and the logic supporting it. The real question is whether there was sufficient evidence to support *both* methods of murdering Ard, i.e., striking her with a tire tool and striking her with an unknown object. As previously noted, Walker testified that appellant told him he used the tire tool from the van. Cantrell testified that she remembered seeing a tire tool in the van before the murder, but that she did not know if appellant had seen it or used it in the murder. The tire tool could not be located after the murder. However, appellant's statement indicated that he only hit Ard with his hands, and evidence from the scene suggested that a wooden board may have been used to inflict the fatal injuries. The medical examiner was only able to state that the object used to kill Ard was a blunt object; he could not testify about any of its characteristics. We find the evidence presented at trial was sufficient to show that either a tire tool or an unidentified object was used to kill Ard. Accordingly, we overrule appellant's sixth point of error.

**IDENTIFICATION OF MURDER VICTIM**

In his seventh and final point of error, appellant claims the trial court erred in allowing the victim's mother to make an in court identification of her daughter's dead body from a photograph. He asserts that (1) because the complainant's identity already had been established, the identification was not relevant and (2) the prejudicial effect of the evidence substantially outweighed its probative value.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *See Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996) (citing *Montgomery v. State*, 810 S.W.2d 372, 379-80 (Tex. Crim. App. 1991) (op. on reh'g)). The trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to guiding rules or principles of law. *See Montgomery* 810 S.W. 2d at 380.

First, we address appellant's contention that the victim's identity already had been established and so was not relevant. The only other evidence of Ard's identity came through a police officer who had never met Ard and who testified that he "learned" the body of the victim was that of Kellie Ard after assisting at the murder scene. The Texas Rules of Evidence favor admitting all logically relevant evidence. *See Moreno v. State*, 1999 WL 974269, at *4 (Tex. Crim. App. Oct. 27, 1999) (citing *Montgomery*, 810 S.W.2d at 389). The identity of the victim in a murder case is a relevant issue. *See Morales v. State*, 897 S.W.2d 424, 427 (Tex. App.—Corpus Christi 1995, pet. ref'd). Appellant conceded in his brief that the victim's mother's testimony was relevant; however, appellant did not stipulate to the victim's identity at trial. We find the mother's testimony was relevant to establish the identity of the victim.

Next, we address appellant's contention that the probative value of this evidence was substantially outweighed by its prejudicial effect. A trial court may exclude evidence when its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. APP. P. 403. In close cases, the trial court should favor admitting prejudicial evidence. *See Moreno*, 1999 WL 974269, at *4. In determining whether the probative value of testimony is substantially outweighed by the potential for unfair prejudice, the trial court should consider the following factors: (1) the testimony's inherent probative value, (2) its potential to impress the jury in some irrational but indelible way, (3) the amount of trial time the proponent needs to develop such testimony, and (4) the proponent's need for the testimony. *See Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997) (citing *Montgomery*, 810 S.W.2d at 389-90); *Broussard v. State*, 999 S.W.2d

477, 482 (Tex. App.—Houston [14th Dist.] 1999, pet. filed).

Testimony about the victim's identity is probative in a murder case, where, as here, the accused does not stipulate to the victim's identity. The state used very little trial time to develop the testimony of the victim's mother. In eliciting the identification, the state showed Ard's mother a single autopsy photograph of Ard's dead body. More importantly, the state needed the testimony of Ard's mother to establish the identity of the murder victim. The only other evidence of Ard's identity was the statement of a police officer who did not know the victim and only "learned" of her identity after assisting at the murder scene. Although a mother identifying the body of her brutally murdered daughter has the potential to impress the jury in some irrational but indelible way, the other factors strongly support a finding that the probative value of the evidence outweighs any prejudicial effect. The jury was already aware that Ard was a young woman and could deduce that her family members would be distressed by her murder. In a similar case, the trial court found the danger of prejudice did not outweigh the probative value of an autopsy photograph when the defendant refused to stipulate to the victim's identity and the autopsy incision was not particularly gruesome. *See Dams v. State*, 872 S.W.2d 325, 327 (Tex. App.—Beaumont 1994, no pet.).

We find the trial court did not abuse its discretion by allowing the murder victim's mother to testify as to the victim's identity from the autopsy photograph. Furthermore, we note that even if the trial court had erred by allowing this evidence, appellant failed to assert what harm he actually suffered as a result of the court's ruling. Points of error not briefed are waived. *See* TEX. R. APP. P 38.1 (h). We overrule appellant's seventh point of error.

## CONCLUSION

Having found that none of appellant's seven points of error have any merit, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 24, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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